

**AFRICAN CUSTOMARY
LAW:
AN INTRODUCTION**

AFRICAN CUSTOMARY LAW: AN INTRODUCTION

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lawAfrica

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history in their training as future men and women of law. Grace Senga stood tall as the only African lady to participate in the course despite the general feeling that the African society is male-dominated and African customary law has man as its promulgator, author and judge. She is a role model for other Africans who would wish to explore this academic area despite the gender and attitude usually associated with it.

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PREFACE

*“...If it is well written and to the point,
That is what I wanted; if it is poorly done and mediocre,
That is the best I could do”. 2 Maccabees 15, 38.*

Advancing the academic inquiry into African customary law has been a persistent endeavour among world well-known jurists. Explaining what is law from the African perspective has been an on going project since the colonial time in Kenya and many parts of former colonies in the African jurisdiction. It is a pity that too little has been documented on African traditional laws since the publication by the late Justice T.O. Elias back in 1956 as we shall see later in this text.

The study of law as a scientific discipline is a recent endeavour as compared to other branches of social sciences. It was only in the late 18th Century that law as a discipline was incorporated as part of other higher education disciplines as a systematic study and part of practical and applied social sciences. Originally, it was merged with political science, international relations, sociology and anthropology *inter alia*. Credit goes to Jeremy Bentham, an English legal positivist-cum-philosopher who pioneered, proper scientific study of law. Legal science or jurisprudence from the positivist perspective developed into a full discipline with its own unique approach distinct from the already diffused Natural Law (moral law) and divine law along with the development of civil law and common law systems originating in Continental Europe and United Kingdom respectively.

Realist legal school of thought instead was spearheaded in the 19th, 20th and 21st Centuries by American legal realists such as John Rawls, Fuller, Hamilton, and Pollock.

African jurists have been trained under historical colonial legal matrixes imbued with modern realists' school of thought whose interest has never been that of developing African customary law jurisprudence as a *sui generis* legal system but propagating scholarly advancement of the Western thoughts, a trend that appears to be

intellectual re-colonization of the continent, an attitude that has been deemed by the Banjul Charter in 1981¹ as unacceptable.

No wonder many modern African law practitioners who trained under the received Common Law System do think that “African customary law” is not qualified enough to be considered as a legal system. It was not a surprise, therefore, when one of my students questioned the practicality of customary law regimes in the modern and Westernised Post-colonial African society. The same applies, therefore, to general sentiments shared among some of my colleagues who have been made to believe that customary law is not law in real sense but customs, because to them, what is law ought to be expressed exclusively in Western conception of law as represented in what is referred to as written “state law” or statutes. To some people what is unwritten is considered archaic, primitive, backward, unscientific and empirically unverifiable. This attitude contradicts the foresaid English Common Law system that is well spread but is not written anywhere. Negative attitude towards customary law among African lawyers and jurists is what this book seeks to address.

Herbert Liones Adolphus Hart puts it forthright that *he prefers not to refer to a social structure as that of “custom” because often ordinary people links customary rules with something very old and supported with less social pressure than other rules*². This attitude is felt across the board in the modern formal societies in several African States despite the persistent need to spearhead development of an African jurisprudence.

The modern formal judiciary based on state laws fails to accommodate or take cognisance of the African understanding of justice, rights, morality and doctrine of equity based on African legal conception or African legal background. Consequently, the risk is dualism in the exercise of law in several African countries in which

1 (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986). Article 2 of the Charter reaffirms the pledge they solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations.

2 H.L.A. HART, *The Concept of Law*, p. 91.

the majority of the African people still live in the dichotomy of laws. Customary law in so far as it is regarded as social rule, on one hand still governs the minds of many indigenous Africans within their communities, linguistic groups or as ethnic groups. On the other hand, state law that enjoys wider recognition of the state apparatus behaves as the official legal system to which all citizens are subjected and are expected to owe their allegiance to through the so-called formal court systems. The experience of the West African region especially Ghana and Nigeria, after the insertion of traditional chiefs as the managers of customary law in their Constitutions, has been considered a major breakthrough towards developing a proper African jurisprudence that would replace the amorphous English Common Law and Civil Law systems. National House of Chiefs in Ghana is already a pragmatic sign that Ghana got the core sense of African Customary legal approach³ that may contribute significantly to the universal struggle to get the African legal system back to track.

Today, training of lawyers in Common Law in many African countries, especially Kenya, presumptively, takes for granted the role of such disciplines as sociology of law, legal philosophy, legal history, customs and traditions of the indigenous people despite the fact that they are needed for achieving the goals of law, that is order and harmony.

The reality of rapid social change in Africa shifts rapidly from African legal values to the Western concepts and theories developed in line with Western civilization that distanced itself from the African customary law and whatever is related to it. We will defer this concern to the later reading of the text as it requires more illustration.

There is a substantial evidence of *lacunae legis* in the adopted and adapted foreign legal systems in most of the independent African States that which if not well addressed and punctually amended, may see legal systems in Africa not achieving their main objective for forming good citizens and creating more harmonised and

3 ROBERTO DANINO, Senior Vice President and General Counsel of The World Bank, “*Customary Law Systems as Vehicle for Providing Equitable Access to Justice for the Poor and Local Governance, the Peruvian Experience*” – during the Leadership Dialogue with Traditional Authorities, Kumasi, Ghana, December 5, 2005.

consolidated society based on the rule of law principle. Theoretically, legal research should guide students towards a genuine knowledge or accurate understanding of roots and traditions of law springing from their own socio-cultural background as contrary to borrowed legal conceptions whose applicability in reality may not be in tandem with unfolding social realities. In this sense, the African schools of law should not only train lawyers based only on foreign ideas as it is today, but train jurists, or men and women of law with integrity and sufficient rectitude to render law relevant to the context and to give the judiciary the face of justice it merits.

It is a fact that the students of law today will be the future administrators, interpreters, makers, un-makers, and enforcers of law. Their training should not therefore be limited exclusively to advocacy practice or defending of parties in court but rather be directed to the very art and practice of law as it ought to be. By doing so, law shall be considered prudent, hence jurisprudence. In other words, the law of the land should always tally with the given social needs of the people in the real time and at the same time adapt to the required international standards and desired quality measures.

It is also a fact that African legal literature has been developed more in Europe and America than in Africa merely due to lack of sufficient keen attention towards its importance, value, and relevance at home. Low opinion and negative attitude have been formed towards customary law and anything related to it encounters corresponding resistance from the same African lawyers.

Negative attitude towards customary law originates from dominating Western ideologies, post-modernism ideals and general deception that nothing good can come from Africa. Some Africans still consider customary rules as pre-logical, pre-legal or rather primitive, a pseudo-allegation that had been prior advanced by the colonial regimes of the time. It is what some scholars alleged as the state of nature or status of innocence and complete ignorance about the primary rules that ought to determine social equilibrium at any given time.

African law scholars have been regarded as repetitive and those who lack critical and scientific thinking especially when it comes to such advanced topics as the theory of law or jurisprudence proper.

Likewise, those who evangelised Africa and introduced Christianity in the 19th Century brought along with them their conception of justice, natural law and divine law. *African customs⁴ and traditional laws⁵ were then misinterpreted and whatever was found in the African primitive societies was reduced to mythology, meaning, primitive beliefs that are identified with paganism⁶.*

Quoting from Oginga Odinga,

“... with this attitude Christianity could not be accepted without the rejection of African customs and religion”.⁷

Besides Christianity, other major world religions such as Islam, Hindu, and Judaism have not been so much interested in promoting the African customary law, neither the modern sects nor occults managed to reach out in order to save the already crippling system. African traditional way of worship started to crumble down rendering the African religion, beliefs and practices irrelevant and inconsistent with the Western conception of African law. The burden of proof whether African customary regime is law or not lies with Africans themselves.

Repercussions of such negative attitudes towards African customary law, is what translates today into radical and expeditious need for law reforms in various African independent States. There is enough reason to believe that lack of sufficient wisdom in the administration of law has become the main failure of establishing the rule of law and constitutionalism in the late 21st Century.

In spite of all external forces, it is certain that nothing of that nature has ever been strong enough to overhaul the African customary law system in its totality and the attempt to do away with it is still very

4 Taslim Olawale Elias, *The Nature of African customary Law*, 1956.

5 Oginga-Odinga, *Not Yet Uhuru*, p. 63.

6 P. Onyango, *Cultural Gap & Economic Crisis in Africa*, Fastprint Publishing, Peterborough, England, 2010, pp. 104ff.

7 Oginga-Odinga, *Idem*

remote. African customary law has survived hard moments in its history. It is a reality that among the pastoralists of Kenya especially those occupying the Northern region are practising their traditional African customary laws through their traditional court system. In the vast arid area Rendilles, Borana, Gabra, Samburu, Turkana, El-Molo, Burji, Dassanach, Somali and Waata communities live side by side maintaining and observing their prominent customary laws and traditions. It is in this part of Kenya that dichotomy of law is evident and the question of addressing the African customary law becomes real. Still justice managed by community elders is what commands and rules the conduct of many individuals and there is no doubt that formal judiciary may not affect them so much. Un-statutory customary courts are advancing the traditional justice system among the pastoralists in their social set-ups. For example, such social conducts as raiding other communities are still considered by some of the pastoralists as legal and licit act and cannot be punishable. In the statutory law raid is robbery and is categorised under criminal offence and provided for in the penal code.

The dichotomy between the State laws and the reflection of true African social life of the people is quite eminent. Certain legal values that have been enshrined by the ancestors and have been persistently passed on from one generation to the next by elders, through oral traditions, have been binding on the members of respective communities from time immemorial. Reviving the long debate on the need for the study of the African customary law therefore is timely and worthwhile.

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INTRODUCTION

The book is a summarised guide towards the conception of law in the post-modernism period and how African customary law can add value to the on-going law reforms in Kenya and other African states. This study is meant for practising customary lawyers, law students, researchers, jurists and professionals found in the Continent of Africa. African legal system is treated in this research as a pure legal discourse with unique impetus and relevance on the articulated foresaid laws of State. Prior to our analytical preview of customary law and its impact on law making process in Africa, it is procedural to first address its appropriate procedures, motivation, scope, aim and methodology before indulging ourselves fully into analytical and conceptual studies.

The need for research in customary law in correspondence to current socio-economic changes and new challenges facing the enforced modern judicial systems, is eminent in a way to create predictive foundation for suitable legal knowledge for the sake of best practice, constitutionalism and rule of law.

Reviving the old debate on customary law does not mean embarking on obsolete principles practised by our ancestors many decades in the past. The study does not mean falling back, returning to the past in order to discover what was there in the books of history, but to interpret the past with the view of improving on the present for the future progress of African legal knowledge. So the study of African customary law should not be interpreted as a subject of history, but rather, a subject of present need to improve on African laws and to craft our laws in a manner that such laws would promote sustainable development goals.

It is imperative to evaluate some of what transpires in the formal courts of justice today and realize that a lot has to do with questions linked to social realities and problems created by modern lifestyles of people in terms of their beliefs and adopted economies. An example, of the missing part of legal system is clearly expressed in the murdering of persons (through mob justice) accused of witchcraft,

burning allegations in Kenya today⁸, and the legal conundrum surrounding civil disputes in marriage cases⁹, cattle-raiding, land cases¹⁰, and family issues such as burial rite issues¹¹. This is a sufficient explanation of a changing social scenario and if law, whether in Africa or in Europe is meant to establish social equilibrium, then the study of African customary law must be considered relevant and timely.

Some legal anthropologists in the olden days considered *Africans a dying race basing themselves upon current Anglo-Saxon law concepts and traditions those who after getting a nod, saw little or no law in African Societies*¹². Then they argued that in African context everything is custom. Therefore, it is not possible to differentiate between rules of social conduct and convergent habits of behavior. What is the African take on such allegations?

In the book of Elias, Sir Donald Cameron, former Governor of both Tanganyika and Nigeria, distinguishes customs from African law warned against the confusion of,

“mere ceremonial practices with the essential requirements of the law for instance: dances and drumming at native weddings are customs but they are not like payment of dowry that is entrenched in native law that gives validity to marriage”¹³.

8 Witchcraft lynching in Kisii is a fresh issue that requires legal approach and enactment of an Act by the Kenyan Legislation. Witchcraft killing, superstitions and crimes linked to customs and beliefs are many in Africa. BBC: Villagers, many straight from their farms, and armed with machetes, sticks and axes, are shouting and crowding round in a big group in Kenya's fertile Kisii district. <http://news.bbc.co.uk/2/hi/8119201.stm>
Sungu Sungu gangsters and community policing in the interior villages in Kenya – around Gusii region has been alleged as genocide. Witchcraft has no credible scientific evidence and is used to settle land and business disputes – Cfr. <http://africanpress.wordpress.com/2008/06/21/sungu-sungu-gangsters-killing-innocent-people-in-kisii-must-be-stopped-by-the-government/>

9 Intermarriages and customary law problems they pose to people.

10 Land Reform and Agrarian Law in Kenya is yet to take shape.

11 SM Otieno, Virginia Wambui Otieno, Samuel Wanjiru (Olympic marathon Champion) death in May 2011.

12 T.O. Elias, *The Nature of African customary Law*, Manchester University Press, 1956, p. 29.

13 T.O. Elias, *The Nature of African customary Law*, Manchester University Press, 1956, p. 29.

Social rules and given convergent habits of behavior¹⁴ are not synonymous and by their very essence, they shall remain distinct.

Customary law can be more meaningful in the sociological and historical schools of thought than in the already postulated English legal positivists' theories. In the letter and spirit of the work of Friedrich Karl Von Savigny, a German legal expert, that says,

the popular consciousness of justice can no longer manifest itself directly, but represented by legislators who formulate them on behalf of the people in terms of technical legal principles.¹⁵

According to this school of thought the task of a lawyer is to translate what he finds in social life of the people into legal material that suits the societal needs of the time. In addition, the role of a lawyer is more important than that of a legislator who, according to him, comes at a later stage of the practice of law in any given society. He adds that law is a craft of an artist and the artist in this case is the lawyer. He continues explaining that some legislators are also lawyers by profession but this does not feature so much as the role of legislation is dominated by political ideologies and not legal ideologies making the craft of law to be for lawyers.

It would make more sense to argue that primitive law is the mother of all jurisprudence in so far as many known legal systems originated from customary laws of the people other than from sovereignty as argued in the John Austin's theory. In so far as the customary law may be considered the conscience of the community as in Savigny, its legitimacy is more justified among the centralized political groups than in the segmented and decentralized political groups.

It follows that, it is not out of mere prediction that legal prudence must have its roots in the legal customs of the people, that is, experience. Oliver Wendell Holmes presenting the Common Law (1881) affirms that the study of law is not about logic but

14 H.L.A. Hart, *The Concept of Law*, Oxford University Press, 2nd edition, p. 12.

15 Friedrich Karl Von Savigny – “law is not separable from the people”, scientific or abstract aspect of the law is not enough but there is also social, cultural and political aspects that should be taken into consideration.

experience¹⁶. The law embodies a story of a nation's development through many centuries hence the "customary law" other than legislations.

THE STUDY OF CUSTOMARY LAW JUSTIFIED

"That I believe customary law qua positive law is dying; it is in fact dead in a lot of substantive areas... I believe Customary Law now belongs to social and cultural history, and that those principles of it as reflect the way of life of contemporary Kenyans belong to Sociology and Anthropology!"¹⁷ Okoth-Ogendo.

It is no longer wise to be naïve about our academic aspirations, and for our universities to be ineffective in their search for excellence in innovative and creative skills based on the true African jurisprudence. The sentiments contemplated in the work of Professor Okoth-Ogendo demonstrates that legislatures and courts in Africa give regard to Anglo-American jurisprudence rather than African jurisprudence. The statement that African customary law is lying in a juridical morgue waiting to be buried beneath unyielding legislative tombstones¹⁸, is a mockery of our modern legal systems. In a nutshell, this demonstrates passivity in the research based on African wealth of knowledge allowing preference to foreign legal systems that can be termed as a neo-colonization process. The "rights of credit" against the State and the organized national and international bodies entailed in the economic, social and cultural human rights, respects and promotes the need for people to soldier ahead of time and elevate their traditional legal framework that would abet current appellate, trial courts in superior and subordinate courts in order to administer justice in the best way possible and make law be relevant to the socio-economic demands today. This generation of rights is based on the principle of liberty¹⁹. African scholars are at liberty to appraise their legal traditions and channel them towards the highly

16 O.W. Holmes, "The Common Law", in William W. Fisher III, Morton J. Horwitz, Thomas A. Reed (ed.), *American Legal Realism*, Oxford University Press, 1993, p.9.

17 H.W.O. Okoth-Ogendo, "Customary Law in the Kenyan Legal System: An Old Debate Revived", in Ojwang' J.B., and Mugambi, J.N.K., The S.M. Otieno Case, p. 136.

18 See *Supra..*

19 R.N. Rwiza, *Ethics of Human Rights: The African Contribution*, p. 174.

needed development and standard of life. African customary law is the means towards the end, that is development.

It is a fact that written laws in many African States have failed to regulate the behaviour of some who still perpetuate corruption and impunity in law enforcement organs. Written laws lack the magic power to make people observe and respect them as compared to customary law. The conception of law as command and order, a positivist stand that has been heavily criticized by leading legal theorists such as Herbert Lionel Adolphus Hart does not support customary law and campaigns against its development. This stand of John Austin has been challenged by several law scholars who argue that people do not obey law just because of threat and sanction. The characteristics Austin attaches to the essence of law such as *should*, *must*, and *ought to*, have not proved to make everybody obey, respect and observe the law. This has led to the question of what is law, or rather, what is the nature of law?

Today more than ever before, the world is inclined towards global cultures, noble ideas and smart legal doctrines that would contribute effectively to the need for lasting development and poverty alleviation in Africa. There is no doubt that this trend of promoting world rich cultures and the on-going quest for original ideas, overwhelming the field of legal research, may re-introduce with vigor the interest in African customary law study. In the true sense of the term, African universities should constitute the basis for intellectual search in which law students, academicians, and practitioners shall constantly find originality of their legal ideas and express them in scientific and systematic documents with the aim of coming up with an increasing need for an African legal realism in the world's ever changing legal scenario. Having this kind of academic seriousness, well trained lawyers, jurists and skilled legislators in place, there is high probability that the most desired legal change shall be eventually achieved. Revival of customary law as a legal discourse today should not appear as resurrecting it from the dead laws but highlighting the very legal phenomena that are existing in reality and posing serious challenges to the existing juridical orders.

In regard to this existential aspect of law, Roman jurists in the ancient time had said that law is silent until there are controversies or conflicts. It is expressed in *ubi interesse ibi jus*, where there is interest there is law. It is common during civil and criminal trials to hear references made to the customary law affecting parties in law court. Often courts remand certain civil cases to the jury of elders that would look into the matter and give their advisory opinion.

The meticulous work of Hart, *The Concept of Law* in which he views law as “social rule that is acceptable and usable in a given social group”²⁰ can shed some light on customary law. Law is understood as a coercive order embracing moral perspectives and that of conventional sanctions that is also included in the social rules of conduct.

My main motivation in this research has been based on the lucid statement from Dr. Elias saying that a system of law can only be realistic if it keeps abreast with the economic, social and cultural development and requirements of the people. The centre of gravity of legal development lies not in legislation, nor in juridical science, nor in judicial decisions but in society itself²¹. It is the societal weight put on the definition of law that enables us to reconsider the study of customary law as a discipline par excellence today. The crumbling family social institutions in Africa: marriages, family set-ups, and other forms of human relations speak for themselves. Some important rules found in African traditional legal values and expressed in the customary law of the people have been neglected causing a legal gap and weakened family ties. Some modern marriages that do not respect the African customary values break up so easily since the spouses rapidly lose touch with the very African values attached to the marital union, a role that has been played by dowry institution and involving intermediaries and community. Whether the statutory marriage and religious marriages are the best or not is beyond the coverage of this book. The main point of interest is to provide an avenue for sound law reform and the way forward for constitutionalism and rule of law in the independent States.

²⁰ H.L.A. Hart, *The Concept of Law*, pp. 44ff.

²¹ See Bello and Ajibola, *Essays in Honour of Judge Taslim Olawale Elias*, Vol.II, p. 584.

SCOPE AND AIM

The main aim of the introductory text is to engage in policy and development oriented scholarly research in African customary law that would promote good governance, best practices, democracy and the rule of law meant specifically for African lawyers and jurists in our contemporary time. The book is meant to guide law students in their persistent quest for legal knowledge originating from their very African social roots. There is a perception that only customary law can satisfy this urgent need for law reform and African legal response to emerging needs for a genuine reform process.

Most importantly, the customary law is meant to bring into dialogue the question of Western civilization getting more interested in African legal discourse more than Africans themselves. Customary law, (*Consuetudo Juris*, as the Roman jurists would name it), is one of the primary sources of legal knowledge and Africa should not distance herself from it and from the very values it stands to protect.

Already Customary International Law emphasizes on the general practices that States have been practicing since time immemorial and they are internationally binding on the State parties. We shall expound on this factor in the coming chapters.

It is a serious act of omission to neglect and ignore legal perception and values that Africans have always attached to their customary laws simply because they fail to convince the Western civilization.

Dual system of law in the South African experience provides us with good example to demonstrate the co-existence of different legal systems within one geopolitical State. The Anglo-Dutch legal system and African customary law have existed side by side to ensure that high level of economic development is achievable through an appropriate legal atmosphere. Similar ambitions of developing African legal system may also be related to Ancient Egyptian Civil law that was used as civil code for several centuries based on the concept of Ma'at (ancient Egyptian concept of Truth)²². Therefore,

22 <http://en.wikipedia.org/wiki/Ma%27at>

the primary scope and aim of this book is to motivate researchers to invest more on the African legal discourse in order to enhance development of African legal system; first for individual State and eventually for the entire region.

METHODOLOGY AND APPROACH

Being an introductory approach, the book shall not exhaust the whole intellectual and the totality of the required academic exercise of the discipline without resorting to a comparative approach. The orientation of the discussion shall be scanty on certain topics yet profound on others depending mainly on the academic objective and the need to build a strong love for result-based law studies. Underlying objective of the book as discussed is an attempt to revive the old debate on African customary law and its relevant contribution to the African jurisprudence or African philosophy of law today. Hence, this defines procedures and approaches in an analytical and comparative manner to avoid common intellectual discrepancies that usually lead to the fallacy of over generalization of issues and criticisms against customary law.

Ipsa facto, it is in the best interest of this book to prepare minds of law practitioners to fully comprehend the basis and roots, or the genesis of law starting from the analysis of their own history, culture, legal context and realities in order to reach out to the real African discourse on the development of law.

The legal profession today requires a wider knowledge of the primitive as well as customary international law and it would be unwise to sideline the very legal traditions and moral values that have kept the families united and progressive till today.

Sources of the information shall be made available for easy references and critical analysis and shall be made to prove the objective of the book. Some relevant court cases, references and analogical instruments shall be made available as necessary addenda for those who may be interested in understanding fully the nature and the legal aspect of African customs and their relevance to the modern legal education policies. Practical comparative analysis shall

also be simultaneously conducted to find out more meaning and relevance in customary law enriching knowledge for the modern law practitioners including courts. Readers shall benefit prominently from concrete legal knowledge backed by their own customs for the sake of their successful legal career.

It is also the best approach to prepare the mind-set of many African lawyers and law scholars to fully comprehend international legal systems and concepts of law as seen from the African legal perspective. Through analogy, readers shall comprehend better some fundamental aspects of law and its importance in the modern society. Finally, customary law prepares critical legal mindsets and develops strong taste for African law practitioners with the aim of eventually developing appropriate African jurisprudence based on African legal literature. In this case it would be necessary for every jurist in each country to be versed with his or her legal knowledge and to understand customary law as the basis for legal development before engaging entirely in critical and complicated legal situations. For example, in the Federal State of Nigeria, one cannot be appointed in any public legal office without having had tangible experience with African customary law or Islamic law.

The decision to give this book its comparative style is fundamental in forming an objective opinion about the African customary law without prejudice or contempt of any forbearing State law, whatsoever. It is also important to emphasize that there are diversities of customary laws that exist and rule the lives of so many people especially the pastoralist communities in some parts of Kenya today. We are alive to the fact that dichotomy of law is there to stay and time is now to train our law experts in all fields of legal knowledge without prejudice.

Consequently, the main conundrum in the legal research today has been the question of diversities within the law as found in various legal cultures. However, African customary law shall make reference to legal concepts and practices as found in different given communities and come up with acceptable uniform rules. The project is to come up with a codex/corpus juris that would serve as point of reference especially for framing laws that would fit the needs

for administering justice based on African Legal System in regard to its uniqueness and particularity. In addition, such customary legal knowledge shall empower the judiciary respecting principle of case laws as promulgated by Common law regime.

It is important to take into account the question of access to justice comparing notes with the borrowed common law and the indigenous customary law systems. Customary law system is found to be more accessible, easy, cheaper and simple to understand than the formal judicial system applied in the common law regimes²³. However, the Common Law System is also unwritten and shares a great deal in the foregoing characteristics of Customary Law System. This becomes clearer as we continue discussing how the nature and characteristics of primitive or customary law system are evaluated.

It is important to mention that one of the adopted methods in recording the customary civil law is by investigation through special law panels composed of persons with special knowledge of customary law that operate in the country. Law panels work better at ethnic level. The ethnic panel would consist of African courts presidents, members, specialists of customary law, e.g. chiefs, the sage philosophers and tribal elders²⁴. Local opinions such as local authority and young persons are also included in the law panel to demonstrate the modern development in customary law including also women representatives²⁵.

Law panels would collect information and make comprehensive reports and share them out through questionnaires and discussions and then a restatement on each of the panel is made.

Another approach and method is by making reference to resource books that provide professional guideline to such understanding of customary laws. Whatever is discussed in the restatement must pass through professional filters to get the very sense of legal concepts

²³ Minneh Kane, "Reassessing customary law systems as a vehicle for providing equitable access to justice for the poor", sponsored by The World Bank – 2005.

²⁴ Jane Achieng, Paul Mboya's *Luo Kitgi Gi Timbegi*, pp. 14f. Elders are considered wise or the sage in the African philosophy. They are the administrators of justice and the community customarily accords them with due respect.

²⁵ Cfr. Cotran, E., *Restatement of African Law*, Vol. 1, "Preface".

and notions that will qualify such customs to be considered law as opposed to mere customs or what Hart would call habitual social behavior.

CHAPTER ONE

THE NATURE OF AFRICAN CUSTOMARY LAW

1.1 INTRODUCTION

African customary law is treated in this book as a system rather than law itself. Since customs bear some universal precepts that would qualify them to be considered a legal system (*corpus juris*) other than substantive law *per se*, it would be necessary to deal with it from its holistic point of view rather than selectively pinpointing particular customary norms as given in certain social groups. *Kikuyu, Kamba, Borana, Gabra, Turkana, Pokot, Nandi, Pokomo, Orma, Kipsigis, Tugen, Giriama, Luhya, Kuria, Gusii, Meru, Ogiek, and Luo* each with its own customary law that can be codified into handy legal documents that can be used as point of reference.

A Conference on “Future of Law in Africa” held in London on 28 December and 8 January 1959, evaluated the relevance and compatibility of African legal system that served as an eye-opener²⁶ for many African modern jurists. It is this Conference that we African jurists should begin our academic inquiry into the future of African customary law and its compatibility with the modern world.

1.2 DEFINITION

As we try to determine whether African customary law is “law” or “mere customs”, legal system or just moral principles, or whether it is correct to speak of African customary law today or not, we are required to give an answer to the question “What is law from African perspective? Or what is the conception of law in Africa?” The attempt to arrive at the definition of law has been a long time debate among world well known jurists and law scholars. The arrival at commonly agreed definition still remains remote and

26 E Cotran, Op. Cit., p. 135.

contentious. Definitions already given by many English positivist lawyers and jurists as from Jeremy Bentham, John Austin, Sir John William Solomond, and in the later period by Karl von Savigny, A.L. Hart, Hans Kelsen, and again by American realists of our time. As a matter of fact all of them belong to different schools of thought when it comes to the definition of law. However, arriving at a shared definition of law from such varied philosophical conceptions shall only convince our knowledge of legal reasoning while rendering African customary law an appropriate and convincing area of law. What matters most is certainly the exploration of different legal thinkers and need to arrive at common contentions when it comes to the definition of law in general.

1.3 SUBJECTIVITY AND OBJECTIVITY OF THE LAW

Generally, there is a predicament in defining law while concentrating on certain contentions of different languages as shall be revealed. In a simplified way in the Anglo-Saxon traditions and in the English framework the term law is used often to refer to several things such as traffic law, contract law, evidence law, tort law, criminal law, and environmental law. English lexicon demonstrates that the word law can be double facet or dichotomous. In one way it can show the normative or objective aspect of law in terms of posited norms that are binding on a community. On the other hand the word law can also contend the subjective aspect of law other than norms or what is known as the spirit as opposed to the letter (a set of written rules). At the common law understanding both notions of law can be referred to by the same term, the law.

In the table below we can understand the normative and subjective meanings contained in the word “the law” treated in separate terms. It makes it easier to distinguish law as legislation and law as right. Certain African languages also make such clear distinctions.

LANGUAGE	NORMATIVE	SUBJECTIVE
ENGLISH	LAW	LAW
FRENCH	LOI	DROIT
ITALIAN	LEGGE	DIRITTO
GERMAN	GESETZ	RECHT
SPANISH	LEYE	DERECHO
LATIN	LEX	JUS

The distinction in legal terms with reference to the Kiswahili language is one of the outstanding examples. Kiswahili word *Sheria* and *Haki* all express two contentions that reflect the normative and subjective meanings of law. While *sheria* refers to normative aspect of law as a set of rules that regulate human conduct and behavior in society, *haki* connotes the question of rights in the subjective sense. *Haki* contains what we shall refer to as the spirit of law and in this manner *haki yetu* – our right translates into what people consider their own, their natural right that reflects the concept of justice. It is also true that Kiswahili borrowed the concept of *sheria* from Sha'ria law distinguishing it from subjective rights. It is therefore helpful to evaluate some of the generally agreed definitions of law and particularly customary law.

1.4 DEFINITION FROM OTHER SCHOLARS

At this point it is necessary to examine some views made by different modern law scholars and theorists before we venture into the classic law theories.

Nyasani defines law saying:

law in its broader sense can be regarded as a paradigm according to which actions, be they rational beings or inanimate beings ought to conform to. In the strict sense of the word, law is corpus of principles recognized and applied by the state in the administration of justice²⁷.

²⁷ M.J. Nyasani, *Legal Philosophy: Jurisprudence*, Consolata Institute of Philosophy Press, 1995, p. 11.

Nyasani's philosophical definition inclines heavily towards the most quoted positivist school of thought and particularly to the way Sir John William Salmond looks at

“law as the body of principles recognized and applied by the state in the administration of justice”.

Nyasani in his legal philosophy, embraces the unwritten characteristic of the law making it clear that even the irrational aspect of law is still considered in the broader sense of law. In other words, customary law in the post-colonial African states has been evaluated under the principles of traditional customs with limited legal impact on the modern understanding of the law in the positivists' point of view.

However, both Salmond and Hart admit that the answer to “what is law” or what is the nature of law (essence of law) has a long and complicated history. Many legal scholars define law basing themselves on the features or aspects of law²⁸.

The intriguing argument is that considering the commanding or authoritative aspect of law as its definition, shall omit the key factor that features prominently in the international law and customary law in which there is no legislator or government (sovereignty) behind the law enforcement notion. Even the positivists' arguments do not offer an accurate and unchallenged definition of law, supporting our belief that African customary law should enjoy all qualifications of being called law in contraposition to mere customs or morals.

Nisar Ahmad Saleemi makes the definition even simpler by referring to the law of State or statutes. Yet he admits like Hart that there is no generally acceptable definition of the word law²⁹ among law scholars. John Austin in his book *The Province of Jurisprudence Determined* refers to law as the body of principles recognized and applied by a State in the administration of justice inclining towards the normative other than the subjective notion of law. Two notions

²⁸ H.L.A. Hart, *The Concept of Law*, 2nd ed., p. 6. Also see, Ogola, J.J., *Business Law*, 2nd ed., Focus Publishers Ltd., Nairobi, 2010, pp. 13ff.

²⁹ N.A. Saleemi, *General Principles of Law Simplified*, Saleemi Publications Ltd., 1992, p. 1. Law is a system of rules, usually enforced through a set of institutions. All legal systems deal with similar issues and behaviours, but each country categorizes and identifies its legal standards and principles in different ways.

are raised in this definition: that of the necessity of court system and sovereignty. If court is intended to be part of the definition of law then we should question ourselves as of what comes first, courts of law or law?³⁰ Is it court that makes the law or is it the law that establishes the court? Does the legitimacy of law depend on whether it has formal court or not? Do we attach the meaning of court here in terms of an edifice or a structure or court refers to qualified personalities sitting as judges? If court means the personalities sitting to hear and make ruling on cases, then the structure is immaterial. African customary law recognized qualified elders or council of elders sitting under certain revered trees as "court" as contrary to institutionalized formal court. In customary law, the use of recognition of elders is different from appointment or recruitment of judges. Recognition portrays more legitimacy and participation of the people in the administration of justice than in the formal judiciary as we know it.

The second notion is related to the authority, the sovereignty that features prominently in the theory of John Austin. The most recurring tone in this definition is law seen as a command or a chain of orders from sovereignty. Law is seen as a primary norm that stipulates sanctions. Austin's definition of law as has been explained attracts lots of criticism as it regards law as an instrument used by the government to administer justice through issuing of threat of punishment or creating afflictions on those who disobey it. In this perspective people observe law not for the sake of its social values but because of the threat one is subjected to. Austin's explanation could fit better in monarchic and authoritarian regimes but does not fit in the modern democracies.

It is therefore correct to allege that legal positivists were majorly concerned with kingly environment around their social context and empirical concepts originating from positivism. Sir J. William Salmond had claimed that Austin only defined a law, that is, an English Act of Parliament and not law in its general connotation³¹.

30 T.O. Elias, Op. Cit., pp. 37ff.

31 In T.O. Elias, *The Nature of African Customary Law*, p. 38

With this understanding we can now proceed to evaluate definitions attached to customary law.

1.5 DEFINITION OF CUSTOMARY LAW

It is necessary to highlight that customary law is human law entrenched in traditional social and psychological fabrics of the human society. The oral aspect of customary law is linked to a people's belief in mysticism surrounding their nature and traditional social world-view as explained by Kanyeihamba³².

History shows that the enforceability of African laws and customs depend on two major operational factors namely; reliance on the parties in dispute to accept the final judgment of the people and the fear of upsetting the balance of nature or of the community, which is the vital force.³³

As it stands people's judgment and the importance attached to their communities make African customary law more legitimate than legislations that represent delegated opinions that can as well be corrupted.

Dr. Arthur Goodhart, professor of law at Oxford had suggested³⁴ the following definition of customary law: Law is any rule of human conduct which is recognized as being obligatory. He further explained, "the law of a given community is the body of rules which are recognized as obligatory by its members"³⁵.

The recognition rule defines the legitimacy of law and demonstrates that it is in accordance with set up social principles and values in that given community. This constitutes the vital force or the central fulcrum around which the society operates.

32 Cfr. M. Gluckman, *Ideas and Procedures in African Customary Law*, London, 1969.

33 George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, p. 11.

34 T.O. Elias, *The Nature of African Customary Law*, p. 53.

35 T.O. Elias, Op. Cit., p. 55.

1.6 SYSTEM

Given the above definition African traditional law is therefore considered as a legal right with all its uniqueness and peculiarity. It is a system *sui generis* and should not fall short of standard or criterion of considering what is law and what is not law.

Clear standards or proper paradigm in defining law is still lacking since law ought to be defined within the perimeters of holistic human social life that transcends postulated statutes (Acts of Parliament). The fact that there is no legislator, jurist or an authority behind customary law does not disqualify it from being considered law³⁶.

1.7 LEGAL ETHNOGRAPHERS AND ANTHROPOLOGISTS

A balance is struck by comparing notes with other law scholars who have delved profoundly into the subject matter. There is no better way of doing this than citing the noble work of Justice Taslim Olawale Elias in which he elaborates with audacity four main schools of thought of the African customary law: *missionary school; administrative official school; the jurist school; and the social anthropologist school*³⁷. Each school had its failure in defining the African customary law as the learned author argues in his book. While missionaries were preoccupied by the work of evangelization and civilization based on the Western model, the colonizers were much worried about whether to assimilate the African customary law or treat it as a parallel. Whatever missionaries found within the African law and customs were paganism and it was their duty to wipe it out in order to gear up the civilization process.

However, Placide Frans Tempels, in his book *La Philosophie bantoue*, cited in the work of Masolo, says:

“if the primitives have a particular conception of being and of the universe, this proper ontology will offer a special character, a logical color, to their beliefs and religious practices, to their humors, to their

36 H.L.A. Hart, Op. Cit., p. 15.

37 T.O. Elias, *The Nature of African Customary Law*, pp. 25-36.

law, to their institutions and customs, to their psychological reactions and more generally, to the whole of their behavior.”³⁸

This statement makes us believe that not all Western ethno-philosophers and others were mistaken in their interpretation of African customary law. Customary law is regarded as one of the most fundamental values found in organized African societies.

Social anthropologists most of whom were not jurists by profession had a tendency of seeing what was there in place in Africa in terms of mythical, uncivilized and irrational reasoning. Western discourse on Africa has been widely illustrated in the work of Masolo³⁹ to an extent that makes us believe that there is more to discuss about the European presentation of the African customary law in light of the already developed European law. Europeans have talked so much about Africa and now it is the turn of Africans themselves to give their version about their laws and how such laws can translate to order and harmony.

Administrative officers had a mandate from their governor to offer administrative services according to the requirements of the British government and had less interest in the African traditional life-style or laws that dictate it. Their approach appeared to be better than their counterparts in that the administrative officers respected the role of local chiefs and had regard for traditions. Certainly this was also another easy approach to render people less hostile to foreign complicated life-style.

An eminent English law scholar-cum-jurist, Justice Eugene Cotran, took bold steps to come up with a compilation known as the *Re-statement of African Law in Kenya* back in 1968. Most probably Cotran was aware of the Western prejudice towards the African traditional legal regime and the social rules enshrined within the African juridical order. Cotran had already served as a puisne judge in the Post-Colonial Kenya and might have had challenges posed by the existing African customary laws. He is today considered as the

38 Dismas A. Masolo, *African Philosophy in Search of Identity*, pp. 46f.

39 Dismas A. Masolo, *African Philosophy in Search of Identity*, p. 1.

only jurist with meticulous interest in developing African law but how about African lawyers?

In Kenya, Eugene emerges as the only shining brain that had foreseen the role of African customs in the African judicial process pitting it on the imposed and borrowed English Common legal system. Max Gluckman, Evans-Pritchard, Richards Antony Allott, and Taslim Olawale are some of the few exponents who also had explored African customary law as a pure legal discourse and launched an academic inquiry concerning the development of real “African jurisprudence”. As much as their pieces of work would be subjected to wider criticism, so much has been achieved by their academic work, and today they are exemplary in promoting research on African legal knowledge.

Unfortunately, very few African law scholars take interest in studying their own native systems let alone their own legal system. They are the same personalities criticizing and under valuing the only available written documents without introducing anything new in their place. It is true that with this negative attitude and self-denial trend in our academic sector, too little shall be achieved. Policy makers in many African independent States are at home with borrowed foreign ideas, namely; legal concepts, systems, and practices as found in the application of foreign legislations in the Kenyan legal system. This aping system is one of the wrongdoings for the African Continent; her values, her wonderful history and the administration of justice meant specifically for her people. The anonymous adoption and adaptation of the English and Indian laws in Kenya and making such legal systems rule our lives, is still a question of being unfair to the indigenous populations.

Great Britain, France, Belgium, Italy, France and USA, have vested a lot of interest in learning the African customary law. As the saying goes there is no labor without interest, such civilized nations have one thing in common-how to control the Third World.

Most of the African scholars lack interest in developing what is their own and prefer to replace the European imperialism with Asiatic domination: in other words, they solve their problems

with another problem whereas Customary Law in Africa is all encompassing, oral traditional regime, which grew up in Africa, before there was a State⁴⁰.

Another factor that undermines the development of customary law in Africa is the fusion between law and morality⁴¹ that continues to overshadow customary law reducing it to mere primitive social rules⁴² that go against the modern understanding of the law and rights. Religion or belief in the supernatural, are fused and mutually supportive⁴³.

Geoffrey Stuart Snell, an administrator in Kenya during the colonial era, also supports this by saying:

“As in primitive tribes in general, their philosophy and religion were indistinct combination of attitudes, ideas and beliefs and they drew no sharp distinction as in the moral law and the law of the tribe such as has long been in Western societies”⁴⁴.

Parallel notion about African customary law is not distinct from the belief of people, their customs expressed in folklores, and mores. It is in this way of presenting African customary law that leads Prichard, to make a fallacious mistake, saying that the Nuer people in the Southern Sudan have no law.

Thanks to the jurists' school of thought led by an English legal empiricist Jeremy Bentham, its founder. He tried to delink the study of law from the mysticism surrounding its nature and essence, in an attempt to do justice to legal positivism. As a classic positivist legal scholar, according to him law is law leading to his famous work on Pure Theory of Law. This positivists' perspective contends that the study of law should be detached from its moral, social, religious or other links limiting it to pure empirical theories. In his “Pure Theory of law” Bentham made key distinctions between

⁴⁰ J.W.Van Doren, “*African Tradition and Western common Law:A Study in Contradiction*”, in Ojwang’J.B., and Mugambi,J.N.K.,The S.M. Otieno Case, p. 127.

⁴¹ R.S. Bhalla, Op. Cit., P.4.

⁴² In T.O. Elias, Op. Cit., in p.... quoting from Hartland “*Primitive Law*”.

⁴³ J.W.VAN Doren, “*African Tradition and Western Common Law:A Study in Contradiction*”, in Ojwang’J.B., and Mugambi,J.N.K.,The S.M. Otieno Case, p. 128.

⁴⁴ G.S. Snell, *Nandi Customary Law*, p. 1.

law and morality⁴⁵. John Austin, from the same school of thought introduced the expository jurisprudence, exposition of law as it is⁴⁶ by a sovereign. Austin makes the study of law arid and deprived of its subjective relevance, that is, the social context surrounding law, limiting the notion of law to its normative aspect making it be a command from the Commander. This reductive way of looking at law makes law be a tool for the King to use towards his subjects in a vertical format but not in a horizontal format. Austinian theory supported by Sir John William Salmond, provoked several criticisms especially among some Western legal philosophers and jurists such as Adolphus Liones Hart. Hart objected the Command and order theory of Austin. Looking at law as a command from above and an order from Sovereign authority does not reflect well with the primitive law or international law, rendering the definition of law arid and tasteless.

Germanic historical school of thought in the 19th Century, pioneered by a German jurist, Friedrich Karl Von Savigny, realized the fallacy made by the English positivist jurists and strongly backed the subjective notion of the law pinpointing its sociological aspect, that is, the spirit of law. His school of thought deliberately linked law with its subject, humankind and the social context⁴⁷. Law deprived of its subjective notion is arid and cannot work in the administration of justice. It is in this sense that law is restored again to its main subjects, the people in the society other than the instrumental purpose attached to it by utilitarian theory of the English school of thought. In this sense relativity and contextualization of law are highlighted as major aspects of law. The historical school went as far as objecting the spread of French Napoleon Code in the continental Europe seeing it as a threat to contextualization of law. Law changes according to the dynamics of social change and given social set-ups and patterns therefore cannot be universalized.

45 R.S. Bhalla, Op. Cit., p.5.

46 *Idem.*

47 Rfr. The Sociology of Law and History of law as disciplines are linked with the Germanic school of law as contrasted with the Anglo-Saxon schools of thought.

In agreement with thoughts of Savigny and his socio-historical school, a true jurist is that who has regard for the context of law, the social reality, the spirit and culture of people that use it. It is only in the customs of the people that one can have pure knowledge of law as it ought to be not as it is. According to this Germanic school of thought there are no universal standards in the concept of law.

Summarizing the thoughts of the Germanic school, Robert Cotterrell in his essay, “*Comparative Law and Legal Culture*” makes it clear that law is found within a cultural environment⁴⁸. Law scholars must engage in the study of legal differences other than similarities in terms of legal ideas, legal systems and legal traditions. The school falls short of the study of law as a social science whose precepts must make sense to all people, in all places and all the time. It is the universality aspect that enables us to take law as part of our scientific discipline and area of specialization.

Already quoted Elias, a Nigerian born jurist *cum* law scholar, stands out as the best illustrative and an exemplary of a smart brain brewed in African customs that during his life-time made it to the international court of justice before he succumbed to the dictate of nature in 1991. He is the author of *The Nature of African Customary Law* in an attempt to dispel all the misconceptions created by European learned editors on the subject of African customary law. His legal reasoning and audacity in African customary law transcends all walks of life and is as good as it was back in 1956. The book has prominently inspired this research and motivated the author to delve more into the legal insights found within the study of African customary law in the modern and post-modern era.

Even though the number is very much limited, along with Dr. Elias, there are other great African prominent lawyers and jurists who have demonstrated successful knowledge of the African customary law in their legal career in which they managed to earn some mileage in the profession. Richard Otieno Kwach, a Kenyan lawyer-cum-jurist, proved to the Kenyan judiciary of the wealth

48 R. Cotterrell, “*Comparative Law and Legal Culture*”, in *Collected Essays in Law: Living Law-Studies in Legal and Social Theory*, Dartmouth Publishing Company Limited, England, 2008, pp. 281-309.

in the African customary law during the case of S.M. Otieno in 1986. He challenged his peers convincing the bench of the power underlying the African customary law, a case that sparked a lot of enthusiasm among lawyers in Africa and abroad.

The counsel of the defendant, learned friend, John Khaminwa, the attorney of the widow, based most of his legal reasoning on the English Common law and the statutory law disqualifying the use and practicality of African customary law. According to this learned lawyer, *customary law is about traditions, baseless beliefs that lack legal principles*,⁴⁹ an allegation, that made him lose the case.

The two learned lawyers who were both educated elites in Kenya opened the debate on customary law. It made the public realize the failure to develop customary law and the judicial consequences.

Another Kenyan with an interest in customary law is Gibson Kamau who has done a research.

Realist school of thought, emerging in the United States of America, argues that law comes from the people (legitimacy of law), their culture, their customs and social usage. Customary law embraces both the concepts and the law as social institution in its making⁵⁰. In the same manner, Kenyan Constitution of 2010 highlights the need for promoting and protecting the cultures of Kenyans, another episode that shall see African customary law regaining its momentum in the academic field.

Reading from the same script Hart⁵¹, explains his theory of law as,

social rules within a given social group that recognizes, accepts and use them. It is possible to be concerned with the rules, either merely as

49 Cf. D.W. Cohen and E.S. Atieno Odhiambo, Burying SM: *The Politics of Knowledge and the Sociology of Power in Africa*, East African Educational Publishers, Heinemann and James Currey, 1992. The book presents court proceedings in the case of SM Otieno and legal discourse that highlights the power of customary law as compared to statutory law, the first of its own kind.

50 Carl F. Stychin and Linda Mulcahy, *Legal Methods and Systems: Text and Materials*, 3rd ed., Sweet and Maxwell, London, 2007, pp. 2-3.

51 H.L.A. Hart, *The Concept of Law*.

an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct.

In this sense a rule, according to Hart,

is a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a commonly shared standard of conduct to which all members are required to conform.

To use the rule is to conform one's conduct with relevant pattern, and to accept the rule, is to adopt the attitude that the pattern requires as standard both for oneself and for everyone else in the group. The definition of customary law depicts this proposition by Hart in the sense that customary law is identified with the people (group) that accept and use it as a social rule. Hart's view hints on social rule that people accept and apply as a standard to guide their conduct. Accepting and using a rule are the key factors found also in the customary international law that accepts the principle of recognition as legally binding on the States.

A social rule is at the heart of every legal system. The rule of recognition (cognizance) is fundamental to social practice that holds in the people who understand the rule and uses it. The normative character in customary law is duty or obligation character like in any social rule explained by Hart and this brings us to justification of a valid law. Rule of recognition is fundamental for the legitimacy of law and customary law falls under the category of social rules. In this case customary law is not just a social practice but a normative social practice.

The theory of Hart objects the reductive analysis of law as demonstrated by prior positivists supporting the pure theory of law as ideas and norms that should not be mingled with social rules or customs. However, one outstanding element in the African customary law is the "threat" and "sanctions" of those who are believed to have disobeyed it as we shall demonstrate later especially in relation to the administration of justice.

After understanding of African customary law by the above definitions, it is now logical to proceed to the analysis of its nature, characteristics and limitations. The explanation above does not deny the fact that customary law is subordinate to state laws but emphasizes its function as the sources of law per excellence.

Basing our argument on the above analysis we can deduce that African customary law is a legal system, found within the legal culture of various African communities that recognize, accept and have applied them from time immemorial. Custom is a long established practice considered as unwritten law. In order for this to happen, custom must have been practiced from time immemorial, has been exercised continuously, has been observed as right, and must be reasonable, consistent with common law or statute and in conformity with other accepted customs.

CHAPTER TWO

NATURE, CHARACTERISTICS, LIMITS

2.1 INTRODUCTION

It would not make much sense to evaluate the nature of customary law before explaining its fundamental functions or understanding how such customs exist or disappear from existence. The nature of law is a long debate and the attempt to exhaust it here is only futile. Readers should be directed to Hart's *The Concept of Law* for a broader understanding of African customary law⁵².

2.2 CUSTOMARY RULES AND PRACTICES

Law as a body of rules, norms and principles for human behavior is all about *order, harmony* and *administration of justice*. In *sensu strictu*, law deals with real social life⁵³ as it touches on tangible and real societal experiences within the understanding of every ordinary person. The Pre-colonial Africa, from time immemorial, had organized societies of people who had well defined rules and principles that were serving to ascertain order and harmony in a consistent and systematic manner.

Disputes were settled through customary law mechanisms that placed certain degrees of sanctions on the offenders. It is a fallacious statement therefore, to argue that the colonial regimes introduced law to Africans or brought law to them and the general attitude of Africans was negative⁵⁴. Law had been there to deal with social conduct, social pathologies and served as *modus operandi* in the best interest of the society before the Europeans' domination. It is just sufficient to think of the ancient African kingdoms and organized societies that had their own legitimate authorities that would deal

52 Cf. H.L.A. Hart, *The Concept of Law*.

53 R.S. Balla, *Concepts of Jurisprudence*, Nairobi University Press, 1990, p. 1ff.

54 Oginga-Odinga, *Not Yet Uhuru*, pp. 61ff.

with issues of justice, peace and order within their jurisdictions and assert laws. The same sentiment is echoed in the work written by Makali. *The alleged position taken by colonial power did not suggest that there were no inherent and fundamental human rights and freedom in Africa prior to 1950s*⁵⁵.

Reading from the pedigree of legal practice, sociology and anthropology, Africans lived in consistent and systematic structured societies where order and harmony had existed⁵⁶. From the perception of legal science and methods, law and justice, in their strict sense, is basically about people and their communities. Going by the fact that law takes both moral and positivist approaches, customary law are not abstract theories, or ideas, but concrete and factual realities expressed in day-to-day social phenomena. It is true that customary law tends to express itself more in its moral dimension and subjective notion than the posited state laws emphasizing the normative aspect of law.

With the colonization and post-colonization process *de jure* independent African States enthusiastically adopted Western legal systems and legal conceptions, forgetting the need to develop their legal systems. The legacy of colonialism that brought Western civilization in terms of literature and formal schools sort of killed the oral traditions and certain analogous values of the indigenous people depriving them of some of their fundamental rightful legal traditions. However, this phenomenon did not hinder Africans from the perpetual struggle to maintain their legal identity as Africans making many states superimpose customary law within their Constitutions. A lot more is still brewing as some African modern intellectuals, scholars and researchers are determined to go down in the books of history as authors of “customary law”. It is not too late or obsolete to start now addressing ourselves to the questions “whose legal system are we applying? Whose legal concepts are we

55 David Makali, (Ed.), *Media Law and Practice: The Kenyan Jurisprudence*, p. 102.

56 Writings, legal history, sociology, anthropology and missionary writings of the olden days have proved that traditional African Societies were well organized and they had an operational legal system even before encountering the outside powers. Olawale mentions African Kingdoms, Empires and Chieftainships that had well structured social life and a system of rules and to which everybody had to owe some reasonable allegiance.

using in our courts? From which legal tradition do we interpret our laws? How far can we prove that such statutory laws safeguard our human rights? Do the wigs put on by the judicial officers and English gowns put on by the advocates make clear sense to us?" Time is now for universities in Africa to decolonize the minds of law students and fully embark on the originality of our laws in terms of customs, *coutume*, *consuetudes*, mores, ethics and legal traditions of the African people. African students have the last chance to conduct pragmatic research in their own traditions and come up with studies of customs that are known, practiced in their respective communities and importantly, express them in codes that could be handy for the administration of law. I am afraid that the failure to do this may lead other powerful nations to re-colonize Africa with their own ideas, laws, systems, styles, and ideologies, concerning the administration of justice.

It is a fact that legal literature in Africa has not been expressed in a systematic and methodological manner as the positivist school of thought would argue. There are no written codes of African customs anywhere and those who apply them are doing it exclusively through oral traditions or certain dogmatic doctrines. Parents would tell such laws to their children, grandparents to grandchildren, transferring knowledge from one generation to the next. Such laws were carried forward in a consistent manner by communities from time immemorial but have never been expressed in codes besides the restatements.

2.3 CHARACTERISTICS

Sir Charles Njonjo, a former Attorney-General in Kenya, wrote in his foreword of the *Restatement of African Law* volume one:

"One of the greatest problems that has faced the smooth administration of justice in Kenya, and indeed in most parts of Africa, for a very long time has been the fact that the customary laws of our various peoples have been unwritten"⁵⁷.

57 Cotran, E., *The Restatement of African Law*, Vol. 1, p.V.

Njonjo demonstrated that customary laws are the main stumbling blocks for initiating sound law reforms, and a big problem for both judges and advocates.

The non-written characteristics found in the African legal system is what makes it known as customary law which stands to date to be inferior or subordinate to statutory/substantive law in Kenya referring to the Judicature Act of 1967. The reason is that what is not written or expressed in literature risks being considered inaccurate, unjustified, unverifiable, and inauthentic. Such prejudice can be objected by the fact that customary international law is one of the primary sources of international law and applicable at the International Court of Justice yet it is unwritten.

Law without jurist or legislator has been regarded for a long time as no law and cannot be termed as legal system. How comes the unwritten English Common law, British Constitution, International Law and Equity are considered as law or rather as legal systems and African customary law does not qualify? Common law system has been known also by some scholars as common sense and it is a system developed from the very customs and traditions of the Anglo Saxon and Wales people. If English Common Law is considered a system of law then African customary law ought to be considered the same without any element of prejudice thereafter. It is of course possible to imagine a society without a legislature, courts, or officials of any kind⁵⁸.

African customary law must be considered a legal system as long as it makes sense to a given social group which recognizes it, accepts it and applies it for the administration of justice. It contains general rules that are recognized, accepted and used by given social groups.

Given the characteristics of customary law it is also true that some customary norms may become irrelevant with time and disappear under the principle of repugnancy and inconsistency at common law system. Modern generation that tends to ignore cultural values of its people would certainly discard African customary law and tag it an issue of the past or out-dated. Question that logically follows

58 L.A. Hart, Op. Cit. p. 91.

would be, what is the issue of the present and what do we consider issue in the past? The retrospective aspect of African customary law creates an impression that, such traditional laws only concerns the ancestral laws that should be forgotten and discarded. Sir Njonjo, in his foreword mentions:

“...it was the biggest stumbling block to law reform since it was hardly possible to initiate sound reforms without complete knowledge and understanding of these different customary laws”⁵⁹.

It is notable the statement complete knowledge and understanding of different customary laws, that would provide a road map for laws in the country.

Even though customary law remains deeply rooted in patriarchy and ageism it would provide the right answer to what are the African legal traditions, concepts and values in relation to the present legal challenges and issues such as land issues. This does not, however, prevent us from some reasonable allegations against certain rules and norms found within certain customs and traditional laws. For example, when customary law is interpreted to permit the husband to beat his wife and not to allow a woman to administer or outrightly inherit her husband’s estate under the African law of marriage and divorce, then there must be consideration.

Avoiding being over defensive and excessively reactive, such practices as domestic violence and mistreatment of a spouse basing reasons on the customary law is baseless and attempt to corrupt the true nature of the African customary law. In other words, domestic violence belongs to a different domain of discussion and should not be drugged into legal issues.

Misinterpretation of African customary law has a lot to do with the fact that it lacks legislators or judicial system (court system) that would maintain its authenticity and even work on amendments in terms of social changes. It is a kind of spontaneous legal framework that exists within a group of people that rules its social conduct in a non-institutionalized manner. Lack of institutionalization of

59 *Idem.*

customary law is what makes many people misuse it to justify their own immoral and unacceptable acts.

Traditional courts have been abolished since the independence of Kenya replacing them with statutory courts provided for by the state laws as we shall see later. Reasons attached to such closure are varied and could be contested.

In Kenya, and Uganda, before the colonization, customary law was administered by cultural leaders who were knowledgeable and vast with its concepts and had the power to interpret it. With the introduction of the Constitution which rules over all citizens and over those who followed customary law alike, the role of Customary Law system was overtly played down. The transfer of customary cases to formal courts contributed a great deal to this disgraceful scenario. In Uganda, Customary Law has been reduced to secondary source of law for the formal courts⁶⁰ and the same trend is experienced in Kenya.

In the contrary, the interest in customary law system is now attracting the attention of developers and universities in Africa as an option for developing new policies and responses to the emerging needs. According to many technocrats and bureaucrats customary law has what it takes to respond adequately to the fundamental needs of the society especially in line with the access to justice and gearing up rapid human development.

Since we are not concerned with particular customary laws the universality aspect enables us to speak of African customary law as a system rather than a norm as had been previously discussed. There are several similarities that could be traced all over the region making it adopt the name “Africa”, hence African customary law. Several researchers have concluded that different African communities or groups share same legal concepts when it comes to setting up their social rules or customary norms such as found in dowry system.

60 Minneh Kane, J. Oloka-Onyango and Abdul Tejan-Cole, “Reassessing Customary Law Systems as A Vehicle for Equitable Access to Justice for the Poor”, in Arusha Conference, “New Frontiers of Social Policy” – December 12-15, 2005. Kane et al, Conference Paper.

2.4 CONTEXTUALIZATION AND DIVERSITIES

African customary law has been referred to by learned authors as social rules pertaining to specific ethnic groups that believe and practice them sporadically without any formal (written) structure. It therefore, follows that the African legal realism, in so far as such informal or unarticulated laws, corresponds to the immediate social needs of determined social groups.

Given that African independent states are multi-ethnic in structure makes it difficult for such nations to incorporating some well known customary laws into the national Constitution without creating more problems. Kenya having over 42 ethnic groups and Nigeria having over 240 ethnic groups and some major ones is a reason why customary law has not received supremacy in the legal education for the sake of national unity. However, this is being short-sighted and unfocused. The diversity found in African traditions and cultural values should be seen as an asset rather than a liability for the future legal development. Borrowed legal frameworks might not work well for Africa in so far as law reform is concerned. It is not neglecting the traditional rules of the people, their values and conception of law that will bring the rule of law and order in the modern states. Certainly the diversities in African legal system could be translated to a huge wealth of knowledge that may serve in making good laws and enhancing integrity of the system.

In line with customary law theory realists' school of thought advances its theory of contextualization and relativism that forms part of the aspect of law. Every social group may make its laws according to the given social set-up, cultural patterns, and economic needs that suit them. It is indisputable that such groups can form their social rules in the language that they understand and accept.

2.5 LANGUAGES

Having the multi-ethnic scenario linguistic barrier is automatically an impediment in its own making especially for the cynics⁶¹ that

61 Cfr. P. Onyango, Op. Cit., pp. 7-16.

blame it all on articulated legal language. Language issue becomes an issue to determine the veracity of certain customs and legal concepts expressed among a social group. Imperative language of law such as *must*, *should* and *ought to* vary according to different languages.

Austinian theory of law holds that law is in terms of order, and command and its obedience is attached to threat imposed by the commander⁶². In this sense language, legal terminologies and legal concepts expressed in different languages tend to render customary law relatively limited and confined only to the social group that recognize, and use it and nothing across the ethnic boundary. The confusion created by different languages, dialects and meanings, make it relatively difficult to develop uniform customary law system in terms of formal codification.

However, linguistic difficulty should not be considered a primary impediment *per se* neither in the centrally organized social groups, with central authority nor in the decentralized social groups. It is not the language that matters but the notion of law that should be universal and must express the same meaning to all people all the time. The command and order language of law as purported by Austinian theory of threat has been challenged by other legal scientists such as Herbert Hart.

African customary law system may lack the articulated imperative language but according to legal scholars such as Hart, law also embraces issues that do not involve threat, command and order⁶³ something that makes the definition of law more polemical among lawyers and theorists in the legal field. It is not right to argue that we obey law because of threat but because of the sense it makes to us. A orders B to give his money to him and the failure to comply will make him shoot A. This is a command from B but if A obeys this order due to fear for his life, is not the same as obeying the traffic light. When A stops at the traffic light because it shows color red, it is not that he fears being shot at when he fails to comply. It is not the

62 John Austin, *The Province of Jurisprudence Determined* quoted in H.L.A. Hart, *The Concept of Law*.

63 H.L.A. Hart, *The Concept of Law*, pp. 18ff.

punishment alone that lead to the obedience of law as Hart argues but the legal sense it makes.

It is true that plurality and diversity of African languages to which African customary law system is subjected may render it laborious to determine the semantic meaning of legal notions contained in certain norms. When we say laborious it is not the same as saying impossibility. Mono-linguistic nations such as Rwanda, Burundi and almost Tanzania have proved that language cannot be a hindrance to universal concepts such as justice since they can express their social rules in one language. Diversity of languages and differences in semantic expressions by social groups is a secondary issue that can be dealt with by learned jurists.

Linguists and African scholars would agree that many African languages are clear in articulated language such as *must*, *should* and *ought to be*. Hence, language is not and shall never be an impediment to the cognizance of African law by an established judicial system of a country.

Some critics argue that relativism versus universalism in the customary law poses valid challenges lowering the significance of customary law in the national legal framework. Since law must make meaning to the people that it affects, it is not simple to come up with generally accepted principles that would make sense to all people, in every place all the time. Some critics of customary law conclude that the study is a utopia that shall not see the light of the day.

In addition some argue that African customary law is a legal system belonging to small-scale communities with members expressing themselves in one shared language. Such social groups are termed as ethnic groups living in a defined area and their customary law makes meaning only to them. Pluralism of languages in Africa cannot be enough justification for its demise and it is wrong to reduce customary law to linguistic groups. Every law is valid as long as it meets the primary objectives of law in any human society. Roman jurists wrote in Latin and that did not hinder common law

lawyers from applying some key Latin legal expressions to express the legal meaning even today.⁶⁴

It is still debatable to say that customary law is difficult to track since there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify such law. Since law has a lot to do with politics it is obvious that the more numerous the group is, the more powerful it is. Powerful social groups are always dominant. Dominant groups shall always influence others and even impose their laws on them. It is what the Roman Empire did in the early ages. The British Empire has done the same thing. Comparing the question of number, Romans were not many during their time of conquest. In the same manner, English people are very few in number, as compared to the Chinese or even Indians yet their law has conquered most parts of the world and not that of China.

2.6 SCARCE BACK-UP AND LOW SUPPORTIVE POLITICAL WILL

Which political authority is behind the African customary law? African independent modern states do not have kings or queens whose authority may back-up the research on African customary law as the British Monarchic Empire did. Swaziland or Lesotho still hold onto their ancient traditions and have monarchies that do too little to advance or promote the cause of customary rules. Yet the majority of African independent states have abandoned the track to pursue their original traditions and adopted the standardised concept of law. African customary law is pitted on the same African lawyers who may propose it and convince politicians to back it up. However, there is low social pressure on African customary law.

Unlike the Islamic customary law backed by powerful religion and some Islamic governments, African customary law does not have any religion or political authority supporting its cause. Unfortunately African outstanding nationalists are now perishing

64 (FN) Reference Chapter 8.

with time and the new African intellectuals easily sell out themselves for economic and political purposes. Generally, many practicing lawyers and academicians tend to switch to political career or open their personal law firms to make more cash other than investing in research. It has become so cheap to borrow legal ideas other than creating them despite their weighty consequences.

The abolition of African traditional courts in 1967 in Kenya and allowing the Kadhi's courts instead was a wrongdoing for the customary law and its future development. It lacks constitutional backing which is very unfortunate.

It was during the reign of President Jomo Kenyatta (1963-1978) that customary law had its last chance, whether to survive or be phased out in its totality from the Kenyan legal system. The President ordered a study on African customary marriages so to come up with uniform law of marriage but the project failed all together for lack of good will and cultural diversities in Kenya⁶⁵. Two commissions were set up: one to inquire into the Laws of Marriage, Divorce and the status of women and the other into Laws of Succession. It was during this time that Justice Eugene Cotran prevailed in working on a Restatement of African customary law also for the interest of the Kenyan Judiciary which he was serving⁶⁶. Kenyatta's predecessor Daniel Arap Moi (1978-2002)⁶⁷ did too little to revive the project despite the much discussed case of SM Otieno in 1986, a legal debate that attracted more attention of advocates of customary law and its significance in the modern legal framework across the continent. Amos Wako, the Attorney-General that served for a long time under President's Moi and Kibaki (2002-2013), did practically nothing concerning the African customary law project until he was expunged out of the State Law Office by the Constitution of 2010.

65 In 1967 two commissions were established on the law of marriage and divorce; and on the law of succession with terms of reference to make recommendations for a new law providing a comprehensive and maybe practicable, uniform law (code) of marriage and divorce (succession) applicable to all persons in Kenya... See Eugene Cotran, *Casebook on Kenya Customary Law*, Nairobi University Press, 1987, "Preface".

66 Cfr. A. Morton, Moi: *The Making of an African Statesman*, Michael O'Mara Books Limited, London, 1998.

67 Cfr. A. Morton, Moi: *The Making of an African Statesman*, Michael O'Mara Books Limited, London, 1998.

There is no gain of mileage in undermining the study of customary law or making it obsolete in the academic curricula if law reform means something to get by.

South African lawyers, jurists and scholars are better placed since their government is supporting the cause of customary law with proper decorum. The reason is quite self-explanatory. South Africa has had a long time of apartheid regimes, racism, xenophobia and critical conflicts of laws, customs and interests. It is inevitable therefore, to recognise the customary law of the indigenous people in order to bring them on board with the national strategies and government policies. The case in Kenya is quite unique. Kenyans have never experienced substantial inter-ethnic conflict apart from some sporadic clashes over land issues and majorly politically motivated clashes of 2007/8 known as Post Elections Violence (PEV) that attracted the attention of the International Criminal Court. Kenyans have lived a peaceful life of innocence and total ignorance of their own national reality, forgetting that they are custodians of rich customary laws that could be utilised to improve the judicial system and get closer to the desired reforms.

It is recommendable to conduct one-on-one case study and carry out critical analysis of how the current authorities behave towards the development of African customary law. Another issue lies with the status of *panafricanism* movement⁶⁸ and the African Union and other movements with chance to promote research and codification of African legal system. Borrowed laws have not been very helpful to render African young nations stable, self-reliant and legally powerful. Authorities have not realised the huge debt lying behind the cultural globalisation – and some cunning countries such as the People's Republic of China are finding their way *ultra vires* into the heart-beat of Africa either through bilateral or multilateral agreements. Most African governments see this as an opportunity of gaining economic mileage without realising its possible consequences and the future of such relationships. Lack of focus and failure to open a

⁶⁸ Thomas Joseph Mboya, Kwame Nkrumah, Haile Salassie, Julius Nyerere, Nelson M. Mandela, Kenneth Kaunda, Oginga Odinga, and Jomo Kenyatta. *Outstanding Founders of Panfricanism and its Cause*.

small window to develop African legal culture from within has been a big challenge and a time bomb for the future of legal education in the independent African states.

2.7 LACK OF BARGAIN POWER

Given that modern education trends and new technology neglect indigenous cultures and archaic studies, and that several scholars shy away from history, literature, philosophy, anthropology and embrace empirical sciences, customary law is suffering a huge blow. African customary law lacks sufficient bargain power and adequate capacity to re-propose itself among the world modern legal systems. In contrast to Sharia Law enforced in Islamic Legal System, African Traditional Law has no authority behind it since Africans did not have any structured and institutionalised religion to begin with. Political authorities in terms of Kingdoms that would have promoted its development collapsed during the colonization process and never re-emerged even after the independence.

The fact that there is no legitimate authority enforcing customary law makes many people think that African customary law is not law but an informal system. The failure to have specific enforcement organs and government backing the customary law is not the justification of its failure. Certain focused African states are seeking to re-instate chieftainship and make the village chief the overseer of customary norms in given small contexts within their law reform process. The use of ancient kings and chiefs in some countries may help in reviving the African customary law system and make it contribute a great deal to the collective need to renovate our judicial systems.

All that is needed is to emphasize the study of African customary law system and recognise it in the legislations through establishing statutory customary courts that would sufficiently address customary disputes. Kenyan Constitution of 2010 highlights customary settlement of disputes, a move that might see Kenya re-

energizing research on her customary laws and coming up with certain legislations that would enable or empower the customary law approach in the judicial system.

2.8 INCONSISTENCY PRINCIPLE

When we say that customary law is inconsistent, we mean that it is not in accordance or in compliance with certain written laws or statutes of the state or municipal law or it is not compatible with the principle of justice. Whenever customary norm is considered inconsistent with the written law at common law system then the written law shall prevail. In other words if there is conflict between what customary rule provides and that of the existing legislation then that of the legislation shall prevail. Both inconsistency and repugnancy theory were skewed into legal concept by the British colonial authority during the interaction with customary laws of the colonised Pre-British African societies. The British referred to such social rules as native laws or black law in South Africa during the apartheid regime.

Inconsistency, incompatibility and repugnancy are synonyms and key words used to shoot down the progress of African customary law during the colonization process. The Constitution of 2010, under Article 2(4) makes a provision that “any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”. At this juncture it has been made clear by the Constitution that all existing customary laws in Kenya are subjected to the Constitution and in case of conflicts then the Constitution shall prevail. This should not be interpreted as constitutional impediment of developing African legal system based on salient customary law principles that exist in various African communities.

2.9 REPUGNANCY PRINCIPLE

The customary law must not appear to contravene principles of natural justice and morality as expressed in *jus cogens*⁶⁹ theory and understood by English jurists. It must not violate the principles of rights and duties that underlie the concept of justice and equity as determined by Common Law System. An example is the mutilation practice of the female genitals by some social groups that has been considered repugnant to natural justice, hence, considered illegal at common law system. Such practices, if enforced by any customary law are considered void and disputable under the repugnancy test⁷⁰. Professor Okoth-Okombo made an indispensable consideration of the semantics of repugnancy in his article “semantic issues”⁷¹ that can shed light on the English Common law jurisprudence on repugnancy principle.

In its ordinary sense the English word repugnant has the meaning of revolting or disgusting or appalling. A person finds food or drink repugnant if he or she can not stand the taste or the smell⁷². Utterances and actions could also be considered repugnant if they don't respect certain general rules such as morality and justice.

According to law, the repugnancy principle is understood in the sense of inconsistency or incompatibility with certain written norms or generally accepted legal doctrines. It is in this sense that some customary norms in given societies could be judged using the repugnancy principle.

69 *Jus Cogens* refers to a body of principles or norms in international law which override or supersede others and which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent norm of contrary effect. They are peremptory norms of general international law – laws relating to the rights.

70 The Constitution of Kenya (27 August 2010) provides under Article 2 that, “This Constitution is the supreme law of the Republic and binds all persons both and all State organs at both levels of government”. The following subsections explain the sources of law in Kenya: (4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

71 Okoth-Okombo, “Semantic Issues” in *The S.M. Otieno Case: Death and Burial in Modern Kenya*, edited by J.B. Ojwang and J.N.K. Mugambi, Nairobi University Press, pp. p. 94.

72 *Idem.*

In some countries there is a concern that customary laws could be discriminatory against women, children, persons with disabilities and vulnerable ethnic minorities, therefore, fail the repugnancy test. It is this sense of the word that has attracted most of human rights lawyers to argue that certain customary norms contravene the rules of justice and/or morality.

Following the above explanation customary law should not be seen as contravening the laws of nature or against natural law. If a custom rules that members of a community should murder the first born then this is contravening the natural rights of the child hence incompatibly illegal. Customs that discriminate against women, children or people with disabilities fail the repugnancy test and therefore cannot be considered customary laws⁷³. The reason is simply that such customs are not in line with natural law principles, that is, natural justice and morality because it is the act of killing a human being. There is a belief that killing a human being is inconsistent because the life of a human being is sacrosanct. It is not the same as slaughtering a goat for meat on Christmas day. Incompatibility and inconsistency of norms means they can be subjected to public scrutiny, that is, open to public investigation and validation⁷⁴.

Repugnancy as a mere revolting against some habit of behaviour is more of cultural judgment that is subjective. However, repugnancy as inconsistency and incompatibility is objective and this latter case is the interest of customary law.

When repugnancy is used in the sense of revolt against certain habits of behaviour in a given community or shared attitudes then the judgment is considered unfair for what is repugnant to you may not be repugnant to me. This relativity in the meaning of repugnancy principle is what makes us conclude that certain customary norms that make more sense to the concerned community may not be repugnant in the real legal sense.

⁷³ All men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness. By Thomas Jefferson, "The Declaration of Independence (1776)". See David Makali, *Media Law and Practice: The Kenyan Jurisprudence*, Phoenix Publishers Ltd., Nairobi, 2003, p. 21.

⁷⁴ Okoth-Okombo, Op. Cit., p. 95.

Case No. 6 Leviratic marriage⁷⁵

Ocharo D/O Oigo (Applicant, original plaintiff) v *Ombego Mogoi* (Respondent, original defendant)

Before Mr. Clive Salter, Q.C. (Chairman), Mr. J.A.H. Wolff, Mr. P.W. Low (Acting African Courts Officer), and Mr. Shadrack Malo.

Application No. 28 of 1955 (South Nyanza District Registry No. 61 of 1954)

Held (26 July 1955) that it is repugnant to natural justice and to custom to refuse a divorce, her father being willing, to a woman who has been “inherited” against her will.

Judgment – The applicant’s husband, by whom she had one child, died in 1953. Upon his death the applicant was “inherited” against her will by the respondent, who was a brother of her deceased husband. This union was an unhappy one and on 24 April 1954, the applicant sought a divorce from the respondent in the Divisional Court, who, however, dismissed the case upon the grounds that there was insufficient evidence to support it. The applicant appealed to the S.N.A.A.C., who allowed her appeal, but ordered that the custody of her child by her former marriage and the unborn child with which she was believed to be pregnant should be given to the respondent. The respondent appealed to the District Officer’s Court, who allowed the appeal and restored the judgment of the Divisional Court. The applicant now appeals to this court and we are asked to decide whether it is repugnant to natural justice to refuse divorce to a woman from a man who has inherited her according to customary law. We are informed that the applicant’s father consents to the divorce and to her marriage with the man, who, she says is the father of her second child, which has now been born...

In the result the appeal is allowed with costs; the applicant is granted a divorce from the respondent and the custody of the younger child. The respondent will have the custody of the elder child.

2.10 RELIABILITY

It is clear that customary principles, and rules based on given communities and known to the members of that community, lack consistency principle. Some customary principles are no longer in use as members of the communities abandon them or just don't know about them (customary norms that have disappeared are considered repealed or abrogated). The custodians of customary law are always the elders in a given community and when such elders pass on, the next generation loses connection and it naturally dies out with elapse of time. This is quite in line with the law of ancestors and the theories that relate customary law to the archaic and history.

Some traditional customary practices become obsolete in different given traditional contexts and that makes it irrelevant to hold them as law any longer as members lose touch with them. In this sense, most of young lawyers have developed an attitude of unreliability of customary law system and its irrelevance to the modern conception of law in line with the rule of law and constitutionalism.

The same theory also argues that customary law changes according to given space and time and socio-economic challenges of the time (it is flexible). Economic challenges make it difficult for certain traditional tribes to practise such things as paying dowry in some ethnic groups, making the customary law untenable. The flexibility aspect of law is in line with what Roman jurists called *summum jus summa injuria* – meaning too much insistence on the law can as well result in too much injustice.

The meaning attached to certain customs keeps on changing with time and members tend to adapt to new conception of customary law. According to this theory it therefore follows that customary law presents itself as fluid and mutable with time. The flexibility aspect is in line with the concept of law for the administration of justice.

Going by the fact that customary law is unwritten kind of law does not make it become less important in the applicable legal systems. Oral tradition that characterises customary law may reduce its legal significance to mere hearsay in the general legal parlance.

Theories arguing that customary law lacks the scientific dimension, are also inaccurate in so far as oral traditions in the judiciary are still valid. Otherwise in the trial process there would be no need for the principle of hearing the parties that Roman jurists called *audi alteram partem* – meaning that both sides must be heard.

It is illogical to consider the supremacy of written law or documented legal issue over the narrated version that is typical of customary law judicial process.

Unreliability of customary law in this argument does not change its meaning from law to moral customs or mere hearsay with no binding obligations (*vinculum juris*). It only qualifies and quantifies the scientific or objective aspect of law but not its subjective aspect that can only be best expressed in the very customs of the people. The urgent need for law scholars to embark on innovative legal research is therefore justified. There would have been no need for discussing about the codification of African customary law, if there were written records available.

Even if some of the customary principles and rules have become obsolete they still serve the purpose of learning how African societies were administering justice before and the meanings and values they attached to such customs in order to improve our modern judicial systems and render justice accessible to all.

I can challenge all these hurdles by saying that English Common Law is not written yet it is one of the major world legal systems in our present time. There is no written Constitution of the United Kingdom, meaning that their Constitution is “customary law” as opposed to “statutory law”⁷⁶. The question that customary law is unwritten does not make it illegitimate and non-existent, or rule out its veracity as far as legal studies are concerned.

It is law in the sense of the word as it belongs to a branch called customary or generally agreed principles with *vinculum juris* (legally binding force). In so far as jurisprudence is concerned, customary law is the beginning of the legal philosophy of a people therefore should not be underestimated by education policies.

76 Cf. Rodney Brazier, *Constitutional Practice*, Oxford University Press, 1988.

2.11 ORAL FORM IN THE JUDICIAL TRADITIONS

In the law of evidence oral testimony of facts, whether in civil or criminal proceedings in the court of trial and appeal, it is stated that witness can give his/her evidence orally or written purporting the principle of *audi alteram partem* – meaning, both sides must be heard. The judicature provision in various jurisdictions recognises oral evidence to establish facts and inferences. A judge relies on both oral and written evidence.

The question of the customary law being unwritten is not sufficient reason to convince us that unwritten law is not valid law. Yet at the same time it is necessary to believe that formal education has taken the lead over the informal or oral tradition. African customary law expresses itself in the oral tradition that the Western civilization treated as inferior to the statute or written law.

It is important to consider that legal discipline recognises unwritten traditions of the people as the most concrete way to serve justice. I would quote Socrates, the ancient Greek philosopher in his definition of a judge saying: Four things belong to a judge; to hear courteously, to answer wisely, to consider soberly, and to decide impartially⁷⁷. The word hearing itself is an oral practice. We cannot hear something written but read (mention). In trial procedure, hearing of a case is purely from the oral tradition. Were it not so then the suitable term to use would be to read a case in court other than hearing a case.

2.12 CIVILIZATION CHALLENGE

Unfortunately the modernity or civilization mentality has played down most of the efforts to develop African customary law within the Post-British Africa. Development concept and the internationalization of the legal systems have always been linked to Western civilization and the mentality of young lawyers today.

⁷⁷ J.D. Ogundere, “*The Philosophy of Justice, the Parameter and Ends of Justice, Jus Naturale: Natural Justice and Unjust Laws*”, in Emmanuel G. Bello, Prince Bola A. Ajibola, San, Essays in Honour of Judge Taslim Olawale Elias, Vol. II, *African Law and Comparative Public Law*, p. 806.

What is civilised has been for a long time associated with Western civilization where common law and civil law were developed and ruled. It is a fact that our legislators, jurists and lawyers are trained by the common law mentality that has undermined and influenced African legal thought.

Customary law of the African people shall only find its real meaning if African lawyers, jurists and scholars were interested in its development. Two vital points must be addressed in this hypothetical statement: conceptualization and actualization of law. Treating law as concepts, precepts and written rules is known to originate from the European civilization and there is no doubt about this. Treating law as social practice instead belongs to all humanity and we can all agree on this. It follows that Africans demonstrate that they had their social rules which were accepted and used by the internal members of such communities for the sake of social harmony and social equilibrium. The study proves that there are uniform legal characteristics in such social rules and that is what has led us to believe in the authenticity or veracity of customary law as the social rule recognised by a given social group and governs general social conduct of human beings within such social set-ups or patterns.

African customary law belongs therefore to the realm of African legal system and can only make sense when applied to serve justice for a given social group or context, that is determined by such factors as education, the influence of religion, and social and economic advancement.

In the legal parlance it is a sheer contradiction to claim that customary law exclusively belongs to the domain of traditional, primitive, uncivilized or backward systems in Africa. In so far as law is both matter of facts and matter of law, in reality you cannot extract the law from its subjects, the people and their environment. The law is made for the people, and not the people for the law. At the time of Jesus, the Pharisees and the doctors of law were considered a conservative group that took the letter of law as it was given to them by Moses denying the flexible aspect of law. In Mark 2:27 Jesus

stated that “Sabbath was made for man not man for the Sabbath”⁷⁸. He literally made reference to the written commandments (statutes) that were given by God to the people through Moses with a provision that on the Sabbath people of God are not supposed to work but to rest. As much as this sounds as a contradiction, Jesus wanted to emphasise the aspect of justice that supersedes the “written law” (legislation) and reaches out to customary understanding of law as principles that are fluid and allows some degree of flexibility.

Deriving our argument from the Western legalism and positivism are not irrelevant in themselves, in so far as they insist on the normative principles of law but they should not disqualify the customary law/*consuetudo juris* that forms the basis of legal practice. English lawyers foresaw the flexibility of legal principles in their contention of rule of precedent (*stare decisis*) and the doctrine of equity. Whatever the English common law could not address would be directed to the doctrine of equity that gives some room for legal wisdom other than the written legislations.

Legal customs of the African people contain in their essence the wisdom about law and the role of law in acquiring justice. Both legal science and civilization regard in the same parameter what is law in written form and what is law in the unwritten or customary form to justify the subject of justice. This statement is found in the study of jurisprudence and theories of law.

2.13 PROXIMITY

Considering the fact that customary laws are not uniform across ethnic groups in Africa and for us to derive what is law in the customary laws of ethnic groups must be traced to various factors such as proximity, origin, history, social structure and economy. Customary law rules among the people who share certain common cultural values such as language or share some genealogical factors. It is plain that only a small community closely knit by kinship, common sentiments, and beliefs and placed in a stable environment

78 *The African Bible: Biblical Text of the New American Bible*, Paulines Publications Africa, Daughters of St. Paul, Nairobi, 1999, p. 1695.

could live successfully by such a regime of unofficial rules⁷⁹. Hart made it explicitly clear that such a simple form of social control system may require a supplement in different ways otherwise may prove to be defective.

Also to consider is the lineage of customary law. African customary law has been referred to especially by French speaking lawyers and jurists as law of the ancestors. The ancestral factor makes it fit within a given social group, that is, among members that understand it, recognise it, accept it and use it. In human decency, referring to the law of the ancestors does not disqualify the meaningfulness of customary law.

Such proximity of customary norms can add value to the research in that they can expound on the vastness of the customary jurisdiction and eventually lead us to the universality conception of certain customary norms that fall under the category of primary rules. The proximity aspect makes customary law more understandable and useful to the people than statute (legislation). It is close to the people and its language is simple and understandable than the borrowed legal system. Customary law presents general rules and elaborates the obligations that characterise the primary rules.

However, primary rules must go along with secondary rules for law to enjoy its full stature in every given society. In Africa we cannot insist on legislation alone or on customary rules alone. Both must go along hand in hand.

Attention is also drawn to the fact that such social rules appertaining to given social structures must also be repressed if similar societies are to coexist in close proximity to each other⁸⁰. The legal trend in many African states appears to embrace this last option by Hart in respect to their urgent need for the sake of national unity. Repression does not mean rejection but careful and prudent application of such customary rules.

79 H.L.A. Hart, Op. Cit. P. 92.

80 *Supra*, p. 91.

2.14 SOURCES OF LAW

Introduction

This section shall focus on the roots of African customary law as a system found in many African social set-ups from time immemorial. It is also true that several African groups still believe and practice such laws without difficulty. It also has been demonstrated that several African independent states emphasized on African customary law as one of the subordinate sources of law in their statutes a sign that there is no sign of ruling it out. The nature, roots and practicality of African customary law can better be illustrated pinpointing some experiences in some selected contexts.

Following the definitions, characteristics and nature of customary law in general, it is agreeable to question its roots or rather, its sources. African customary law is found all over Africa as developed and practiced by the indigenous communities⁸¹ and exists alongside common and civil law systems within a national legal framework from time immemorial.

Concerning people and populations, Kenya has Bantu speakers who are the majority followed by the Nilotics speakers, the Cushites who occupy north and north eastern parts. Though in small number there are also Semites, Asians, Europeans, Americans and Arabs living in Kenya and observing their customs. In this scenario there are differences and similarities in the customary laws of Kenyans.

Having this mixed background, it is true that coming up with a uniform code would be difficult and cumbersome. Also to consider is that African laws are not written nor codified in any known formal documentation and no research disproves it⁸². Therefore, the source of customary law in its totality pertains to oral traditions and some ancient writings by some Western missionaries and ethnographers whose interest served the interest of the Western imperialism of the

81 See T.O. Elias, *The Nature of African Customary Law ...*Chapter 1.

82 The African customary law, unwritten regime, native law and customs, is in the memory of Octogenarians living in a Continent well known for its high rate of mortality and the fear is there that such traditional legal values may fade away with time, Cfr. Okoth-Ogendo's article, p. 135.

time. Unfortunately too little research has been done by scholars to come up with documentations, and compilations. Therefore, African customary law is still in academic limbo⁸³ and due research is still required to develop it to the desired level within the existing predominant world legal systems and also for it to serve as a proper source of law. It follows therefore the question of its practicality in the judicial system as we are going to discuss.

83 Cfr. Okoth-Ogendo, "Customary Law in the Kenyan Legal System", in The S.M. Otieno Case: *Death and Burial in Modern Kenya*, (Ed. J.B. Ojwang and J.N.K. Mugambi), pp. 135-147.

CHAPTER THREE

PRAXIS OF CUSTOMARY LAW

3.1 INTRODUCTION

This chapter shall discuss country by country analysis of how African customary law has been handled and its relevant significance in the modern legal trends today. It follows that comparative approach of how African customary law system operates in various independent States of Africa determine its compatibility. It follows that comparative analysis of how African customary law system operates in various States of Africa eventually justifies its practicality. Given the vastness of the continent and diversities involved in the cultural divide, the chapter shall only consider few cases that could be of much interest. By analogy it shall as well be realized that colonial regimes imposed on the African jurists and practitioners their legal education. It is clear, therefore, that in many free States teachers of law were initially from Anglo-American law background and there is no element of doubt that they had no option but to represent their legal matrixes to the colonized populations. In some new States foreigners were appointed judges with attempt to make them develop the local jurisprudence. However, this could not do justice to the desired development of African jurisprudence.

3.2 KENYA

Kenya is one of the best examples where African customary law has been referred to as one of the subordinate sources of law under the Judicature Act Chapter 8 section 3(2) of the Act which provides that:

The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay⁸⁴.

Kenyan legal tradition recognizes customary law in the African Christian Marriage and Divorce Act (Cap. 151), that includes customary marriages, divorce, succession and others.

Perhaps what can be termed as practical in the customary law is covered in the Evidence Act in which the court makes reference to witnesses or experts of such customs, as best expressed in the *SM Otieno* case in 1986.⁸⁵ It is also correct to affirm that African customary law is well accommodated in the court precedents following court rulings. The same disputes on burial rights were again witnessed after the polemical death of a Kenyan athlete, K. Wanjiru in 2011.⁸⁶ There are numerous court cases linked to traditional marriages or reference is made to customs in cases of divorce or any family litigation.

Following the Kenyan case it is right to believe that customary lawyers still prefer customary law to African legal system. The latter includes both written and unwritten law whereas the former only addresses unwritten law. It is unfair to keep African customary law at its present status but uplift it through literature to a level of codified texts that would form core basis for references.

⁸⁴ Tudor Jackson, *The Law of Kenya*, p. 21.

⁸⁵ Daily Nation, Monday, 5 September 2011, Nairobi, pp. 2-3 of the ND2 focuses on *Wambui v Kager Community Case* following the death of Wambui Otieno. Cfr. *The SM Otieno Case: Death and Burial in Modern Kenya* edited by justice J.B. Ojwang and J.N.K. Mugambi, Nairobi University Press, 1989. See Court of Appeal at Nairobi (Nyarangi, Platt, Gachuhi, J.J.A., February, 13, 1987), Civil Appeal No. 31 of 1987.

⁸⁶ In June 2011, the mysterious death of Kenya famous athletic champion Samuel Kamau Wanjiru's burial was stopped by Nakuru Court pending the disputes. His mother Ms Hannah Wanjiru had pleaded for justice asking the court to make a ruling. The case drag in the issue of customary law among the Kikuyu marriage since another person claimed to be the real father of Wanjiru. The burial petition was brought before the Nakuru High Court Judge Justice Anyara Emukule in which the petitioner asked for injunction for the burial.

Yet it is an evident fact that the failure to succeed with African law project shall propel many African new States to adopt foreign legal systems. By assumption African new independent states will lose their legal independence as they will be subjected to foreign concepts, ideas, notions... this could be considered re-colonization not by military conquest or economic occupation this time, but by foreign legal systems in force. The time African scholars give up their God-given tools (customary law), is when Africans will have no more option other than go shopping for legal clientele beyond their borders, a sign of total failure and cultural poverty.

Time is ripe for African universities and other institutions of higher education to trace the very roots of legal concepts in the existing African customary laws. There is no other way apart from tracing the roots of African law and exposing legal customs for academic evaluation, scrutiny and approval by law experts other than tracing the history of the people. Compilations and documentations on African customary law later shall be precious for the future generations when it comes to certain legislative and judicial decisions. Then we shall say that there is equity in the legal practices and justice shall eventually be done to Africa and her people under the principle of self-determination and fundamental freedoms of the people. The more we adopt foreign laws and ratify them blindly and insert them into our Constitutions, we as Africans will remain forever slaves and intellectually colonized. Our home-made lawyers will not be competitive in the legal profession with other advanced countries for their lack knowledge supported by their own original legal ideas but borrowed ideas. The eminent challenge is the development of international law in the late 1920s and the expanding international legal system that is widening its jurisdiction beyond the borders. An example is that most of the Africans charged at the International Criminal Court or other recognized international courts, would crave for hiring international lawyers or those whose legal knowledge is expansive.

The Republic of Kenya, during the promulgation of its Constitution on 27 August 2010, highlighted the sovereignty of the Kenyan people, a sign of great social change. As the Constitution

empowers the people of Kenya and their cultures, there was a feeling that the new Constitution shall revive the long time debate of customary law. Pegging this argument on constitutional challenges facing customary and statutory laws, Kenya might set precedence in terms of enacting legislations that would make it easier to highlight the role of customary law. The conundrum concerning customary law in the land law, succession law, inheritance law, marriage and divorce shall find their legal meaning only when the country embarks on the customary laws of the Kenyan people. An example is that of the Will Act that in case of *lacunae leges* shall switch to English statute of Trust Act. There is still a lot to be done at the legislative level to come up with laws that would take cognizance of the customary law to fill in the gap.

3.3 ETHIOPIA

Ethiopia, despite the adoption of civil law, accommodates 60 systems in customary law in its legal system something that is very encouraging. With over 50 ethnic groups, Ethiopia stands out as a country with a long history of African juridical order that worked for many years under ancient regimes that were organized and very powerful. An example is the leadership of Emperor Hail Selasse (the last Nugu 1930-1974) that took over from Menelik. As other colonized African nations, Ethiopia also had to cope up with the European conquest despite its resistance. In 1974, the Soviet authority influenced the turn of the regime and almost changed Ethiopia into a Marxist/Leninist that negated the former system that was notoriously known as feudal state⁸⁷.

Despite its strong Christian history Ethiopia had to reconsider its laws. In the 1970s volumes of Consolidated Laws of Ethiopia compiled under the auspices of the University of Addis Ababa based on English Common Law model were introduced. It is at this University that lawyers and jurists of Ethiopia have been trained under North American model with close cooperation of the United States of America. The faculty of law of Addis Ababa University

⁸⁷ Rodolfo SACCO, Il Diritto Africano: Trattato di Diritto Comparato, UTET, Turin, Italy, 1995, pp. 266-271. (1)

issues a *Journal of Ethiopian Law*. A reality that worth proportional attention, is that most of the lecturers of law are foreigners with Euro-American origin.

The judiciary in Ethiopia was structured back in 1942, and in the Constitution of 1955 that was not altered until 1974. There is a pyramid of state courts alongside the Islamic courts. Above them all is what is known as Imperial authority. There is the Supreme Court, High Court of Appeal. At the district level there is the District Court known as *Awradja* and below the level of district there is another court known as *Woreda*. Both are the only courts that are not collegial and do not refer to unwritten law unless it's implicitly required for the trial process and they must respect the Civil Code Procedure in the Anglo/Indian model.

Instead criminal cases are dealt with under customary model with a judge of peace appointed by the Minister for Justice presiding. Disputes and local crimes do not follow any procedural rules for the sake of conciliation purposes.

The Islamic court has 3 levels with Naiba and Kadhi at the base and Shiitic High Court on top. They only deal with cases concerning family and issues of succession that are ruled by Sharia law. For all the rest the Muslims are bound to adhere to the State law that follows Civil Code Procedure. Church courts are distinct and they only deal with disputes between the clergy and their congregation of the Coptic Church. Such courts have jurisdiction in cases of religious marriages whenever one of the spouses makes a request.

Customary courts in Ethiopia are not officially recognized by the State law yet they continue to operate everywhere in the territory according to the given local customary law. During the Emperor, the *Fetha Negast* was the legislation of the Emperor and for many years Hail Salassie ruled Ethiopia using his Decree.

Yet in 1960 the Civil Code of Ethiopia recognized customary marriage along with civil and religious marriages. In disregard of the low development of indigenous law in Ethiopia the use of customary law is very much diffused all over the state by particular

ethnic groups that recognize, accept and use them to regulate their social life.

3.4 SOMALIA

Somali people have been following customary law in their system known as Xeer for a long period of time. Xeer has served the integrity of judicial systems even after the political collapse of Somalia in the 1990s and this is evidence of the role customary law can play towards development and peace in Africa if well highlighted. Customary law is decentralized and lacks central administration in Somalia.

Somalia is one of the most homogeneous nations in Africa with Cushitic populations with one language apart from some dialects. It is paradoxical that Somalia is one of the most disintegrated nations faced with major conflicts from rival groups and Islamic fundamentalists since the collapse of the regime of Siad Barre back in 1992.

Somalia is purely an Islamic nation and a member of the Arab League since 1973. The primary source of law in Somalia is the Sharia. Another competitive source of law is that of customary law which operates among the people in form of clans. Somalis make reference to both Sharia law and customary law. English common law system is also recognized by the authorities since Somalia was part of the British colonies. English, Arab and Somali are practiced as legal languages. Somalia was assigned to Italy as a protectorate until the British took over making it adopt civil law procedures in its statutes as a model. The Constitution of 1979 abolished the customary law system and instead directed all judicial powers to statutory courts. However, the customary law system and Islamic law systems have never stopped operating in Somalia especially during the civil war.⁸⁸

Somalia has accommodated plurality of legal models and languages within its system making legal education multilingual and legal knowledge more comparative in type than others. National Somali University of Mogadishu has been the only institution

88 Rodlfo SACCO, Op. Cit. pp. 347-351.

with a faculty of law all over the country. Lecturers and teachers of law have been predominantly Italians and some Indians as from the 1960s. Later most of Somali lawyers, jurists were trained in the Soviet countries and in Italy.

Family law in Somalia is based on extended family and customary law has been heavily influenced by Islamic law.

3.5 NIGERIA

It would be an offence to leave out Nigeria if really we want to learn the genesis of African customary law system and its future on the continent. Nigeria presents a very unique reality in which the northern part of the country is distinct from the southern part. In the pre-colonial time the northern part of the country was an Empire known as Kanem-Borno that emerged in the 8th Century and had a very strong Islamic influence from Chad and Niger. The region known as Western Sudan influenced the part known as Fulani Hausa in the Kano region that is till today predominantly Islamic. At the central region of Nigeria we trace important ethnic groups such as Yoruba, Benin and Oyo. In the south east region we have the territory of the Ibo. The Ibo were known as pastoralists and did not have unitary governance in terms of Kingdoms or Empires, neither were they a warlike group. In the north the Sultans of Kano and Sokoto were very powerful and had the support of the Islamic religion and application of the Sharia law. This dichotomy led to the crisis of Biafra war masterminded by General Ojukwu between 1963-70 in quest for separation and the formation of Biafra Republic. The bloody war lead to another military revolt in 1975 that promulgated in 1979 a federal Constitution based on the model of the United States of America.

In the same trend, Nigeria also received the common law system from the colonizers that forms one of the sources of law as in Kenya. General principles in terms of common law and equity that are in force in England were adopted in the after independence Nigeria without any substantial problem. The judicial precedents developed in the Nigerian courts formed part and parcel of the sources of law.

Legal education in Nigeria can be traced back to 1862 when Nigeria fell under the English administration of justice, much earlier than Kenya. It was only in 1867 that the first attempt to allow African lawyers who studied law in England and local attorneys to exercise the profession. The situation did not change till 1962 with the enactment of Legal Education Act and Legal Practitioner's Act. The first Act provided for the nomination of the Council for Legal Education with a duty to come up with adequate system for training those who wish to take legal career in Nigeria. The same Council formed the Nigerian School of Law something analogous to Kenyan experience. The school has the role of developing forensic profession and to promote legal research. Four universities in Nigeria offered law. However, in Nigeria the study of African customary law system was not part of the curriculum for law students in Nigeria. There are texts concerning customary law from major ethnic groups and that of Islamic law but nothing much.

The judiciary, as presented by the Constitution of 1979, provides some considerations that are worth our attention. There is provision for Magistrates' courts and Customary courts in every federal state for the administration of justice. Every federal state can make a request to establish magistrate's court and customary court according to the needs. Kenya does not have any provision for customary court and the Constitution of 2010 has done away with District Magistrates Courts that were handy to deal with customary cases brought before them.

Nigerian law recognizes both monogamy and polygamy. Polygamy is recognized by customary law of the spouses and the Nigerian statute⁸⁹.

The Constitution of the Federal Republic of Nigeria has also recognized the role of customary law⁹⁰: Article 288 – Appointment of Inspector-General and control of Nigeria Police Force. ... 288, Appointment of persons leaned in Islamic personal law and Customary law ...

89 Cfr. Ajayi, *The Future of Customary Law in Nigeria*, in AA.VV. *The Future of Customary Law in Africa*, Leida, 1956 quoted in RODOLFO SACCO, Op. Cit., pp. 326-333.

90 Cfr. <http://www.nigeria-law.org/Constitution Of The Federal Republic Of Nigeria.htm>

The Constitution recognises both Islamic and Customary law just to do justice to the indigenous people, their culture and religion. *Inter alia* it accorded honour to the study of customary law by Article 288. This is a point proving that the future of Customary law is promising in such countries like Nigeria where a lot of research has been done. In Kenya too little has been done by universities to develop socio-legal research that would lay the ground for the development of customary law.

3.6 GHANA

Ghana, known as Coast of Gold was also in the north part of the Empire of Western Sudan. The name was changed because the British colonisers conquered the Coast of Gold for the sake of its resources and this did not augur well at independence in 1957 through the leadership of Dr. Kwame Nkurumah. On the Coastal strip Ghana had had experience with the Portuguese in 1471 just as Kenya. The Germans were already in Togo, the state bordering Ghana. During the Second World War, Togo fell under the protectorate of the French while Ghana became a British protectorate⁹¹. The British had landed there as early as 1874, earlier than Kenya.

Ghana, presents a peculiar reality in the sense that there is a dual system, that on one hand is the local customary law, and on the other, the English law received during the colonial time. The latter consists of the whole jurisprudence of the Common Law and Equity. Before the coming of the British in 1874, the Ghanaians had laws of general application that lasted almost a Century. As the African customary law was in conflict with most of the principles of the English Common Law and Equity, the colonizers were not comfortable with the customary law that was already diffused. The majority of the African population continued to observe their customary laws despite the imposition of the common legal system. However, at independence a lot of changes took place, the training of lawyers and jurists took the common law direction just as in Kenya and Nigeria.

91 Rodolfo SACCO, Op. Cit., pp. 277-283.

Acts of Ghana has laws that can be traced back to the 1960s and Ghana Law Reports are sources where we can trace the legislations of Ghana. Customary law in Ghana is observed by the majority of the population and regulates social relations, family relations and inter-personal relationships. It is only in Ghana where African customary law, especially of the numerous ethnic groups, has been translated into study materials. Between 1897-1904 Mr. J. Sarbah made a compilation of the Customary Law of the Fanti people just as Eugene Contran also pioneered the Restatement of African Customary Law in Kenya.

Training of lawyers and jurists in Ghana is particularly interesting as compared to Kenya and Nigeria. Local law experts, jurists with international resonance are given attention. Examples are J. Sarbah⁹², J. Casely Hayford, J. Danquah and K. Busia who all enjoy a prestigious place at different international contexts. What is similar is that lately Kenya has been stressing on the local law practitioners and the teaching of law demands academic-cum-lawyers as a balanced way of emphasizing on the jurisprudence and practice.

Family and social organizations in Ghana are stronger than any of their counterparts. The state has also facilitated a great deal the development of customary law through certain laws especially the family law.

3.7 SOUTH AFRICA

South African law scholars have a better presentation of customary law. The reason is linked to the legal history of the state and her multi-ethnic and multi-racial background. It gives us what I would call the best way of looking at the future of customary law in Africa. Africa is a multi-ethnic and multi-racial society that requires a thorough research on the customary law practiced by the people.

African Legal System project is on and it shall give African states mileage in dealing with their legal issues such as land reforms, marriage, Constitutions, contracts, succession, conveyance and

92 Sarbah, Fanti *Customary Law*, London, 1897 (3rd edition 1968).

practice and functional judicial systems with the development objective.

South Africa has taken the initiative to entrench customary law in the Constitution:

With the introduction of the Interim Constitution (Constitution of the Republic of South Africa, 200 of 1993) and the final Constitution of the Republic of South Africa, 1996 (hereafter Constitution) a new dispensation was introduced. Not only does section 112 of the Constitution state that customary law must be applied where applicable, subject to the Constitution, but section 15(3) states that nothing prevents legislation from recognising, *inter alia*, marriages concluded 'under any tradition, or a system of religious, personal or family law.' Section 9 of the Constitution further regulates that everyone should have the right to equal protection of the law.

South African experience is unique as it presents some historical dimensions that have a lot of impact on the development of customary law. In 1652, with the occupation of the Dutch people in the Cape of Good Hope after some short-lived experience with the Portuguese, and that of the British in 1806, South Africa proves to have a reality that is peculiar⁹³.

The Dutch brought with them the amalgamation of Roman Civil law and Dutch law to South Africa whereas the British colonizers imposed their English Common law and Equity as practiced in England. Having different races and struggle for freedom on the part of the indigenous people the need to promote African customary law in South Africa is stronger than in Kenya. On the other hand the need to come up with laws that would satisfy some interest groups was also felt especially with the apartheid system. Yet the need to introduce English judicial system as the mechanism to administer justice was evident. Yet English jurists and those of the Dutch communities were also in problems since both were hailing from different legal systems that were both influential. The problems faced in the process made it possible to create more interest in legal

93 Cfr. Rodolfo SACCO, Op. Cit., pp. 351-357.

research of different and concurring legal systems, ideas and concepts of law as understood by the Dutch occupiers, the British colonizers and the African people.

South African jurisprudence is now collected in South African Law Reports. It is not only based on the court precedents but also reference is made on the doctrines and written documents, thanks to the Dutch-Roman tradition from civil law perspective. The real integration of the two systems is seen in the legislations found in the Statutes of the Republic of South Africa and Annual Survey of South African Law.

South Africa has more universities where law is offered as compared to other African states that we have analyzed.

This reality obscures the African traditional legal system and to make this happen, some African states were to be given independence such as the Basutoland and the Swaziland. The majority of the African population that found themselves occupied and ruled by the white minority applied their customary law within their ethnic groups such as the Zulu who already had a strong Kingdom that resisted the white occupation and colonization.

Such customary marriages that allow polygamy are still rife in South Africa under the customary law regime. It is true that many African lawyers and jurists in South Africa are challenged by the need to perform more survey and research into African customary law and how to develop African jurisprudence for the sake of justice. The general attitude of the white administration was to establish African Native Courts that became notorious due to some overtones of racism and discrimination of the black people during the apartheid regime. Westernization of the judicial system in South Africa has frustrated any development of African customary law regimes so much so that African customary law cannot be extinguished by any written law since it is the law that ordinary people in their communities shall always regulate their social conducts.

CHAPTER FOUR

THE USE OF CUSTOMARY LAW IN OTHER SYSTEMS

4.1 INTRODUCTION

The entrenchment of international human rights law, or law of nations in the domestic legal systems of member states through ratifications will continue finding its best resonance in such accrediting systems only if such systems are also equipped with their own original and traditional legal background. An example is the human rights law and its relevance to African law as treated in the book of Rwiza⁹⁴. It is in this manner this research seeks to make a contribution to the legal thinking of our modern time. It is worth repeating here that the bottom line of legal crisis in Africa today is caused by governments not appraising their culture and eventually not investing in academic research to reinforce the legal reform process.

4.2 BRITISH EXPERIENCE

English Common Law was an investment by the Royal family of its time in creating a legal system that would later command the world and this happened. Customs that were obsolete were left out to avoid contradictions. Another strong example is the English Common Law derived from Saxon and English old customs. The English Common Law that is largely applied in many legal systems was all the effort of the Royal family and the input of customs of the people. Jeremy Bentham grew in this reality that saw the law as part and parcel of human moral reality and emerged with pure theory of law, giving legal study its scientific identity for the first time in history.

94 Cfr. Richard N. Rwiza, *Ethics of Human Rights: The African Contribution*, 2010.

Social contract concept of Rousseau, Locke, and Kant, had portrayed the customs of people within their legal concepts at different stages of legal philosophy. The idea of justice has much to do with the basic structure of every society. “They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality...” says John Rawls⁹⁵. African customs had the element of fairness, rights and duties allotted to persons within a given traditional society.

It is important also to consider the Anglo-Saxon Law (England), *Coutum* (France), Consuetudinary Law, Customary Law (Australia), Early Germanic Law (Germany), Early Irish Law (Ireland), Laws of the Brets and Scots (Scotland), Mediaval Scandinavian Laws, Customary Laws (South Africa), Welsh Law (Wales) and Xeer (Somalia).

4.3 ROMAN EXPERIENCE

The Roman Emperors⁹⁶ once invested in the codification of what is known as *corpus juris civilis* that formed the basis of Roman law and served as codex, that is the book of law for most of Europe. The Justinian and Gaius collections relied on old literature of law.

Marriage is a fundamental institution in our society even today that forms part and parcel of the Family law. Its institution in the African context has many similarities and some dissimilarities in the Roman law. Legally speaking marriage is status, creation, and has termination (death, divorce). A Roman marriage was very largely a social fact of which the law had very little role and over the parties. African marriage is also considered of its social factor other than legal.

As Roman marriage considered capacity to marry in terms of having Roman requirements *conubium* = capacity to marry, several African customs also imposed rules such as initiation rites, circumcision and other practices present among African communities. Either of the parties no matter what age had to be in

95 J. Rawls, *A Theory of Justice*, p. 10.

96 N. Barry, *An Introduction to Roman Law*, Oxford University Press, 1962, pp. 40ff.

patria potestas (paternal consent) and in many African customs, sons had to get formal consent from their father before they started the marriage process. In the Roman context all that was required as a condition before marriage was manifestation of the intention to get married. English Common law has it that marriage is only valid if the parties being capable of marrying, that is, being sane, not within the prohibited degrees of relationship, and not below the permitted age limit, can go through the formalities of marriage. Many African customs also have systems of principles and rules that determine marriage and limit it accordingly. Some cultures allow the marriage of the underage while some prohibit it.

Marriage in English law, as an institution, produces certain legal consequences, for example, the conjugal rights, the husband's duty of support etc. Roman law knew none of all this. Conjugal rights were not known in cases whereby only one party could determine divorce. There were rules governing dowry (dos) and gifts to the wife in the Roman law. Roman law gave to the husband the rights over the wife's property, contrary to the English Common law system.

Manus ... the hand. Within the union of marriage the wife was considered to be in the *manus*/hands of the husband in the Roman law context. Many African customs where dowry is recognised as the criterion to determine the validity of marriage, the wife is considered to be under the hands (*manus*) of the husband. A married woman is no longer under the *potestas* of the father but *manus* of the husband who ought to care for her rights within the rules of the customs of the husband or of both if they happen to be from the same community practising such customs. The term *manus* is still in modern English use ... asking a woman for a hand... is like asking her to marry you. The wife in the Roman Law context had the right of succession of her husband's property just as his children when she had *adrogatio sui juris* (her rights) and if she were not then adoption.

Purchase of the woman in the expression *mancipatio* existed in the Roman law and the same concept is found in some African marriages where dowry is strongly practised. A woman in *mancipatio* is not free and cannot go with another man. This was in the context of a slave whose master could determine his rights and

only his master could guarantee freedom after a certain period of time for service. In marriage among the Romans the woman was given *coemptio* meaning that the woman is now in the *manus* of the husband and not in *mancipio* and that is presumed to be the survival of marriage by purchase. The modern English term emancipation originates from the Latin term *mancipio* or freedom from bondage.

Dowry in many African customary law reflects the Roman concept of *mancipatio* (in the hand of the husband through paying dowry⁹⁷ – *coemptio* that grants the husband the right over the woman). At the divorce many African customs shall consider the return of dowry, a sign that the marital bond is broken and the former wife enters *mancipatio*/liberty from the *manus* of the husband. The dowry system in Africa has similar meaning in the ancient Roman law in that it was a legal principle for protecting marriage and keeping the conjugal tie⁹⁸. Marriages under native law and customs can be annulled under customary marriage.

Concubinage v polygamy are practices found both within the Roman law system and the African customary law system. In both regimes one husband could bind himself in union with more than one spouse or woman. That is the contrary of polygyny in some African cultures where one wife can marry several men (a case of polygamy in Mozambique)⁹⁹.

Marriage in sub-Saharan Africa has been commonly described as early and universal (van de Walle, 1968; Lesthaeghe, 1989) and this situation has partly been blamed for the persistence of high fertility in the region (e.g. Gould and Brown, 1996). However, the region is far from homogenous. Marriage patterns vary across and within

97 Cfr. G.S. SNELL, Op. Cit., pp. 102ff – “*Marriage and Bride-wealth*”.

98 Cfr. African Christian Marriage and Divorce Ordinance (No. 51 of 1931)- in dissolution of marriage ... bride-wealth would presumably be returnable, Rfr. G.S. SNELL, Op. Cit., p. 104.

99 Polygyny and marital dissolution in Mozambique, Cfr. *Ethnicity and Marriage Patterns in Mozambique*

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countries among different ethnic groups (Lesthaeghe and Eelens, 1989; Lesthaeghe, Kaufmann and Meekers, 1989). Such variations could be due to both cultural and socio-economic factors....¹⁰⁰

Lomwe and Chiwabo people are matrilineal in Mozambique and it is the wife that can marry different men at the same time keeping them in different houses. There are also elements of mixed patterns of marriage, patrilineal and matrilineal.

Marriage remains a difficult concept in African societies and in several ways it has many legal implications in the modern African law. The research of Carlos Arnaldo reveals the complications found in African family regime appertaining to archaic customary laws that still rule the lives of many people¹⁰¹.

Marriage is a difficult concept in African societies because it is a process rather than a discrete event and involves rituals, negotiations and transactions that can stretch over years, making it difficult to say at what point a couple becomes married. There are also more than one type of marriage. In Mozambique, at least four main types of marital union can be identified: Customary/traditional marriage, religious marriage, civil marriage and mutual consent union/cohabitation.

Customary marriage: This is a traditional Mozambican form of marriage and is usually carried out with the consent of both families. It is a process involving a series of stages that can go on for months and even years. The way the process is conducted varies according to ethnic groups and descent system. Among the patrilineal groups (the Tsonga and Sena/Ndau) the process is centred on the payment of bride wealth from the boy's family to the girl's family, while among the matrilineal groups (the Lomwe/Chuwabo and Macua) such payments are not required. Under customary marriage, polygyny is permitted without any limit to the number of wives. In fact, among patrilineal ethnic groups polygyny is recommended when the first wife is infertile¹⁰².

In the Roman law a man could enter into union to his freed woman without giving her the social and legal recognition accorded

100 *Idem.*

101 *Idem*

102 *Supra*

to a wife¹⁰³. Concubinage survived many years in European legal civilization without any problem as from the time of the Roman Empire to the Republic in Italy. Christianity negated concubinage as a form of marriage and unregulated union, therefore, discouraged its practice especially during Emperor Constantine.

Divorce in the Roman Law and African Customary Law presents some dissimilarities. In the Roman context, no formality was needed for the beginning of a marriage nor formality was needed for its termination. All that was needed was the evidence of intention. The divorce in this manner was very free. In many African customs divorce had its rules and regulations. The community aspect of marriage safeguarded easy and simple divorce in order to safeguard the rights of spouses and their siblings. It varies from one community to the other.

It creates a huge impact flipping into the world great legal systems to realize the wealth of legal knowledge traced in the customs of the indigenous people themselves. The discourse on customary law today is not about obsolete practices, beliefs, traditions or revival of the past. Rather it is the return to the wits of African jurists in order to emerge with authentic legal literature that shall reinvigorate the judicial systems applicable in the African context.

4.4 INDIAN EXPERIENCE

Customary law in so far as it is unwritten law practiced by people within their communities from time immemorial has it that only some parts of it may get recognition in the statute of the state or state law. In India where there are several customary laws influenced also by the dominating religion, Hinduism, follows the rite of dowry as we shall see later.

It is important how nations identify some customary norms that are practical and useful and make them into legislation. It is in this manner that India has managed to develop its jurisprudence to an extent that some customary norms get recognition in the state law.

103 N. Barry, Op. Cit., p. 84

CHAPTER FIVE

CONSTITUTIONAL ANALYSIS OF CUSTOMARY LAW

It has featured in advanced legal studies that culture is the foundation stone upon which other foreign modern or evolving cultures are laid. It provides people with an identity and is an important factor in life and development¹⁰⁴. The old Constitution in Kenya known as Lancaster House document highlighted African customary law in its provisions. The new Constitution of 2010 highlights rather the culture of the Kenyan people avoiding the use of African customary law.

5.1 OLD CONSTITUTION

There is no other place in the legal system of a country in which we can tell the strength of the customary law other than the Constitution. Being the fundamental law of the land (grundnorm as Hans Kelsen had postulated), the Constitution of Kenya, holds the absolute legitimacy and legality of any law including the African customary law. The old Constitution of Kenya had high regard for the customary laws of Kenyans and the provisions were clear in this.

The repealed constitution of Kenya of 1987 revised in 1992, had regard for African customary law. In the provisions of Article 82 section 4, subsection 1 says:

No law shall make any provision that is discriminatory either in itself or in its effect. Under section 4 it says subsection (1) shall not apply to any law so far as that law makes provisions-

- a) With respect to persons who are not citizens of Kenya;
- b) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

104 Jane Achieng, back page.

- c) For the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or
- d) Whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special persons of any other such description, is reasonably justifiable in a democratic society.

The new Constitution that repealed the old one has missed out the distinct provision of customary law in its coverage. Whether this was deliberate or accidental is yet to be established referring to the intention of the Committee of Experts that drafted the document, the Parliament that endorsed it and the citizens of Kenya that voted it during the national referendum on 4 August 2010. It is clear in the first document that an exception of legal discrimination is made for the application in the case of members of particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons. The clause mentions adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law as areas in which diversity will continue to persist. This is a sign that in Kenyan past history certain discriminatory attitude had been built.

5.2 NEW CONSTITUTION

The Constitution of 2010 in Kenya misses out the word African customary law yet in the preamble it says – “proud of our ethnic, cultural and religious diversity...”. The Committee of Experts that were assigned the work of drafting harmonized copy of the constitution disregarded the mention of African customary law. To the contrary article 11(2) a, cultural heritages is mentioned and the word cultural expression is highlighted to a level suggesting the revival of African customary law. This is made explicit in article 63 (1):

“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.”

Section 2, makes it even more ambiguous by avoiding African customary law and says:

Land lawfully registered in the name of group representatives under the provisions of any law.

Through assumption, any law may mean customary law. However, the Constitution gives the mandate to Parliament to make legislations that would define Land Law and Policies and shed light on the hanging concepts.

Unlike the former Constitution, the new Constitution by avoiding the use of the term African customary law, has made it very difficult for such topics as family, marriage, land ownership and use, divorce, children custody, and succession be very difficult to administer unless through legislations, the Parliament shall highlight the role of customary laws of the Kenyan communities.

Unless amended or modified, the Judicature Act (1967) is the only legal instrument on which African customary law is still applicable in the Kenyan legal system.

5.3 JUDICATURE ACT OF 1967

Section 3 of the Judicature Act provides for the laws that are applicable in Kenya. They are listed in the following order:

The Constitution; written law (statutes); doctrine of equity and the statutes of general application in force in England as from 12 August 1897,

which are to apply only if the circumstances and the people of Kenya permit; and customary law: that the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties is subjected to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.

This part of law is a reproduction of the hierarchy first enacted by the colonial authorities in 1897. It is noted that the position of the

African customary law is at the bottom of the hierarchy and its juridical weight were addressed by the Court of Appeal during the case of *Otieno v Ouga and another* [1986–1989] 1 EA 468 (CAK), famously known as the *S.M. Otieno* case.

Since then the Court was called upon to consider the following issues concerning the African customary law:

5.4 THE QUESTION OF RANK

A careful study of the ranking of the African customary law confirms that it is at the bottom in the hierarchy of norms. This ranking was done by the British Colonial Authority in bad faith. African customary law was not expected to remain permanently as one of the sources of law in Kenya. The intention was to render it totally irrelevant. Africans were expected to cross over to English Law.

5.5 APPLICABILITY OF CUSTOMARY LAW

The question of applicability holds that African customary law applies when, and to who? In response to this the Court held: “At present, there is no way in which an African citizen can divert himself of association with the tribe of his father if those customs are patrilineal”. This position of the Court has been criticized as being dogmatic since there is no anthropological evidence to support it. The question of applicability of customary law in the modern Kenyan juridical order relies on the social change, mode of life, acquisition of membership in a different community.

There is tendency among modern educated Kenyans of deviating from the traditional trends of life and anything to do with customary law has been considered irrelevant, an attitude that supports the colonial position back in 1897.

CHAPTER SIX

GENESIS AND UPHEAVALS OF THE CUSTOMARY LAW

6.1 INTRODUCTION

It is a historical fact that the known English Common Law did not originate in Kenya but was brought to Kenya by British colonial powers in 1895 through colonization process. The amorphous English law has left its blue-print in the legal history of Kenya just in the same way as other Commonwealth nations that still owe their allegiance to the British Royal Authority. It is in the interest of this book to explore in depth the genesis of English common law and its impact on the development of African customary law.

6.2 BRITISH COLONIAL RULINGS (ORDINANCES)

Under the British Protectorate, Kenya had parallel legal systems comprising: (a) The African courts that applied customary law. In 1897, the Order of Privy Council provided that African customary law was applicable to the natives within the colonies with condition that it was not repugnant to justice, morality or general conscience. African Christians article 64 of the Native Courts Regulations, 1897, provided that native Christians were governed by the law that governed native Christians in India. In 1902, the East African Marriage Ordinance (No. 30 of that year) provided that the natives married under that ordinance divorced themselves from the customary law and henceforth subjected to English way of life. This was wrong and an act of arrogance to the development of African customary law by the British imperialism.

In 1924, this section of law was repealed and replaced by No. 9 of 1924 section 2. It repealed section 39 of the 1902 statute and provided that all Africans, Christians or otherwise, were to apply African Succession Law. In 1961, the African Wills Act (Cap. 169

of the Laws of Kenya) was enacted. Intermingling Africans and Christians and treating Muslims separately was a divide and rule tactic that favoured only the coloniser's interests but not that of the foresaid colonised.

In 1937, Matrimonial Causes Act elaborating the statutory law relating to divorce and matrimonial causes in Kenya is contained in the Act, which largely follows the Matrimonial Causes Act, 1937 of England.

6.3 FALL AND RISE OF AFRICAN CUSTOMARY LAW

History of the Kenyan judiciary tells it all. Kenya was part of British East Africa as from 1897 which established East African Order in Privy Council under Britain and this was based on subordinate courts i.e.

Native, Muslim and those under administrative officers and magistrates. A dual system of superior courts was introduced for Europeans and Africans. The system lasted only for 5 years. Village elders, headmen and chiefs were empowered to settle disputes. This was recognized in the Native Courts Ordinance of 1907. In 1950, the African Court Ordinance abolished the tribunals and replaced them with African Courts. In 1962, the courts were transferred from Provincial Administration to the Judiciary. In 1963, an impartial judiciary was set up. In 1967, the judicature Act, Magistrates' Courts Act and Kadhi Courts Act were enacted. They have been the backbones of the administration of justice in Kenya¹⁰⁵.

The genesis of customary law in Kenya takes into consideration the political evolution from pre-colonial time, colonial time, post-colonial time, at independence and after, first Constitution and new Constitution as it follows.

Recognition and application of different Marriage laws of Kenya shall provide us with a clue of how African customary law landed into trouble with other laws. Four systems of marriage and divorce are recognized in Kenya: 1) Statutory marriage and divorce; 2) Customary marriage and divorce; 3) Hindu marriage

105 Kenya Year Book 2010, p. 808

and divorce; 4) Islamic marriage and divorce (Mohammedan marriage and divorce). The statutory marriage and divorce is found in: a) The Marriage Act, Cap. 150; b) The African Christian Marriage and Divorce Act, Cap. 151; c) The Matrimonial Causes Act, Cap. 152. Separation and Maintenance Act, Cap. 153 under which the subordinate courts of the first class may make orders for maintenance, custody of children on certain grounds. This follows the old Summary Jurisdiction (Married Women) Act, 1895; and the Summary Jurisdiction (Separation and Maintenance) Act, 1935, of England. The Maintenance Orders Enforcement Act, Cap. 154 is based on the Maintenance Orders (Facilities for Enforcement) Act, 1920 of England that makes a provision for the enforcement in Kenya of maintenance orders, made in England, Eire, Northern Ireland and other Commonwealth countries.

Customary marriage and divorce in Kenya embarks on the authority for the recognition and application of the customary laws¹⁰⁶. Reference to customary law is made in the Marriage Act and other Acts which makes it legally recognized in Kenya¹⁰⁷. “Any person who is married under this Act or whose marriage is declared by this Act to be valid shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, by save as aforesaid nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom or in any manner apply to marriages so contracted”¹⁰⁸.

“The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”¹⁰⁹

106 Cfr. Jane Achieng, Paul Mboya’s *Luo Kitgi Gi Timbegi*, pp. 65-79.

107 See Cotran, E., *Restatement of African Law*, Vol. 1, pp. 5ff.

108 Section 37 of the Marriage Act.

109 Judicature Act, 1967 (Act No. 16 of 1967) “Power of Courts to apply customary law”.

It is important to note that this section is based on the old Article 7 of the Kenya Colony Order in Council, 1921. It applies to cases in which Africans are parties ... the new section says, to which one or more are subject or affected by customary law. This suggests that customary law, including customary law of marriage and divorce may now be applied to non-Africans.

It is very important to note the evolution of customary law of marriage and divorce in Kenya and the importance that has been accrued to it.

There is likelihood that African customary law is regaining its momentum in light of the Constitution 2010. The proposed Marriage Bill of 2012¹¹⁰ pointed at empowering local chiefs to be invigilators of customary marriages. If the Bill passes to law, then the chiefs at County level will have the authority of handling customary marriage cases to an extent of issuing valid marriage certificates. In line with the Marriage Act in Kenya¹¹¹, polygamy is legal and recognized by the courts under the Marriage Act.

It is right to think that the new Constitution in Kenya is a true legal revolution in the multi-ethnic State and is out to revive customary law from the grassroots. There is a sign of hope that traditional laws can abet the ongoing judicial transformation in the country through empowering the jurisdiction of traditional chiefs. What has been deemed to be a gone story is now emerging with an approach that respects the provisions of the Constitution and modern legal trends in the international law spectrum.

Citing from the same document,

the law which brings together Christian, Islamic and Hindu marriages as well as marriages consummated under Civil and African Customary law provides legal protection to all marriages and will facilitate the

¹¹⁰ <http://www.capitalfm.co.ke/news/2012/11/come-we-stay-over-6-months-to-be-legal-marriage/> Research done on 9 November 2012, Nairobi, Kenya, 8 November – “The Cabinet has approved a law which will recognise come-we-stay arrangements of over six months as legal marriages. The Marriage Bill proposes that chiefs will be enabled to consider ‘come-we-stay’ affairs that last more than six months as a marriage and to register them as such.”

¹¹¹ See The Marriage Act, in Kenya for more information on the same.

protection of the rights of children and spouses in all types of marriages in the country¹¹².

This draft law is highlighting the reality of many people who formulate their marriages in a customary manner without legal recognition in what is termed as “come we stay”.

The fact that the Cabinet has approved the role of the Chiefs in this matter is already a breakthrough. The passed Bill also brings together in one law, Christian, Islamic and Hindu marriages as well as those done under customary laws.¹¹³

6.4 PRIORITIZING AFRICAN CUSTOMARY LAW

6.4.1 Background Study of Facts

As has been said earlier the English Common Law (English Customary Law and Anglo-Saxon traditions) of England and in Commonwealth Countries and their adherence to the English Royal Monarchy (Privy Council) have had a lot of influence on the development of customary law in the former colonies. Since 1897, with the conquest of the British Imperial authority, Kenya became *de jure* part of British East Africa, that with the League of Nations in 1919, was considered British East Africa Protectorate subjected to Great Britain. In 1945, with the collapse of the League of Nations, the United Nations, its successor, assigned the colonies to Trusteeship system agreed on at Yalta¹¹⁴. Throughout this period of conquest, English Common Law and Equity, and certain laws of India were applied in Kenya.

6.4.2 Islamic Marriage and Divorce

Islamic marriage and divorce is governed in Kenya by the Mohammedan Marriage, Divorce and Succession Act, Cap. 156,

112 <http://www.capitalfm.co.ke/news/2012/11>.

113 http://www.standardmedia.co.ke/?articleID=2000070224&story_title=Kenya-Chiefs-to-legalise-%E2%80%98come-we-stay-marriages%E2%80%99. A study traced on 9 November, 2012.

114 A. Leroy Bennet, *International Organizations: Principles and Issues*, Prentice Hall, 1995, pp. 380ff.

section 3. All this is dealt with under Kadhis' courts as we will see in the successive themes.

6.4.3 Hindu Marriage and Divorce

The law of marriage and divorce relating to Hindus is now governed in Kenya by the Hindu Marriage and Divorce Act (Cap. 157) which is largely based on the Hindu Marriage Act of India. The Act only applies to Hindus as illustrated in section 2.

Historical background of Kenya as part of former British colony approves that there was presence of Europeans from Europe, from South Africa and from India. There were also Indo-Pakistan populations (the Guru) that were brought along by the British government to do some cheap manual labour and by then, it was the construction of Kenya Uganda Railway. They remained and settled in Kenya especially in urban areas forming another reality of Hindu customary law and religion within the system. Since the Indo-Pakistani community is a minority group their customary law is less highlighted in the Laws of Kenya just as in the case of African customary law which belongs to the majority of the population.

6.5 REVIVING AFRICAN TRADITION COURTS

In Kenya it would be interesting to ask oneself, why is Kadhis' courts constitutionally recognized while African customary or traditional courts are not? This issue was found disturbing in 2010 national referendum where certain portion of the voters with dissenting opinion considered the presence of Kadhi's court in the Constitution contentious. It did not go down well with the Christians who saw this as a short-changing or a raw deal for their religion. It was an oversight that Kadhi's court is not about religion but about a culture. The Constitution of 2010 prohibits State religion but has provisions for promoting cultures of Kenyan people.

African traditionalists did not emerge among the polemical wrangling groups during the campaign for the new dispensation to claim the restoration of African courts. It would serve the purpose to

remind ourselves of the importance of legal history and what led to the abolition of African courts by British Colonial power in Kenya.

Reading the history of Kenya as a state, Arabs were found at the Coastal strip along the Indian Ocean already applying Islamic law, the Sharia Law, amongst Muslim populations. The spread of Sharia law in Kenya was evidently slow due to well spread Christianity and strong practice of African customary law. In making of Kenyan first constitution – the Lancaster House Conference convened between 12-18 March 1962, the British authorities had to negotiate with the Omani Sultan of Zanzibar, Abdulla bin Khalifa, whose stronghold in the Coastal region was already fragile and threatening to break away from the rest of Kenya¹¹⁵. The agreement of 8 October 1963 between the Sultan of Zanzibar and the British Government was to accept the insertion of the jurisdiction of Chief Kadhi's Kadhi Court¹¹⁶ in the Constitution of Kenya and this was the termination of the deal of 1895 between Her Majesty the Queen of Great Britain and His Highness the Sultan of Zanzibar.

Wajibu, a journal of social and religious concern is quoted here:

Kadhi's courts were in existence along the East Coast of Africa long before the coming of the British colonialists in the 19th century. The Kenyan coastal strip was then part of the territories controlled by the Sultan of Zanzibar. In 1895, the Sultan of Zanzibar authorised the British to administer the coastal strip as a protectorate, rather than a colony as distinct from the mainland, subject to certain conditions including the British agreeing to respect the judicial system then in existence in the said protectorate. The British agreed to these conditions and throughout their administration of the coastal strip this judicial system, which included the Kadhi's courts, continued to exist.

After independence, the Kenya Government expressed its desire not to be bound by all pre-independence treaties and agreements entered into by the colonial government. President Kenyatta informed the United

115 Mark Agutu, "When a Bit of Kenya Belonged to an Omani Sultan in Zanzibar" in the DAILY NATION, Monday, 12 September 2011, DN2, pp.(2-3). Sessional Paper No. 9 of 1961: The Kenya Coastal Strip Report of the Commissioner, contains one of the detailed negotiations between the British Government as from 1895 till 1962. The agreement reads, "It was necessary to safeguard the interest of the Coastal people by including in the new Constitution of Kenya the "rights of the Coastal people".

116 http://africa.peacelink.org/wajibu/articles/art_2120.html

Nations of the intention of the Kenyan Government to review all such treaties and agreements and determine those which it would honour. Among those immediately honoured was the agreement protecting the existence of the Kadhis' courts.

The Kadhis' courts, as with any other court, must be provided for in the constitution, as otherwise their establishment would be unconstitutional. Once provided for under the constitution, the courts themselves can either be established in the constitution also or in an Act of parliament. The problem with establishing them under ordinary law by an Act of parliament is that it would make them vulnerable since any decision to abolish them would require a simple majority of the members of parliament. Under the present standing orders of parliament, which sets the quorum of the house at 30, it means that the approval of only sixteen (16) members of parliament would be sufficient to repeal the Kadhis' courts. In contrast, to abolish the courts as enshrined in the constitution would require a two-thirds (2/3) majority in parliament. Kenyan Muslims therefore find great relief and solace in the entrenchment of the Kadhis' courts in the constitution.

During the referendum that approved the new constitution in Kenya in 2010, the insertion of Kadhis' Court in the constitution became a contentious issue especially among the dominant Christian group. It was seen as a contradiction with the articulated provision in the constitution that imperatively states: "there shall be no any state religion". Kenya is a secular state and no religion should appear within the constitution.¹¹⁷

The failure of African customary law to promote its cause is a key issue. The British government did all it could to tame the Africans and bring them under the European legal imperialism. Another circumstance is to close down African district magistrate courts, or native courts whose role in the administration of justice was effective. Post-British African governments whose main emphasis was on decolonization and nation building did not see the need to promote African customary law. The traditional customary laws that belonged to tribes or a section of some tribes were treated as counterproductive and detrimental to the maxim of national unity. Politically the regimes had no option but to thwart the development of African customary law. Judicially the British laws would appear

¹¹⁷ *Idem.*

to be non-partisan to the national politics and divisive realities. All Africans would easily identify themselves with English common law and English and Indian statutes other than unifying their own traditional customs and making legislations out of them.

Kadhis' Court and the Chief Kadhi are there due to historical pacts that Kenya shall find difficult to run away from¹¹⁸. However, even though the fate of Kadhis' Courts lie with Kenyan politics, Christianity may not propose something similar since such may conflict with the constitutional prohibition of State religion. African traditional Courts form part and parcel of the culture of many African communities living in Kenya and from this point of view, it can be accorded with constitutional recognition just as the Kadhis' Court.

Sharia law is a limited source of law in Kenya. It is binding on parties that profess Islamic faith and the Court does not have jurisdiction over all Kenyans. Its rulings are limited within the framework of Islamic religion and the Sharia law as is known.

What can be alleged in this topic should be the abolition of African traditional courts and replacing them with the district courts. District courts phased out in the Constitution of 2010 a sign that African traditional courts miss in the judicial system as it stands.

6.6 ABOLISHING AFRICAN COURTS

Introduction

The process of integrating the judicial system began in 1962 when powers of the administrative officers to review African Courts' proceedings were transferred to magistrates in Kenya. The process was completed by the passage of two Acts in 1967, namely: (a) The Magistrates' Courts Act, 1967 - this abolished African Courts and the Court of Review and instead established District and Resident

¹¹⁸ The Kenya Coastal Strip: Agreement between the Government of the United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Kenya, Presented to Parliament by the Secretary of State for the Colonies by Command of Her Majesty, Her Majesty Stationery Office, October 1963, London.

Magistrate's Courts and a High Court; and (b) The Kadhis' Courts Act, 1967 – this established six Kadhis' Courts for the application of Muslim personal status law.

Civil cases that require the application of customary law shall also consider whether such customs are tenable or not. The judge shall apply the Doctrine of Precedent before making a ruling or giving his verdict in the case in court. Case Law serves, in this case, as a fundamental point of reference that may dictate the judge's decision in the matter. Procedures in customary law are provided for in Magistrates' Court Act (Cap. 10) where civil claim is stipulated¹¹⁹.

English Common Law and the doctrine of Equity have not met much resistance neither in the East African judges nor Kenyan judges. As from the records, Horsfall said, "it would be wrong to apply principles of equity which were devised to suit Christian society in England during the last century in order to import a presumption whereby to gauge the intention of a Muslim husband and wife living in present-day Zanzibar whose social and cultural background is very different from that of Victorian England" in the case of *Raya Binti v. Hamed Bin Suleiman*, 1962, EA 248.¹²⁰

In conclusion, abolishing African courts and replacing them with the formal courts under the Judicature Act has been another tsunami on the development of African customary law and the killer of the African law project by the Kenyan government in 1967.

6.7 QUALIFYING THE ROLE OF THE CHIEF AT AFRICAN CUSTOMARY LAW

Since the ordinance of 1937 establishing Paramount Chief, with full powers in Kenya, till today so many amendments have been performed on the same. The powers of the Chief have been shelved so much so that what we see today as Act of Parliament and the Bills of Parliament carry too little to consider in so far as the attempt

119 Jackson, T., Op. Cit., p. 104.

120 Tudor, J., *The Law of Kenya*, p.17.

to revive traditional regimes is concerned¹²¹. The Chiefs Act Cap. 128 is composed of 26 articles and several of them have since been repealed. The need to re-enforce the Administrative sector and the role of the Chiefs repeats itself in 2010 with the promulgation of the new Constitution and legislators are still undecided of how to re-propose the role and duties of Chiefs and Assistant Chiefs.

Chiefs' Amendment Bill introduced to amend Chiefs Act (Cap. 128) appears to develop some positive sense towards the development of African customary law by saying in one of its objects:

This Bill will go a long way in fighting corruption at the grassroot level, institutionalizing the quasi-judicial role played by village elders in alternative dispute resolution, dissemination of important policy information at the grassroots, enhancement of peace building and integration efforts and enhancement of community policing.

The role of paramount chief was introduced during the British colonial regime as an administrative tool in Kenya. The paramount chiefs were known as the eyes of the British colonial power and for the British Governor to get his message down to the local communities, a local leader with knowledge of the local people was indispensable. Their role included *inter alia* the administration of customary justice. Civil petitions and criminal disputes would be handled locally by such chiefs without taking matters to the district courts.

The image of a chief has been redefined by politics to suit the new needs especially in the independent Kenya. It emerged that the new Constitution did not focus expediently on the Chiefs and their role in matters of justice much more on the matters concerning administration. Judicial role of the chief was removed with the abolition of the African Courts shifting such role to the formal law courts of Kenya in 1967.

The chiefs can as well deal with matters concerning justice at the chief's camp or during the barazas, chief's assembly. The confusion surrounding the role of chief in Kenya is damaging the chance for

121 The Chiefs Act Cap. 128, Cap. 97 (1948), 12 of 1950, 43 of 9152, L.N. 362/1956, L.N. 172/1960, L.N. 461/1963, L.N. 101/1964, 9 of 1967, 17 of 1967, 13 of 1978, 10 of 1997.

the African customary law to prosper further. In some communities such customary jurisdiction shall be handled by elders or council of elders depending on every given community. In some communities the customary jurisdiction was pushed to heads of the families.

Referring to the Chiefs Authority Act 128, the primary duty of the chief and assistant chiefs was to offer administrative support to the government and that is why the Administration Police was attached to each chief. It was all about law enforcement subjected to the internal security but not the administration of justice. In the Constitution of 2010 there shall be no more Administrative Police and a new administrative plan shall be introduced in line with the devolution framework. In section 6 the duty of the chief is:

It shall be the duty of every chief or assistant chief to maintain order in the area in respect of which he is appointed, and for such purpose he shall have and exercise the jurisdiction and powers by this Act conferred upon him over persons residing or being within such area.¹²²

It is the public office appointed one to be a chief and not the members of the community. The criteria of appointment, does not take into account whether the person is conversant with African customary law or not. The chief can recruit village head persons according to their suitability for the job or dismiss them according to the Act. A village head person appointed under this Act, shall be subject to the provisions of the Public Officer Ethics Act, 2003 and the provisions of section 20 of this Act¹²³.

Chiefs Act Cap 128 does not provide chiefs with prosecutorial or executive duties as it were in the paramount chief rule under the British. The lacunae of this kind might render the role of the chief in his capacity as protector of African customary law blunt.

However article 8 of the Act says:

8. (1) Any chief or assistant chief may interpose for the purpose of preventing, and shall to the best of his ability prevent, the commission of any offence by any person within the local limits of his jurisdiction.

122 Duty of chief to maintain order. 43 of 1952, Sch., L.N.101/1964, 13 of 1978, Sch.

123 Removal from office. (No 3 of 2004).

(2) Any chief or assistant chief knowing of a design by any person to commit an offence within the local limits of his jurisdiction may, if it appears to such chief or assistant chief that the commission of the offence cannot be otherwise prevented, arrest or direct the arrest of such person; and any person arrested under the powers conferred by this subsection shall, without delay, be taken to the nearest police station.

(3) Every chief or assistant chief receiving information that any person who has committed a cognizable offence triable by any court or for whose arrest a warrant has been issued, is within the local limits of his jurisdiction shall cause such person to be arrested and to be taken forthwith before a court having jurisdiction in the matter.

(4) Every chief or assistant chief receiving information that any cattle or other livestock or other property of any description which has been stolen outside the local limits of his jurisdiction has been brought and is within such local limits shall cause such cattle or other livestock or other property to be seized and detained pending the orders of an administrative officer, and shall forthwith report such seizure and detention to an administrative officer.¹²⁴

This article attributes more administrative powers that make the chief an extension of the work of regular police in collaboration with the court. However it has nothing to do with the African traditional court or judicial action.

Sincerely, in disregard of the Kenyan laws to recognize the judicial role of the chief at customary law, many disputes at such laws are still handled by the chief or assistant chief. This is the reality at the Kangaroo Courts or informal courts.

In Kenya, the question of African customary law is always dwindling especially among modern lawyers and legislators who tend to undervalue it. Yet its existence is clear and many Africans still practice the dichotomy of laws especially in the northern and north-eastern regions where the use of traditional courts such as Marslah courts are operational and people refer to the council of elders for justice.

124 Powers of chief in prevention of crime. 43 of 1952, Sch., L.N.461/1963, L.N.101/1964, 9 of 1967, Sch., 17 of 1967, 1st Sch., 13 of 1978, Sch. 10 of 1997, Schedule.

CHAPTER SEVEN

QUEST FOR INTEGRATED SYSTEM

7.1 INTRODUCTION

So far, not so much has been done to replace English Common Law and Equity with African customary law system to date. This has eventually led to the quest for an integrated legal system in which we have English Common Law, Islamic Law, African customary law, and Statute existing together. The need to reinvigorate African customary law in the judicial system has been more than ever stronger in Kenya especially in civil matters concerning marriage. Among the unwritten laws recognised in Kenya, there are African customary law; Substance of Common Law; Doctrines of Equity; Muslim Law; and Hindu Customs¹²⁵. They are all found at the bottom of the judicial hierarchy while African customary law is also one of the subordinate sources of law in Kenya.

Even though studies show that customary law has been undermined in the legal education by powers in authority, the same powers have failed to stamp it out completely from the social set-ups in Africa where the majority of the people still recognise, accept and use their customary norms as a rule to determine their social conducts. *Ipsa facto*, it is therefore necessary to illustrate areas in which strong reference is made to the customary law system and those that make it indispensable part of the integrated system.

7.2 CONFLICT OF LAWS

The word conflict of laws is used to refer to the private international law. It is also used in the African customary law and other legal systems to show the diversities that characterize such system. Professor Smokin Wanjala asserts that “the phrase conflict of laws must be terrifying to the ear, for it tends to confound the perception

125 Cfr. J.J. Ogolla, Business Law, 19.

of the functions of law in a conflict-ridden society..."¹²⁶. According to this source, conflict of laws is the way judges tend to look at different laws in an attempt to come up with solution to disputes especially in civil procedures. It is fair to comparatively consider various laws while dealing with a difficult case lying in court.

In matters concerning African customary law, the question of conflict of laws is obvious. It is a puzzle to know which rule the court is to apply for making impartial decision especially in matters that are controversial at common law system.

Wanjala makes it clear that it is necessary to consider the jurisdiction of laws in order to distinguish the territory of the law. He speaks of the internal conflict of laws as a way of specifying the proper choice of law when there is dilemma of which law to apply. All this is realised in the context of customary law system in which certain norms seem to be in conflict with others especially when parties belong to different customary law backgrounds. The court shall decide on which law to apply with the consent of the parties. In this sense we speak of the need for the integrated system in the Kenyan legal system that will deal with the question of judicial fairness to all which is the basis of justice.

It is certain that internal conflict of laws in Kenya, originated from the colonial legacy. There are various bodies of laws that are distinct in defining and regulating duties and applying them¹²⁷ accordingly. Statutory law is the body of written law or legislation; the common law and the doctrines of equity; African customary law which means the body of law that arose out of the customs of various ethnic groups in Kenya and which applies to the extent to which statute allows it to apply¹²⁸. Kenya also recognises Muslim and Hindu laws but restricting them to the parties that belong to such creeds and the aspect in which statute allows them to apply. The conglomeration of such laws in a legal system is what is referred to as internal conflicts of laws.

¹²⁶ S.C. Wanjala, "Conflicts of Law and Burial", in *The S.M. Otieno case: Death and Burial in Modern Kenya*, Edited by J.B. Ojwang and J.N.K. Mugambi, p. 101.

¹²⁷ Op. Cit., pp. 102ff.

¹²⁸ *Supra*.

Statutory law, or Acts of Parliament or legislations are subjected to the Constitution, *grundnorm*¹²⁹ or law of the land which is the supreme law. Other laws must conform to the supreme law of the land vis-à-vis, the fundamental law. African customary law applies in respect to the statutory law and must not be in conflict with the Constitution or any of the written law.

In Kenya, African customary law is restricted to civil cases only and not to criminal law or cases related to it as from the time Kenya adopted English Common Law in its legal system.

Van Doren puts it clearly that African tradition and the Western Common law have contrasting grounds. For example, Kenyan traditional model of dispute resolution is based on the council of elders different from what exists in the Western societies¹³⁰.

7.3 DEVELOPMENT OF MARRIAGE LAW

As has been said before, the spirit of law is in real facts (*animus factum* of law) and practical social life other than abstract ideas, utilitarian theories that are exclusively based on ideas and concepts. Marriage has been, therefore, centralised by social sciences as a reality that determines the development of people as a social group. In the legal sociology and cultural anthropology, marriage is seen as an institution that is better regulated by customary law. Sociologists, especially the French scholars, for example, Emile Durkheim and his followers, purported the sociological method to view patterns of society, social institutions, structures and models. In addition, the question of the force of law in marriage has been significantly elevated by various theories.

The adoption of Western legal systems by several African independent States has thrown several doubts on the legality of customary law despite its strong legitimacy.

The integration between the legal traditions of Africans and that of the colonial legal systems was undergoing difficult time as the

129 A term coined by Hans Kelsen to refer to the fundamental law, that is, the Constitution.

130 J.W. Van Doren, "African Tradition and Western Common Law", in Ojwang, J.B., and Mugambi, J.N.K., The S.M. Otieno Case, p. 127.

British powers feared losing it all if African law project would take off during the time of independence.

Yet still the role of African customary law is prominently referred to by our law courts in the administration of justice. Questions concerning divorce and inheritance have proved to have a bond with customary law to which the parties in dispute belong.

7.4 DIVORCE AND INHERITANCE LAW

Given the significance and role of customary law in 1967, two commissions (appointed by the President) were set up to look into marriage, divorce and inheritance law, and produced drafts of uniform family and inheritance codes to replace the existing customary, statutory, Islamic and Hindu laws that were then in force. The commission reviewing marriage and divorce law produced a draft code, but since the 1970s efforts to enact a uniform marriage law have been unsuccessful. Marriage law continues to be governed by several regimes: Civil, Christian, Hindu and Muslim marriages are governed by separate legislation and communal laws and customary law marriages are also afforded official recognition. In relation to inheritance law, four systems of succession existed in Kenya until 1981, namely:(a) The European system – based on statute and common law;(b) The Asian system – initially based on Hindu customary law and later on statute;(c) The Muslim system - based on the principles stated in the Quran; and (d) The African system – based on the African customary law, which varied from one community to another. The post-independence government was aware of this diversity and an attempt was made to establish a uniform code of succession applying equally to all. The commission reviewing this area recommended a uniform code applicable with certain exceptions for customary laws.

Divorce and inheritance are controversial issues that deserve the conflict of law analysis and clear reference to the customary law of the people. The same conflict of law is realised in the Succession Act as we shall see.

7.5 LAW OF SUCCESSION

The Bill was eventually passed in 1972 as the Law of Succession Act Cap. 160, but it only came into force in 1981. When the Succession Act was passed in 1972, Muslims, including the Kadhis, vowed to ignore it and continue to apply Muslim laws of succession. The Kenyan Muslim community protested through newspaper editorials, petitions and heated public demonstrations in Mombasa in the early 1980s. The Succession Act was ultimately amended to exclude application to Muslims in the early 1990s.

As we have discussed above, it is necessary to mention that the controversies arising especially in the issues of succession belong to the conflict of law. Land ownership in Kenya that requires strong policies and well defined laws is still faced with customary norms that are practised and held by communities or ethnic groups in Kenya. The question of tribal territories in Kenya is one of the best examples of communities agreeing to disrespect statutes and even the Constitution to give prevalence to their customary laws and beliefs. An example is when the Maasai community in Kenya refused to allow the government to settle IDPs (Internally Displaced Persons) in 2011 on land that the community believed belonged by customary law to the Maasai people. The same resonance has been the underlying cause for the conflicts in the Rift Valley region in which certain members of the Kalenjin community believe that the land belongs to them and other Kenyans from other communities live there as squatters. Land reform in Kenya faces hiccups due to the conflict of law found in the integrated system as we are going to analyse.

7.6 LAND LAW

As Kenya is struggling to review its laws in force legal issues attached to the ownership and use of land still remain controversial¹³¹. Land

131 Land tenure and land policies feature almost in all sampled African customary laws. In every social group in Africa there were rules to guide the members of the community on how to hold land, how to use it and how to transfer it to the successive entitled members. In some communities the land belonged to the king, or chief, and in others the land belonged to the community members. See Gordon Wilson and others.

reform is raising temperatures as the Government is struggling to implement the new Constitution promulgated in 2010 and enactment of legislations that would suit the need of Kenyans. The challenge between private land, community land and public land ownership require a keen look into customary law conception and the manner in which the indigenous themselves would look at land ownership and its use. Tribal territories in Kenya render it hard to enact laws that shall see all Kenyans owning lands everywhere within the geopolitical areas. It is a reality in Kenya that communities shall stand against the Constitution when their customary rules or beliefs are interfered with. This is a sign that Kenya lives in an integrated legal system that requires perhaps better research on customary laws of Kenyan people and find out the best way of how to integrate them into the national legal system.

Parliament is to perform thorough investigation on how to come up with legislations that would satisfy the needs and challenges many Kenyans are facing with the current legal system in force. The truth of the matter is that the already existing “tribal territories” still behave as powers especially when it comes to the rights to land ownership. The ancient regime that behaved as state-like entities before the colonial conquest is still rife in the social context in the present Kenya. It will definitely require the involvement of scholarly work and collaboration of political or ruling class to come up with laws that would accommodate customary beliefs and the statutory framework that would make a ruling on the “tribal territories” which have become even sensitive in the new Constitution.

The devolved government in terms of the official 47 counties did not take into account “tribal territories” issue and in that case certain counties accommodate more than one ethnic group. In such cases the rule of law and constitutionalism become paramount in rendering the coexistence and social life more peaceful and harmonised. It is advisable to mention a brief preview on the scholarly work.

7.6.1. The Land Bill of 2012

The Bill dated 13 February 2012 under the Ministry of Lands, James Orengo has been gazetted and produced in Parliament for debate. The document composed of 176 articles is seeking to remedy land disputes and provide legal solution to the question of lands in Kenya. In respect to article 68 of the Constitution of 2010, land ownership can be defined in 3 categories:

Public Land and its administration as defined;

Community Lands and Private Lands and their administration.

In the preliminary provisions of the document “Customary Land Rights” is one of the key terms that highlight the role of Customary Law in the Land Laws and Land Policies in Kenya. It is an evident sign that the question of African customary law is indispensable. Indirectly, the new Constitution has ordained the perpetuity of Customary Law in Kenya and its provisions shall be enforced through The Judicature Act, Cap. 128. Customary Land Rights are the rights conferred by or derived from Kenyan Customary Law whether formally recognised by legislation or not. It is the use of terminology that changes but the essence is the customary laws belonging to Kenyan communities.

7.7 SCHOLARLY EVALUATION OF THE INTEGRATED SYSTEM

Introduction

Legal hermeneutics

Too little has been done so far by law scholars to render African customary law more significant and competitive among the world known juridical order and this deprives African customary law of its fundamental merits and rightful position in the modern legal systems. The sad reality is that there are too few law students choosing history of law in Africa as part of their academic interests undermining the whole process of African legal literature apart from some handful LLM students who are motivated to do so. Something

that is rather absurd and academically discouraging is that African lawyers focus mostly on Western concepts such as the law of tort, English Administrative law, English Family law at the detriment of developing their own African jurisprudence. As said earlier, there is general belief that what the colonial authority had imposed is in itself sufficient enough to serve justice to the Africans. Some African Constitutions miss-out customary law jurisdiction such as African, native, Kangaroo, customary or traditional courts¹³². In Kenya they have been replaced by statutory courts put in place by the Constitution and Acts of Parliament and which lean heavily towards the statutes other than the African customary law. It is absurd to ignore the local roots of our legal systems and sell our rights cheaply to the English legal system.

There is proof beyond any reasonable doubt that world giant legal systems owe a great deal of their legal concepts to traditional customs of their indigenous people in what we may call “primitive law”. English Common Law that is today predominantly applied in different countries world-wide and the systematic civil law that forms the basis of jurisprudence as we know it, have been keen on the legal traditions of the local people. Customary law in the Anglo-Saxon legal literature has stood to be the foundation of the English Common Law that today is applied widely in the UK, USA, Commonwealth countries *inter alia*. The world classic Roman law was founded on the collection of customs (*consuetude juris*) during the time of the Empires of Gaius and Justinus around the fifth century Before Christ.

Quite a number of African law scholars have not realized fully the significance of linking justice to the cultures of their people nor the need to delink our legal systems from foreign influence, borrowed or imposed notions and ideologies. Making the long story short, African universities can creatively embark on ambitious scientific research in the African traditional legal systems and proactively develop them into documentations, resource books and collections that would eventually serve our courts/the judiciaries and legislatures for the administration of justice. Doing so, we are

132 Cfr. Gacaca Courts in Rwanda.

aiming at good laws or laws that would fit the given social contexts in the rapidly changing states and desire to form good citizenry. If we truly believe in the rule of law and constitutionalism in the new African States then we cannot afford treating customary law as an elective course or as subordinate source of law.

The contextualization and relativism of law is what makes the administration of justice functional in every country without prejudice or pragmatic negligence of facts. African lawyers and lay people are in dire need of smart legal ideas that would provide solution and do justice to the African people wherever they are.

It has been alleged that customary law institutions can be inconsistent, unpredictable and discriminatory in their essence. Also decisions are not recorded and appeals from the decisions may be difficult, there is insufficient monitoring and supervision of their *modus operandi*¹³³ leading to the eventual failure to recognize customary courts or the role of paramount chief in Kenya. The removal of African, or customary court from the judicial system in Kenya and shifting everything to the formal courts has not ruled out the existence of customary law system within social groups apart from weakening its functionality.

We are going to analyse some of the critical limitations of customary law in Common Law Africa and make short opinions that would guide our knowledge of customary law system.

Dr. Richard Rwiza illustrates the need for African contribution in the Universal Declaration of Human Rights in his “Ethics of Human Rights: The African Contribution”. This is an exemplary masterpiece from an African insider¹³⁴. Several right-thinking African jurists and academics have realised the need of developing African Legal System based on the Legal traditions of the African people that are still conserved. It is only in this manner that Africa as a continent or region shall be proud to defend her cases before

133 *Reassessing Customary Law Systems as a Vehicle For Providing Equitable Access To Justice For The Poor – Conference Paper by Minneh Kane (The World Bank), et al. 12 - 15 December 2005 “New Frontiers of Social Policy”.*

134 Cfr. Rwiza, R. *Ethics of Human Rights: The African Contribution*, CUEA Press, Nairobi, 2010.

the International Court of Justice, International Criminal Courts, Regional Courts and even National Courts of law. It is categorical for African lawyers and law students to take up the interest in African legal roots and make contribution to the rich legal literature before it gets too late. As time passes, and there is no legal literature in place, such legal traditions shall die away with the elders and there shall be no trace of them. At the same time lawyers shall have little idea about their own legal concepts that Savigny explained that law should not ignore its course, that is, the community concerned¹³⁵.

Scholarly evaluation of the integrated system should bring us to the conclusion that it is not going to be wise for our authorities to ignore the reality and throw African customary law system into oblivion¹³⁶. The failure to revive African customary law as a legal discourse shall weaken it more and create a gap that shall be filled by foreign laws. Eventually Africans shall be re-colonized by more powerful legal systems such as Common Law Legal System, Islamic Legal System, and Civil Law Legal System.

It would be wise to have a rapid review of Professor Kameri-Mbote's view on the law of succession that suggests how modern African law scholars ought to look at the role of African customary law and the predictability of the system.

7.8 MORE ON SUCCESSION

One of the most brilliant studies on customary law is found in the research of Prof. Patricia Kameri-Mbote's on the law of succession in Kenya reflecting so much on customary law¹³⁷ regime. Law of Succession Act (Cap. 160 of the Laws of Kenya) shows that different ethnicities in Kenya use customary laws to settle some matters related to succession outside court. Most of such cases are related to family law. As such four types of marriage are recognized by the laws of Kenya and traditional African marriage¹³⁸ is among them.

135 Cfr. Savigny, *Legislation and Jurisprudence*, New York, Arno Press, 1975.

136 Cfr. George W Kanyeihamba, Op. Cit. pp. 8-13.

137 <http://www.ielrc.org/content/b9501.pdf>

138 Marriage Act (Cap. 150); The African Marriage and Divorce Act (Cap. 151) both reflecting on customary law marriages.

Modern law development sees some criteria in the African customary law as repugnant to justice and morality especially the movement of women and the discourse on gender issues. There is strong feeling that customary law regime violates the human rights of women especially in the law of succession today. Prof. Kameri-Mbote affirms that the institution of succession has come into grips with three pressures and realities: Modernization of the law (westernization); practice and procedures related to succession¹³⁹. Matrimonial property in African customary law is managed and controlled in a manner that benefits the extended family. According to the opinion emerging from pressure on customary law in Kenya considers certain practices in terms of desuetude. Referring to English law that are referred to in Kenya under the enforced Common law system, the status of women in the laws of Kenya stand to disapprove certain provisions in the customary law especially regarding a married woman as a chattel of the husband, i.e. “The time when an African woman was presumed to own nothing at all, and all she owned belonged to her husband and was regarded as a chattel of her husband has long gone”¹⁴⁰. (Kenya Appeals Report:241, 1991/92) but all the current criticisms of certain customary norms require investigations into the true meaning and context in which such customary laws applied and accepted such norms. Likewise, it would make more sense if human rights groups that criticize certain traditions and customs provide a clue into the origin and reasons attached to such norms that they consider repugnant and against morality. Lastly, it is wise to highlight whether such social practices are social rules or just patterns of convergent habits in certain social groups. Contentious legal issues emerging today can as well guide us to the full knowledge of the role of the customary law or people’s law.

7.9 LAWS OF INHERITANCE IN KENYA

Law of inheritance and succession, in reference to women, is another fact that customary law is yet to cope up with. Socrates, the

139 *Idem*

140 <http://www.ielrc.org/content/b9501.pdf>

founder of Greek philosophy had made a firm description of the community of wives and children during his time¹⁴¹. When he was asked whether the differentiation between sex is a proper basis for occupation and social function his answer was that it was not. Both men and women should follow the same range of occupation. The philosophical explanation of gender equality is what has influenced the Western reasoning and certainly the Common Law theories.

There is a feeling by certain people today that English common law is considered civilized, and suitable for post-modernism. On the other hand African customary law is considered archaic, backward and out-fashioned. This is already posing a big threat to the future and relevance of customary law in Africa. The question is whether the laws we borrow and the Western concepts attached are all that African needs to resolve some of its contentious social, economic, political and religious issues. If the Gay Marriage is law in England or in the USA, then this may not be fair if our African modern states accept them under the pretext of Human Rights principles without comparing notes with the African customary law and general moral attitude of Africans towards such international stands. As we said before, African customary law system has its own stand when it comes to justice and principles of morality. Gay marriage and homosexuality may not form part of acceptable habit of behavior in African societies, therefore may be considered repugnant to natural justice and generally accepted morality.

The dichotomy between the statutory law and African customary law is rife in Kenya as many social groups and ethnic communities still hold tightly on their systems. It would only be unfair to rule such African customary laws out and illegalize them without something in place.

Kenyan legal system has regarded the two dichotomous laws at par¹⁴² and this is how it should be if we mean something to developing an accurate and suitable legal system for the African people living in Africa.

141 Desmond Lee, *Plato: The Republic*, Penguin Books Ltd., on “women and the family” p. 225.

142 *Idem.*

Prof. Mbote's research highlights the paradigm surrounding the African customary law especially in regard to the rights of women. She balances her thought by saying that certain rights enjoyed by men under customary law and were not enjoyed by women had tenable explanation (Women and Law in South Africa: 1993). I personally agree with the researcher on the fact that she balances her way of looking at the African customary law. The fact that customary law is fluid, flexible and dynamic makes it capable of gross manipulation by those in power¹⁴³ or corruptible minds that take advantage of customary norms and robe others of their legal rights. Customs had their reasons attached to every norm and this should not be misunderstood. Any form of gender prejudice or undermining the social rule of the people is unfortunate.

Even if there are several ethnic groups with variant customary law still the study approves that, there are certain similarities (Cotran: 1969) that create uniformity in the system. One common belief is the equality of human beings hence the communal ownership of major forms of property such as land¹⁴⁴.

The law of succession in Kenya, as given by Eugene Cotran, illustrates that customary law bears concepts that are linked to the social and traditional beliefs of the African people. Several African philosophers especially the late Henry Odera Oruka had done profound research in African thought and came up with African philosophical thought in his sage philosophy, a sign to show that there is always room for intellectual discourse on African logical thinking. All this background affirms that customary law is law and deserves rightful recognition by the state laws for the sake of natural justice and rights addressed to the indigenous populations. The rejection of African customary law and the denial of its development would be considered violation of natural rights for the people who believe and practice them without consultation. A typical example is the alleged Female Genital Mutilation that has also been criticized by certain African women as a violation of natural rights of a woman. Another feeling is on the terminology that seems to be Western creation and

143 <http://ielrc.org/content/b9501.pdf>

144 E. Cotran, *Restatement of African Law*, 1969

the preferable terms are female cut or female circumcision rather than mutilation. This is a smart argument since the word mutilation itself does not even exist in the customary law context and it is totally a Western propaganda that does not even sound well to women. Mutilation could be violence whereas circumcision may find its explanation in certain African customary norms.

The same applies to widow inheritance in certain African customary norms. Despite the fact that it is not practical and should be prohibited by statutes, it would be correct to evaluate the meaning African customary norms attached to it. The intriguing question is, are such meanings still valid? If not, then such rules should die a natural death. There is no need for legislation to deal with it but it is obvious that such norms shall phase out with time just as polygamy. The phasing out of a customary norm because of its irrelevance does not mean that African customary law has failed. If anything, African customary law is not making any bargain but it requires its space in the judicial system so to demonstrate that justice is done to the parties that seek it rightfully.

Given the diversities in African customary norms and the rapid change of time, it is right to accept the challenges of time. However, it is right to look at such customs in the light of the service to justice and not to people. It is important to dispel the idea that nothing good can come from African cultures. For countries that have been faced with civil war for an extended period of time such as Uganda and Somalia, customary law has been at service of justice. Whenever state law stops operating, it is the customary that deals with issues of justice.

7.10 UNIFORM CUSTOMARY LAW

Given the myriad of variations in legal systems in Africa, colonial legal systems still stand out to be the option in creating a unified statehood and filling the remaining gap. Van Doren, on S.M. Otieno's case asserts that:

if Western law is an apple then African customary law is an orange.
There is only one heir to a potentially uniform national law, namely,

the common law. Customary law varies. The only law potentially applicable to all Kenya is the common law¹⁴⁵.

Professor Hodgin of law University of Birmingham at the introduction when he discusses the “relevance of customary contract law”¹⁴⁶ affirms that customary contract originated basically in the rural societies that still practice it. It is the least developed branch of law and the most difficult to apply at national level.

As such Kenyan Judicature Act of 1967 section 3(2) provides that all courts shall be guided by African customary law in civil cases where one or more of the parties is subjected to it or affected by it. It also calls upon the courts applying customary law to do so without undue regard to technicalities of procedure and without undue delay¹⁴⁷. Customary contract law is applied in the Magistrates’ Courts and to some extent also in the High Court. Where there is no written law applicable judges can base their decision on customary law. However, the application of foreign law, especially in the judicial legal systems in Africa, is justified by the fact of *lacunae legis* (missing legislations) in such sovereign States. In the absence of law, judges must find where to anchor their verdicts or rulings making the application of foreign laws indispensable.

Since English Common Law was introduced for the first time in Kenya there has been a need of maintaining national unity applying Common Law other than individual Customary Laws some of which have conflicting precepts and may not work well as unifying force. Kenya is already hosting over 43 ethnic groups each with its own legal traditions, cultures and customs. It is like saying we have 43 jurisdictions under one national umbrella.

All customary laws of the Kenyan people may only exist if the policy makers can produce a uniform Customary Law in which all ethnic groups can identify their traditional cultural values. In order to do this, the African customary law project should objectively

145 J.W.Van Doren, “African Tradition and Western common Law: A Study in Contradiction”, in Ojwang’ J.B., and Mugambi, J.N.K., The S.M. Otieno case, p. 130.

146 R. W. Hodgin, *Law of Contract in East Africa*, Kenya Literature Bureau, Nairobi, 1975, pp. 8-11.

147 Op. Cit. pp. 9f.

highlight African traditional values that can work with the modern social needs and make them become national laws.

Frequent disagreements experienced in the National Assembly during debates on Bills, is already a valid sign that lawmakers may not agree with all principles presented by different ethnic communities. The representatives of the people, the Members of Parliament appear to differ whenever they feel that there is a conflict of group interests.

The event of constitutionalism and rule of law principles in Kenya are in themselves unifying forces that will see Kenya as a one unit when it comes legal development.

With the coming of the new Constitution on 27 August 2010, Kenya passed a law that will see devolved government in terms of 47 Counties. Each County will have to be autonomous as the second level of government and at the same time part and parcel of the Central Government for National Unity. Devolution system is in itself a vehicle for legal development and a great hope for reviving African customary law debate.

According to the Constitution of 2010, law making process remains with the National Assembly, the Parliament and not the County Assemblies under governorship. Each County is obliged to apply Kenyan Laws and County Legislation should not contradict the National Legislations or the Constitution. There shall be County Legislation that will have to be consistent with the National Legislations and the Constitution of Kenya. The unifying force of law must be seen to be operational from the word go for Kenya to remain united and faithful to her commitment as a nation.

Section 191, clause 3(a) provides that:

national legislation provides for matters that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards; or national policies or the national legislation is necessary for the maintenance of national security; the maintenance of economic unity; the protection of common market in respect of the mobility of goods, services, capital and labour.

The Supreme Court whose decision is binding on all other subordinate courts all over Kenya, stands out to be a judicial unifying force. The new Constitution therefore has given the Chief Justice (CJ) more power to ensure that there is peace, harmony and legal standard in the administration of justice.

Functions and powers of the County government are well elaborated in the new Constitution. Kenya recognizes only the Constitution and National Legislations enacted by Parliament. The County Assembly has power to enact or legislate laws (By-Laws) for the county government. Powers can be transferred from one level of government to the next bearing constitutional responsibilities.

Under section 191 the conflict of law is put under consideration. Clause (2) says,

national legislation shall prevail over county legislation a provision that gives supremacy to the national unity.

Fourth Schedule of the new Constitution elaborates on the functions between the national government and the county government, (section 8) places courts under the national government. The rationale behind this provision is the rule of law principle and the function of law as a social control mechanism in a multi-ethnic society such as Kenya.

In the light of the new Constitution, Kenya may now find it easy to develop her own uniform Customary Law using the county jurisdiction and initiate an effective socio-legal dialogue concerning Customary Laws of Kenyans and harmonizing them at the national level through the facilitation of the judiciary and the National Assembly. It is also important to mention that County Government will likely develop keen interest in developing its own rules in line with the Constitution of 2010 and predictably revive the interest in people's law in support of the administration of justice at national level mandated with the making of law. Developing more interest in legal culture based on given social groups shall inspire more academic interest in the primitive laws than ever before. It is predictive that through this understanding, legislators shall find it easier to deal with

some of the considered contentious issues that emerge during the law-making process.

It is right to present an overview of how lawyers and legal scholars of our time look at the future of African customary law system in a way to reinforce the African legal system and come up with certain legal concepts that may help in harmonizing the Customary Laws. Developing African legal system should not be regarded as divisive and a way of disintegrating the nation, rather it should be seen as serving justice by making “good laws” that are generally acceptable by the majority of citizens.

Making uniform Customary Law is a process that may see Kenya coming up with good laws that would safeguard family institutions, protect cultural values as highlighted in the Constitution and solve her complicated land problems. To choose the African customary law over English Common Law would involve a rejection of Western values that oppress African values. The stakes are high that the Republic of Kenya may succeed in harmonizing its laws and constituting a legal regime that places its priorities on the African legal traditions.

CHAPTER EIGHT

QUEST FOR AFRICAN JURISPRUDENCE

8.1 INTRODUCTION

Among some eminent African intellectuals: lawyers, scholars and jurists there is a strong feeling that Africa weighs very little in global relations.¹⁴⁸ Where is the role and place of Africa in the global judicial governance? The rationale behind this ambitious question is related to the International Criminal Court created by the Rome Statute in 2002. The Court was established to handle international criminal justice. It came after the Nuremberg Special Tribunal, Tokyo, Cambodia, Yugoslavia and Rwanda Tribunals. The special tribunals that were set up by the UN Security Council to handle international criminal justice had very limited jurisdictions and were very expensive to manage. However, UN sponsored tribunals were more focused in dealing with war crimes, crimes against humanity, crimes of genocide and aggression. They did not provoke complaints such as the International Criminal Court created by treaty law known as Rome Statute.

An impression that Africa is targeted by the ICC continues to fuel negative attitude among some African State Parties to the Rome Statute. The reason given by the dissenting parties is that Africa is lagging behind the civilized nations and some international agreements are inspired by imperialist regimes that are out to re-colonize the continent systematically using the treaty law.

We have to admit that some of the provisions in the Rome Statute may not be in line with African cultural values and current socio-economic requirements. Since the Court administers international criminal justice the question of peace in some African States is wanting and equally needs appropriate attention. General

148 The Addis Ababa Conference on the ICC, December 3-4, 2012, Centre International d'Etudes et de Recherches Stratégiques et Prospectives de Dakar. The theme on "The ICC, Judicial Governance and Trends of Justice".

feeling that international law has never taken cognizance of African legal values, principles and perceptions is justified. International law is used as a mechanism through which powerful nations use to streamline and discipline some African States that are considered rogue and non-compliant. Some learned Africans consider the behaviour of the ICC and the United Nations Security Council as barbaric, accusing them of treating their African counterparts as junior partners in the world judicial governance.

All these allegations resonating from the African region have one thing in common. Africa has been missing out in the map of the world legal systems for a long time as compared to English common law, Civil law, and Islamic law. The truth of the matter is that Africa has never learned how to introspectively develop its own jurisprudence based on the very wisdom traced in its traditional customary laws. Reasons are always pegged on colonial legacy, imperialism, mistreatment and barbaric impositions from the Western powers.¹⁴⁹ Admitting that Africa is part and parcel of the international community and a shareholder in the international justice system, the ongoing blame game fails to realize the loopholes in the modern African legal regimes and points fingers at the international decisions and options taken by “others”.

Not only don’t we Africans play key roles in decision-making processes at the international level, but we suffer from the adverse effects of the bad options taken by others...¹⁵⁰

8.2 THE ROADMAP FOR AFRICA

There is a need to return to the Pan-africanism and nationalism ideologies in order to specify the *locus standi* for African legal system in the modern world. At the same time there is an urgent need to accommodate the rest of the world in order to strengthen the rapidly growing African economy meanwhile satisfying all the stakeholders.

¹⁴⁹ George W. Kanyeihamba, *Op. Cit.* p. 13. "...the main reason for denying African customary law its place in the world and value was colonialism."

¹⁵⁰ Afrique-CPI: Mariage force' ou Divorce de raison? Concept Document du Workshop International organise' par le CIERSP de Dakar et le Laboratoire de Prospective et de Science des Mutations, Faculte' des lettres et sciences humaines, Universite' Cheikh Anta Diop, Dakar, p. 153.

African lawyers and jurists find themselves at cross-road when it comes to choosing whether to develop African jurisprudence, adopt or adapt Western jurisprudence as it stands. The need to develop African jurisprudence rooted in very African socio-cultural values is a persistent argument that requires great level of enlightenment.¹⁵¹

Through modern education system and the increasing need to adjust African legal standard to match the rest of the world, African jurisprudence requires competitive education. Primary, secondary and university education should not shy away from preparing young brains with the traditions and history of law especially those that are found within their cultural milieu. For instance, in many European States Roman and Greek civilizations are taught as core courses in order to prepare the mind-set of the youth towards professional advancement. African States prefer ready made packages from already developed States. Legal systems adapted from Europe or America may not be the right solution and the way forward to develop African jurisprudence. Bad practices that still undermine the development of the people are caused by lack of adequate education. Elders that are not educated in the formal system would carry on with informal education system which has lost its relevance with the pace of modern progress today. As shall be discussed later, elders also need modernization in the procedural law reform process.

Unless the African States invest their resources in developing African customary law through education, Africans shall not stop complaining about foreigners frustrating them through the international law system.¹⁵² Politically powerful States such as the United Kingdom, United States on the side of common law and France, and Belgium on the side of civil law systems shall dominate world legal systems in the absence of Africa since they have learned

151 Cfr. George W. Kanyeihamba, *Commentaries on Law, Politics and Governance*, p. 12. African governments which are committed in modernity and development had had to borrow laws or enact new ones in order to modify indigenous laws and cater for the lacuna discovered in African customary law so as to meet the needs of today's economies and development.

152 Op. Cit. p. 76. "...the only well publicized philosophy about human rights was that of the Western civilization. Western thinkers and writers had led in the formulation of ideas and principles, which came to be adopted at the international level."

how to translate their legal traditions into influential modern legal systems.

International law panels usually anchor their reasoning on Western jurisprudence which has been developed for centuries.¹⁵³ The English Common law and the doctrine of Equity and morality are all fruits of indigenous customary laws that had ruled the Anglo-Saxon people for a lengthy period of time. It is from this traditional basis that English law systematically influenced the world legal system.

Failure to translate African traditional laws¹⁵⁴ into relevant academic material justifies the impossibility of giving rights that are not there, as the Romans had postulated in *nemo dat quod non habet*. It is imperatively urgent for African intellectuals and leadership to come up with a comprehensive codification of African customary law and to emphasize the African socio-cultural values in a manner that national courts may take cognizance of the same.

The facts on which the propositions of law depend constitute what Dworkin calls the grounds of law.¹⁵⁵ The ground of law in developing African jurisprudence is the wisdom found within the existing customary laws.

There are many reasons for which we need to invest in research based on African traditional law and values. It is through the articulated values that Africa will feel part and parcel of the international decisions without alleging that the African continent is being shortchanged or mistreated by other powerful nations. In this regard, the customary international law principle of State equality, sovereignty, and territorial integrity will only be realized when former colonies will have emerged with their own substantive legal system based on African principles and values.

153 Idem.

154 George W. Kanyeihamba, Op. Cit. p. 149. Many African leaders have failed to forge and create nations out of the pre- and colonial existence. This has resulted in the concepts of self-preservation and aggrandizement with the associated myopic loyalties and services to the family, the clan, the tribe and immediate supporters, devoid of nationalism and patriotism.

155 H.L.A. Hart, *The Concept of Law*, p. 245. A similar sentiment is expressed in what Hart calls the ground of law.

8.3 UBUNTU CONCEPT

It is worth a mention in this chapter that African customary law reveals a wealth of legal knowledge that can make a huge contribution in the perpetual quest to develop international law as we know it today.¹⁵⁶ What Africa should be proud of as its true and original raw materials found within its borders are cultural pluralism, diversity and heritages that are still available.¹⁵⁷

*Ubuntu*¹⁵⁸ meaning connectedness is already a significant concept related to humanism, fairness, solidarity and generosity founded within African cultural system. This is not different from the English Doctrine of Equity¹⁵⁹ and morality. *Ubuntu* means I am what I am because of who we are all. This is the sense of collectivity and universalism as we find in the international law. The concept of humanism expressed in *Ubuntu* is the basis for human rights and humanitarian law. Desmond Tutu defined *Ubuntu* as follows:

A person with *Ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, based from a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.¹⁶⁰

Such important values as peace, reconciliation, unity and solidarity which can also be traced in the *Ujamaa* vision of Nyerere¹⁶¹ are nothing new to African traditional systems. Human rights should not be something new to the African customary law conceptions as we have seen in the previous chapters. Such concepts as equality, fraternity and liberty are not new in African legal culture but when enforced through international legal framework they sound

156 George W. Kanyeihamba, pp. 75ff.

157 P. Onyango, *Cultural Gap and Economic Crisis in Africa*, p. 103.

158 http://en.wikipedia.org/wiki/Ubuntu_%28philosophy%29 South African ethnic or humanistic philosophy focusing on Chichewa people's allegiances and relationship with each other come up with *umunthu*. *Ubuntu* originates from Bantu languages in South Africa

159 T. Olawale Elias, *The Nature of African Customary Law*, p.188. In the sphere of African law, fiction, equity and legislation seem to be concurrent in the law making process.

160 http://en.wikipedia.org/wiki/Ubuntu_%28philosophy%29

161 Rwiza R.N., *Ethics of Human Rights: The African Contribution*, p. 113.

as imperialism and oppression. African societal structure is rich in values that can be translated into legal philosophy and taught at law schools.

The basic principles of justice¹⁶² as expressed in the book of John Rawls are all contained in the *Ubuntu* and *Ujamaa* doctrines:

For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.

The essence of being human is not new to the African cultures alluding to the fact that human rights concepts are also traced within African traditional beliefs and practices. It is on this strength that we can acknowledge African customary law as a principal contributor to the rich world cultural heritages.

Judge Colin Lamont puts it forthrightly:

Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more mutually acceptable remedies for the parties in such cases.¹⁶³.

The following values are attached to *ubuntu* legal philosophy: *Ubuntu* is to be contrasted with vengeance; dictates that a high value be placed on the life of a human being; is inextricably linked to the values of and which place a high premium on dignity, compassion, humanness and respect for humanity of another; dictates a shift from confrontation to mediation and conciliation; dictates good attitudes and shared concern; favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant; favours restorative rather than retributive justice; operates in a direction favouring reconciliation rather than estrangement of disputants; works towards sensitizing a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards

162 Rawls, J., *A Theory of Justice*, p. 6.

163 *Idem.*

changing such conduct rather than merely punishing the disputant; promotes mutual understanding rather than punishment; favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; favours civility and civilized dialogue premised on mutual tolerance.¹⁶⁴

Meanwhile we have to admit that many African States are still struggling to create harmony and order within their highly charged multiethnic jurisdictions. Kenya is one of the examples of nations faced with cattle rustling in the north-eastern region and in the Tana Delta in the Coast where many people have recently lost their property, households, and lives. In some of the customs of the people in such regions, cattle-raiding is licit and killing a person during raiding is not a serious criminal offence. Those who murder during raiding in some customs would seek cleansing from the elders which will readmit them to the community.

If our State laws had codified African customary law where such socio-cultural values are well articulated then justice would be brought to the victims through court and such occurrences would be deterred once and for all through law. Unfortunately, nothing has been done to address customary law since independence. It logically follows that people as communities shall perpetuate their trend and beliefs to an extent of killing Government forces to defend themselves with impunity and carry on with raiding other communities using weapons.

Admitting that codification of law is a demanding process, the trend of developing African jurisprudence requires introspective research backed by African socio-cultural values such as *ubuntu* and other concepts found in African wisdom. It is through such cultural values that truth and reconciliation process can effectively take place and bring communities into harmony with one another. It is through well developed customary law of the country that nationhood shall be felt and enhanced across the board.

164 *Idem.*

Law is all about order and harmony among people living together and its objective is justice. Customary law of the people living in organized groups¹⁶⁵ must therefore observe universally accepted values such as *ubuntu* and avoid human disasters such as destroying humanity through genocide and inter-ethnic clashes.

What Elias would refer to as the primitive communism in his famous book, is a depiction of how individuals would define rights and duties within their own social groups¹⁶⁶ and this should be revived and mistakes in the customary practices should be corrected.

Tanzania, Ghana, Senegal, Kenya, DRC, Ethiopia, Sudan and South Sudan, Zambia, Malawi, and all other African States demonstrate the wealth within their cultural diversities that have never been translated into formal law. Unless well managed, such diversities can result into devastating reality when it comes to the administration of justice. Accommodating cultural values in the modern national legal system is better than suppressing them or constitutionally ignoring them.

There are many examples where disputes arise due to failure of the State Laws to accommodate basic legal concepts that are found within ethnic groups. As has been illustrated in the previous reading the Kenyan Constitution of 2010 decidedly ignored the mention of African customary law in its fundamental provisions except Article 2(4). Under this provision customary law is only mentioned whenever it is inconsistent to the Constitution but there is nothing substantial that alludes to the recognition of the African law except the preamble and Article 1 which emphasizes on the African values and the sovereignty of the people. This provision does not negate the practice or existence of the customary law.

Legislators in the two-tier Government are left with great task of formulating laws that will accommodate African social values and there is no way of doing this without comprehensive knowledge of the customary laws of the people.

165 Cfr. H.L.A. Hart, *The Concept of Law*, p. 91.

166 T. Olawale Elias, *The Nature of African Customary Law*, p. 83.

Concerning *ubuntu* which emerges in South Africa, it follows that African customary law has the opportunity of time to become one of the legal systems in the world with indigenous principles and concepts of law that can make sense to the world bureaucrats, diplomats and law technocrats.

African lawyers must excavate Africa from Western discourse¹⁶⁷ once and for all. There is no way the Western lawyers can provide solution to African judicial problems¹⁶⁸ unless the African version concerning justice is heard and determined by the same African jurists and lawyers. African problems must have African solution with the decorum it deserves.

8.4 LINGUISTIC CHALLENGE

As has been demonstrated earlier in this book, language¹⁶⁹ is another interesting dimension of customary law whose jurisdiction ought to be discussed. Customary law is expressed orally in the languages of those who practice them. Most of such languages have got no national status and it is hard for them to gain State recognition.¹⁷⁰ Contextualization of customary law is an oversight of basic normative values hidden behind such rules and illusion of superstitions. Language should not be a hindrance to developing African jurisprudence based on African legal values¹⁷¹ but rather, an additional value.

167 Cfr. D. A. Masolo, *African Philosophy in Search of Identity*, p.147.

168 See also George W. Kanyeihamba, pp. 150f. Plans must originate and implemented by Africans themselves.

169 Cfr. Rodolfo Sacco in his book seeks to analyze the structure of African languages using anthropological geneology of the African racial groups. On pages 55–6 the author seems to be very shallow in describing variety of African languages yet he appreciates the role Kiswahili can play as a communication media. African jurisprudence has a lot to do with the language of the African people and the need for lingua franca to connect the African people is vital. It would be illogical to address African jurisprudence in foreign languages.

170 P. Onyango, *Cultural Gap and Economic Crisis in Africa*, pp. 7–20.

171 The topic on language has been explained under the nature and characteristics of African customary law in the previous chapters. The diversities across the African rich cultures are important sources of customary law that should be accorded due attention. It is from such diversities that Africa shall formulate valid legal principles that would underlie its jurisprudence. The wisdom of law lies within the language of the people making such law more legitimate and more acceptable by the majority.

The concept of customary law is universal and transcends any given ethnic boundary. *Utu* in Kiswahili spoken in Kenya and Tanzania signifies humanness which is still within *ubuntu* concept for the Bantu speakers. Legal and moral values are universally acceptable as long as they do not contradict known pre-emptory norms inscribed in the general principles of the international law. Legal ideas, theories, concepts, principles remain the same in spite of ethnic groups applying them in their respective vernaculars.¹⁷² Legal and moral values found within such linguistic contexts can be important recipe in formulating a sound doctrine of Equity backed by African moral values.

It is therefore right for scholars to dispel the language barrier and focus on the legal concepts contained in various customary laws. Concepts are universally accepted and scientifically accurate. English Common Law still accommodates Latin expressions in order to maintain their original concepts. Use of Latin jargons and expressions in framing certain legal concepts such as *ultra vires*, and *locus standi* are quite in order and have not been disputed by English lawyers. In disregard of Latin, which has become dormant among the world linguistic groups, such concepts can only be best expressed in the original language rather than translating them into an imperialist language as English. The same should apply to the legal concepts found within African cultures.

African jurisprudence of course shall focus on the universal concepts but majoring on the African linguistic meaning. As has been mentioned before the African jurisprudence shall accommodate such meaningful concepts as *ubuntu*, *ujamaa*, *utu* and many others across the continent to render more meaning in the existing customary and residual laws of the people in disregard to

The best example is how Tanzanian people identify themselves under the *Undugu* and *Ujamaa* concepts. Tanzanian nationals find themselves as one people and one nation because of the powerful concepts expressed in Kiswahili language.

172 Cfr. R.N. Rwiza, *Ethics of Human Rights: The African Contribution*, p. 115. Prof. Rwiza makes it clear that language is basic in expressing the fundamental human rights of the individual and the community (p. 115). Kiswahili was proved to have the linguistic capacity to express intellectual ideas. This applies to several vernaculars that are widely practised and whose vocabulary has achieved some standard of communication.

any given linguistic boundary. However, for the sake of systematic development of African jurisprudence, it is necessary that every African State starts from its own domestic customary laws and establish customary courts that would enhance the development of African jurisprudence from the residual laws.

It has been demonstrated in Kenya that the disputes linked to the land use and ownership may call for recourse to the local customary laws given that some communities identify themselves with the occupied land from time immemorial.¹⁷³ Land does not belong to individuals as in the Western conception but by group known as tribe in the African conception.¹⁷⁴ This legendary conception of land ownership¹⁷⁵ is disturbing and is in conflict with private land concept advocated by Common law. Tribal myths and legendary tribal territories shall also create obstacles to individuals willing to settle in some parts of the country at their own pleasure and preference unless land law and policies clearly distinguish between the social group rights and individual rights.

History proves that Kenya is still staggering with its land law and policies as the legislators find it difficult to come up with the way forward. It appears that borrowed English Common Law and State laws may not ignore the role of customary law when coming up with legislations and right policies on land ownership in Kenya. For the sake of equity and justice an African approach is indispensable.

Among the Kamba tribe in Kenya, land *weu* belongs to the community.¹⁷⁶ Land ownership and its use was free and open to all

173 The Environment and Land Court Act, No. 19 of 2011, may become handy in setting up a pace when it comes to land law, cases and customary law. The jurisdiction of the Court does not indicate much concerning the community land or the presumed tribal territory. Yet the fact that Kenya now has a Court with High Court status to deal with environment and land disputes is already a sign that African jurisprudence will have a judicial institution to rely on. Environment means the totality of nature, natural resources, including the cultural heritage and infrastructure essential for social-economic activities. African customary law is part of cultural heritage of the indigenous people and the Court shall have the jurisdiction of matters pertaining to environment and land.

174 Vidra T. Olawale Elias, *The Nature of African Customary Law*, p. 83.

175 Jomo Kenyatta, *Facing Mount Kenya*, pp. 13ff.

176 Community land ownership is a common phenomenon. Still the judiciary is tasked with the correct interpretation of the community land yet customarily Kenya is

members of the community. Rights to possess land by individuals were unrestricted but only for cultivation.

According to Penville, it is clear that Kamba tribe had customary rules to deal with the use of land, right over land and inheritance.¹⁷⁷ Most of this has been dictated by the socio-economic lifestyle of the people and the demographic growth in the recent decades. Common consensus is that land is a real estate. Its value and importance is the same to all tribes.

Besides Tanzania, several African States still accommodate tribal territorial lands that exist in the form of customary law but less articulated in the State laws. Private land, public land and community land ownership in Kenya assumes the existence of tribal territories, a reality that brings land disputes. A straightforward strategy to deal with land disputes in Kenya requires a well researched customary law approach and harmonization of the State law and customary law conceptions concerning land use and ownership. Law and policies must safeguard the values tribal groups attached to land and come up with binding and authoritative rulings acceptable by the people living in a given social set-up.

Prof. Okoth-Ogendo was one of the law exponents that talked professionally on land law and policies in Kenya. His articulated idea of “place of common law of Kenya” calling for a need for an African common law¹⁷⁸ impressed several customary lawyers during his time. Even if it seems like the idea died with him, the problem is still persistent in Kenya and may call for more investigation in the customary laws of the Kenyan people.

The motivation here is to make law relevant to the people it affects and there is no way this could be done without the “customary

divided into tribal territories especially in the rural sectors. Maasai land, Kikuyu land, Kamba land, Meru land, Samburu land, Luo land, Luhya land, Taita land, Gusii land, Kuria land are all existing realities that the State law fails to address.

¹⁷⁷ D.J. Penwill, *Kamba Customary Law*, pp. 32ff.

¹⁷⁸ H.W.O. Okoth-Ogendo, “Customary Law in the Kenyan Legal System: An Old Debate Revived”, in J.B. Ojwang and J.N.K. Mugambi, *The S.M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi University Press, 1989, pp. 144f. Also see page 138.

law" based on the recognition principle of such laws by the people within their respective communities.

Okoth-Ogendo affirmed that common law of Kenya project cannot be handled by the Parliament single-handedly and this is what he calls the procedural hurdle.¹⁷⁹ African jurisprudence must involve the people and all public and private institutions.

8.5 IMPEDIMENTS TOWARDS THE INTEGRATED SYSTEM

Despite the dream of Prof. Okoth-Ogendo about the common law of Kenya, it is clear that some eminent African law scholars are already discussing certain outstanding bottle-necks in developing proper African jurisprudence. As we analyze some of the impediments it would be appropriate to provide some accurate insights in this regard.

Justice Kuloba summarizes some hiccups when he explains why there is no modernization and innovation in the judicial system in Kenya.¹⁸⁰ He provides some of the things that may slow down rapid changes and adaptation to such changes. He accuses political will as the primary cause of the slow down or adaptation. He also accuses the members of the judiciary of lacking focus, with no administrative passion and show little desire to reform the system. The traditional sheltering of the courts is also mentioned as one of the causes for lack of innovation. The tendency to maintain the status quo in the administration of justice is a wrongdoing for the modernization and innovation.

Kuloba also alleges that power struggle has been the cause of slow down in developing an effective legal system.

8.6 COLONIAL LEGACY

Referring to our discussions in the previous chapters, colonialism has been blamed for denying customary law its rightful place in the

179 Op.Cit.

180 Richard Kuloba, Op. Cit., pp. 180ff.

world.¹⁸¹ European writers misrepresented the African customary law during the colonial regimes judging them as superstitions, myths, and irrational rules:

Evans-Prichard wrote about Nuer customary law in Sudan saying that in a strict sense Nuer have no law. There are conventional compensations for damage, adultery, loss of limb, and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict.¹⁸²

The intercultural untranslatability of the Nuer sayings was not due to the irrationality of the Nuer, but to the erroneous assumption that they were making conjunctive statements of physical or metaphysical identity.¹⁸³ Evans-Prichard had not understood the Nuer and his subjective statement is a sign that African customary law suffered from the European prejudice *ab initio*.

Colonial legacy is blamed for underdevelopment of the African customary law today. Powerful States such as Great Britain managed to establish English Common Law within their colonies around the world.

It is a fact that most of the African jurists, legislators and lawyers have been trained under either English Common Law or Continental European Civil Law systems, making them think more like English lawyers, legislators and jurists rather than African lawyers.¹⁸⁴ Training of law students in most of the African countries alludes to the fact that the theory of law is from the European law matrixes and nothing to do with African legal culture.

There is clear evidence that the need for the economic development in the African States is pegged on the adherence of such States and their Governments to the Western ideologies. Such prerequisites to obtain funding from world financial institutions

¹⁸¹ George W. Kanyeihamba, *Kanyeihamba's Commentaries on Law, Politics and Governance*, LawAfrica Publishing Ltd., 2010, p. 13.

¹⁸² Op. Cit., p. 11.

¹⁸³ D.A. Masolo, *African Philosophy in Search of Identity*, p. 220.

¹⁸⁴ Cfr. Rodolfo Sacco, Il Diritto Africano, pp. 9ff. This text on African law is stating that African legislatures and lawyers are trained in the European legal system rendering it difficult for them to emerge strongly with African jurisprudence.

such as the World Bank, IMF and others render the struggle to develop African jurisprudence slow and frustrating. The Workshop of Addis Ababa in December 2012, widely cited neo-imperialism and a tendency to put strict conditions on the African States and their Governments.¹⁸⁵

If customary law is to be developed as part of the modernization and innovation project, then the new law must object to all elements that were seen as impediments in the former law. However, the success of achieving African jurisprudence shall require good will from the international community, regional organizations and the African States themselves. Any fear that African jurisprudence may hinder international harmony and integration should be dispelled.

185 The ICC, Judicial Governance and Trend of Justice, a Workshop held in Addis Ababa, 3–4 December, 2012, organized by CIERSP of Dakar, University of Cheikh Anta Diop, Dakar

CHAPTER NINE

DETERMINING THE FUTURE

9.1 INTRODUCTION

Given the historical background and the trend of things today, a developed African jurisprudence shall beat the odds. It has demonstrated that the attempt to do away with customary law is futile.¹⁸⁶ African States and their legitimate Governments should grab the occasion to determine the future of African legal system. Doing so shall render the attempt to establish the rule of law and make law a legitimate vehicle for spurring economic growth and enhancing national harmony without offending other non African stakeholders.

A new dawn has emerged with the collapse of ideologies in 1989 and the end of iron curtain has been eventually established. African States now have lots of chances to develop what in reality should be their own jurisprudence. They should embrace the rule of law principle and constitutionalism in order to be innovative, competitive and relevant to the emerging socio-economic and cultural needs. In 2010, Kenyans proved to the rest of the world that law reform is a mission possible when on 27 August 2010 a curtain was drawn on old law replacing it with the new Constitution. This attempt shows that Africans can make their own legal system and fulfill the old dream of actualizing African jurisprudence.

During the amorphous colonial imperialism it was not possible for Africans to insist on their own laws as this would be seen as a threat to imperialism powers. “African legal system” was kept under the umbrella of social studies or religion and philosophy but not considered as a discipline of its own at the faculty of law for reasons we have discussed in the previous chapters.

186 Vidra, the preface and introduction of this book.

Even though English Common Law is widely entrenched across the continent, African customary law is sending positive signals and the pressure is on for law reforms to take place. Over dependency of Western ideas, especially in the academic field, seems to fade away with time and law is becoming a rapidly growing career all over the great continent. Studying of customary law is not only considered as forming a solid legal culture but also getting to the heights of legal professionalism and realism based on contextual views of African lawyers, law scholars and jurists. Africa has already achieved the best level of social growth that requires likewise a well rooted knowledge of the role of law in society.

Foreign lawyers and jurists seem to be more inquisitive about African customary law than their African counterparts. The loss of enthusiasm in the African legal discourse is allegedly a failure to create impact on the judicial system and eventually on developing an effective African jurisprudence despite obvious challenges.

A challenging fact is that customary law continues to regulate many areas of people's lives across Africa.¹⁸⁷ Due to this challenging situation some African Constitutions now enshrine the people's rights among their key provisions and oblige courts to apply foresaid customary norms wherever applicable. Said and done, such States are embarking on the customary law approach to harmonise their laws and render them more relevant to the requirements of the administration of justice.

By and large, in many places, the requirements for marriage, the rights and duties of husbands and wives, the obligations toward and custody of children, the ownership of property acquired during marriage, and many other aspects of family life are tacitly governed by customary law. Moreover, even where conflicting constitutional or statutory law exists, lack of access to legal resources may mean that, as a matter of fact, the *de facto* customary law still governs the lives of many African people in their social set-ups. The persistence of longstanding expectations and social practices informed by

¹⁸⁷ Vidra, Introduction and the Summary and Conclusion

customary law has given rise to many problems in enforcing contradictory statutory law.¹⁸⁸

The Conference of Gaborone in Botswana, 2008 highlights human rights approach given to customary law study¹⁸⁹ is one of the current examples of how the future of customary law could be determined.

9.2 DEALING WITH AUTHENTICITY ISSUE

Before an African custom is relied upon there must be proof that it actually exists.¹⁹⁰ One of the common steps of the adjudication process is to call witnesses (law of evidence) that are familiar with the custom as was in the case at SM Otieno's saga when grave diggers and other members of his community had to give testimony in court of the land concerning their knowledge of burial customs¹⁹¹ as a procedure in asserting that such customary law really exists. After the approval the court may take judicial acknowledgment of it, that is to say, its existence will be taken for granted without any further proof. Another procedure is relying on the doctrine of precedent, that is, relying on earlier decisions in which the same custom was an issue or by relying on scholarly work (a book) of authority.

In South Africa customary law is even more developed due to the social realities between different races than in Kenya. One of the cardinal reasons may be linked to the social history of the people of South Africa and the harsh experience of the apartheid regime.

In Ghana and Nigeria the role of Chiefs is still paramount in the judicial system. Since the Chiefs are in touch with reality of social life of the people, they are the best judges at customary law system. They understand the language, the beliefs and the traditions of the

188 <http://www.h-net.org/announce/show.cgi?ID=163898>

189 *Idem*

190 Saleemi, Ahmad Nisar, *General Principles of Law Simplified*, Saleemi Publications Ltd., 1992, p. 24.

191 Cohen, D.W. and Atieno Odhiambo E.S., *Burying SM: The Politics of Knowledge and the Sociology of Power in Africa*, in Peter Onyango, Cultural Gap and Economic Crisis in Africa, FirstPrint Publishing, England, 2010, p. 102.

people. In other words they are the right witnesses of the customary law in such contexts.

The litigants at customary law will first approach the elders, kins (as in Manslah Courts) and the chief before they take the matter to the customary tribunal. The procedural technicality may become cumbersome in the process of developing African jurisprudence.

Impartiality of the judge dealing with the customary cases may be compromised. The person acting as the judge may have some affinity to a party thus compromising the authenticity of the court. On the one hand, as in a given defined social set-up almost everybody knows one another and may have some sanguine relations, it would be very hard to deal with the impartiality principle *nemo iudex in re sua* the concept that no man can be a judge in his own case. On the other hand, customary courts are effective in the law of evidence due to the proximity aspect. It is easier to expeditiously establish the truth in a social set-up in which all members of the community know who is who. It is perceived that traditional courts or customary courts are more legitimate than State courts due to the fact that parties are certain of the presiding judicial officers. The fact that parties know the judges should facilitate more credibility of the court and allow them confidence in the court decisions and adjudication.

African customary law has been recognised in Kenya and applied with the following limitations:¹⁹²

It must be compatible with the written law: thus as a source of law customary law is subordinate to legislation or written law, and in the event of conflict it must give way to the written law.

It only applies in civil cases or matters: thus customary criminal law is not a recognised source of law. It must not be repugnant to natural justice, equity and good conscience.

It only applies where it has not been included by the parties, whether by express contract or by the nature of the transaction in question.

192 N.A. Saalemi, *General Principles of Law Simplified*, Saalemi Publications Ltd., 1992, p. 25

Section 2 of The Magistrate's Courts Act (Cap. 10)¹⁹³ states that the claim under customary law means a claim concerning any of the following matters under African customary law: Land held under customary tenure; Marriage, divorce, maintenance or dowry; Enticement of or adultery with a married woman; Matters affecting status and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy. *Intestate* succession and administration of *intestate* estates, so far as not governed by any written law.

9.3 THE DILEMMA

Courts are *conditio sine qua non* for every human society and without them co-existence shall be impossible.¹⁹⁴ It is necessary to see how Kenya deals with its statutory courts and the controversies surrounding their existence especially in the new dispensation of the Constitution in 2010.

Kenya is a multi-ethnic and pluri-cultural society that accommodates several religions, traditions, people of different legal backgrounds with different legal perceptions and this should be the reason for promoting the cause of legitimate laws of the people.

Customary law is considered the people's law representing legal thoughts, culture, traditions and beliefs of the people towards the law. Obedience of established State laws anchors its success on the fact that people internalize their laws. In this manner the concept of obedience to law is not only based on order followed by threat of punishment but personal persuasive mechanism. In Kenya the sovereignty has been transferred to the people by the Constitution as opposed to the former that concentrated such powers to the State, *vis-à-vis*, State laws. The sovereignty of the people entrenched in the new Constitution connotes customary law or the law of the people as the main source of law in Kenya even if in practice it is limited source of law. Even though this is tacitly expressed it goes without

193 Cfr. E. Cotran, *Casebook on Kenya Customary Law*, 1995. Many authors of Kenyan Customary Law have made reference to this Act and the Judicature Act, the two fundamental legislations where Customary law is applied.

194 Cfr. Richard Kuloba, *Op. Cit.*

saying that the customary law found in every community in Kenya has a major role to play when it comes to the obedience theory and its recognition ought to be highlighted within the legal system. By assumption, law shall no longer appear as alien to people that it is supposed to rule. Further to this the objective of law as social rule that directs people in a given society to a certain conduct shall be achieved.

The discourse on customary law therefore is modern, current and innovative in the legal education in Kenya but rather more advanced elsewhere. It is also important to mention that statutory courts in Kenya are full of civil disputes related to customary law and judges have a task to play.

Quoting from the work of Justice Richard Kuloba: the bulk of magistrates, civil jurisdiction relates to domestic matters concerning husbands and wives, parents and children...¹⁹⁵ It becomes obvious in this case that African customary law cannot be ruled out and its future is promising.

It is high time that the development of African Law or jurisprudence takes grips of the legal culture of the indigenous (native) people in terms of the legal traditions that can still be traced in the existing communities as has been discussed earlier. Legal meaning and significance of law that affects people must be linked to the customary law otherwise people will always *sub silentio* be foreign to their laws leading to its disobedience. What is known as bad laws that motivate citizens to call for law reforms in our countries is related to the fact that state laws are foreign and too far from the life reality of the people it is supposed to serve. The consequence of all this is the mother to perpetual impunity, overt corruption, rejection of international law and increasingly fragile economic system.

Another consequence is the weakness seen in the Family institution in which couples/spouses tend to formulate their marriage contract using non-African legal systems whose perceptions may have little to do with legal values attached to African Marriages

195 Richard Kuloba, *Courts of Justice in Kenya*, p. 58

and divorce systems. A legal system that does not emerge from legal traditions of the people shall stand to be weak, artificial and ineffective.

9.4 INTRIGUING QUESTIONS

Despite the glory we attached to the study of customary law and the development of African jurisprudence in the previous chapters it is a question of intellectual balance that we address the failure in the system. African law has been seen in terms of superstitions, belief in African Magic, witchcraft and supernatural powers¹⁹⁶ that haunt individuals and their communities creating fear and causing people to behave in a certain way.¹⁹⁷ It is true that many thinkers have subjected customary law to the realm of mysteries and beliefs. Yet customary law is in reality distinct from mere social customs or beliefs in supernatural powers. As has been explained under the nature of customary law, it is worth repeating that, not all customary practices can be considered customary rules or norms with coercive nature. It is important to distinguish customary law from general societal practices that lack the aspects of law as we have discussed in the earlier chapters.

9.4.1 Witchcraft

As has been demonstrated before, witchcraft¹⁹⁸ in several African traditional communities comes at a point where it violates certain natural rights and principles of justice as presented in the international law. The form of witchcraft exercised by people in the African traditional societies was in form of spell. The victim and the sorcerer were sometimes unaware of its imposition. Such spells were alleged to affect humans and cattle in certain communities... creating controversies, conflicts and suspicion.¹⁹⁹

196 G.S. Snell, *Op. Cit.*, pp. 76f.

197 G.S. Snell, *Nandi Customary Law*; p. 1.

198 Cfr. O.K. Mutungi, *The Legal Aspect of Witchcraft in East Africa with Particular Reference to Kenya*, 1977.

199 Cfr. G.S. Snell, *Op. Cit.*, p. 76.

Gusii community in Kenya has launched witch-hunting for those who have been believed by the community as witch and have been alleged and condemned to extrajudicial killing in open day lights by youth.²⁰⁰ Those who have been indulged in witchcraft with fatal consequences have been condemned despite the rule of law in the Kenyan legal system.

Witchcraft Act (Cap. 67) in Kenya prohibits witchcraft practice even if this law is not fully enforced and no concrete prosecutions have ever been effected by the formal Courts. However, witchcraft is still considered an act of murder, therefore, a crime of felony at common law regime.

It is not practically easy to bring justice to the victims of witchcraft in Kenya since it all belongs to customary law jurisdiction which has no authority over criminal cases. Customary law in Kenya is applicable exclusively in civil cases making the trial of witch-hunting more complicated in the formal Courts.

Mob justice and murdering of persons believed to be witch in the Gusii community in Kenya is a felony and is equally a criminal offence largely specified in the Penal Code.²⁰¹ Yet it is scientifically difficult to prove deaths or injuries caused by witchcraft or guarantee forensic experiments to establish criminal act in what the Romans would call *nulla poena sine leges*.

Has Kenyan law enforcement authority taken any step to bring the culprits or perpetrators to justice according to the law or rather, is Witchcraft Act ripe in Kenya? If not, why hasn't there been any prosecution against the perpetrators? Failure to establish customary courts to deal with customary related offences is the cause of failure to bring justice to the victims of witchcraft crimes in Kenya.

Therefore, those involved in witch-hunting in Gusii region are doing so at the behest of those bankrolling them to eliminate their enemies either real or just perceived. Even when a witch is caught red-handed, the court has always demanded for a scientific proof that his tools of trade are capable of harming anybody. It is

200 See the introduction page.

201 The Penal Code, Cap. 63 "Murder and Manslaughter"

therefore upon the government to protect its citizens and bring this primitive practice of killing innocent people. These are clear case of cold blood killing, which could easily be translated to genocide or massacre considering the number of people who have been victims.²⁰²

The Constitution of Kenya provides for the “rule of law” principle meaning that the lives of Kenyans should be governed by established and recognized legal principles administered by the judicial authority and procedurally enforced by the Government. The jurisdiction of customary law over criminal offences needs urgent re-evaluation.

Snell Geoffrey Stuart argues that penal law of ancient communities is not the law of crimes but the law of wrongs (civil offences). Referring to Nandi Customary Law the writer hints that there is distinction between tort and crime though not in the same concept of the English Common Law.²⁰³ Some offences in Anglo-Saxon law correspond to offences in the Nandi Customary Law.

In regard to such customary law related criminal offences, the Government shall have to reconsider the jurisdiction of customary law. The limitation of the jurisdiction of customary law to civil offences shall allow many other criminal offences to go without prosecution. *Onus probandi* lies mainly with the Office of Prosecutor and criminal law which have excluded customary criminal offences dealing with such offences as *res judicata*.

9.4.2 Female Circumcision among some Tribes

African customary law finds itself in the same conflict when it comes to the application of international human rights principles in the national justice system which tacitly accommodates customary law. In what is seen as a violation of human rights of girls, some ethnic groups in Kenya still observe their customary rules that impose female circumcision on girls. Under human rights law this is

202 Commentary By Leo Odera Omolo - Posted by African Press International on 21 June 2008.

203 G.S. Snell, Op. Cit., P. 78.

an offence that can be prosecuted, yet it is permitted in customary law of such social groups. In respect to the Constitution of Kenya the general principles of the international law shall prevail in case of conflict of laws.

Some human rights lawyers refer to the customary female circumcision with the term, FGM (Female Genital Mutilation). If mutilation²⁰⁴ of genital organs of a woman is a violation to the natural rights, hence, a criminal offence against womanhood, how about the traditional circumcision?

Among the Kuria people in Kenya the practice of female circumcision is still rife as human rights activists allege that such circumcisions are mutilations. There is a sharp contradiction of concepts attached to the alleged offence.

Human rights law addresses such offences as “child abuse” therefore, an international crime against the natural rights of a person.

Rwiza states that African humanism does not alienate the individual by considering him or her as existing totally independent of society.²⁰⁵ Circumcision is a common initiation rite among various social groups that have it as a rule within their customary laws. It would be right to harmonise Western concepts with local concepts and form universally acceptable principles that will rule over traditional customary practices that are found to be inconsistent with the written laws.

The conception that customary law is a community law means that a given social group accepts and uses the customary practice without questioning its reasonableness and relevance with time. The communities lack customary courts that would make rulings on such irrelevant customs and coerce the elders to prohibit their applications within the local communities. The challenge of human rights in this context shall be reduced.²⁰⁶ Resentment against general

204 Mutilation is a Western terminology whereas African customary law prefers circumcision.

205 Richard N. Rwiza, *Ethics of Human Rights: The African Contribution*, p. 155.

206 *Supra*.

principles of international law as has been discussed earlier is linked to the reality that African customary law has not been given a chance in the judicial system in Kenya.

The promotion of human rights at the national and international levels is a justification of the need to develop African jurisprudence seeking a *compromis* between the two domains of law. As many African States adopt constitutionalism and the rule of law within their jurisdictions, certain norms and principles found in certain customary law may be accommodated or suppressed depending on the needs.

As long as human rights principles are anchored on universal natural rights, and Africans are part and parcel of the same humanity, African customary rules that are found to be necessary for the sake of order in society should be integrated.

Such harmonization shall be faced with conflicting ideas. Some scholars argue that Africans lay emphasis on the “we” ethics whereas Western scholars insist on the “I” ethics. When it comes to law, there is no law for an individual but law is for a group, a community or society of men and women that have certain values in common and agree to accept and use such social rules to guide their conduct. In African wisdom Chief Ijebu-Ode of Nigeria once said: “I conceive that land belongs to a vast family which many are dead, few are living and countless numbers are yet unborn.”²⁰⁷

Considering the second and third generations of human rights, culture of the people is a key issue that cannot be constitutionally neglected. African customary law is covered under the provision protecting people’s right, cultural right, and intellectual property right.

Universality issue is treated in a manner that human rights belong to the humanity. In other words, the Universal Declaration of Human Rights is an international treaty that binds on all state members *erga omnes*.

207 George W. Kanyeihamba, Op. Cit., p. 148.

Female genital mutilation, also known as female genital cutting, has been condemned by the international human rights activists as a violation of natural rights of the person. The international community has its reasons for condemning FGM yet the communities practising such customs hold relevant points to justify the act.

Customary law uses female circumcision as an agreeable term whereas the use of female genital mutilation sounds controversial and unacceptable. Some women from the customary law communities, find the term genital mutilation offensive to the circumcised women who do not necessarily think of themselves as mutilated or of their family members as mutilators. Mutilation terminology is also used to insult people and the cultures from which they come. Women health and human rights activists coined the word FGM that has become a very effective policy and advocacy tool under the United Nations²⁰⁸ and human rights circles.

9.4.3 Dowry Law

The traditional practice of dowry in many customary marriages in Africa is also involved in the conflict between the general principles of the international law and African customary law. Dowry or bride-wealth is the payment in cash or in kind by the spouse or his family to his bride or vice versa.²⁰⁹ The use of dowry has been long practised as we have seen in the Roman civilization but has tended to disappear in some parts of the world with time. In several African customs dowry is a significant legal institution in customary marriages. In patrilineal practices, it is the man to pay dowry whereas in the matrilineal practices it is the woman to pay dowry to the family of the man before marriage.

In India there is legislation to regulate dowry institution. The ancient civilizations had cases of dowry practices and this includes the Anglo Saxons and the Romans. Ancient biblical stories also show that the Hebrews had dowry in their customary laws to validate marriage. Like the FGM, dowry is alleged as an offence against

208 Cfr. Female Genital Mutilation: *A Guide to Laws and Policies Worldwide*, Zed Books Ltd., 7 Cynthia Street, London, N1 9JF, 2000.

209 Refer to family law.

womanhood. It is considered a contravention of women natural rights or of that of men especially from the perspective of the human rights activists. It is alleged to be inhuman and a crime violating natural rights to liberty of the spouse. Yet African customary lawyers have a different version about it.

As has been testified earlier African customary law still recognizes, accepts and uses dowry as a legal tool to validate marriage. Considering the nature of customary law, as unwritten system of law, it is necessary to note that African customary marriages had no written contracts. In customary marriage contracts dowry has played the role of validating the performance of such contracts. Dowry has been instrumental in proving the validity of marriage in Kenya and an assurance for the bond between the married couples and their respective communities. In several customs, the return of dowry would mean the breakage of such contract, vis-a-vis, the divorce. The function of dowry has been the protection of the spouse against the real possibility of ill treatment or breach of the contract. It is a conditional gift that is supposed to be restored to the party in case of divorce, abuses, or other allegable offences.

The question of dowry in family laws has been traced down to the ancient Roman time and has been identified in several customary laws²¹⁰ as Mwalimu states in his book.

In Nigeria, customary marriage laws are well developed than in Kenya and other common law countries. There are customary courts in every federal state in Nigeria dealing with disputes linked to customary marriages. Gender and the law always come under scrutiny today. Women status, treatment and violation of rights of women by customary and Islamic law have made it possible for the Nigerian law to entrench the question of gender in her Constitution and statutes.

In India the Hindu religion made it possible for the country to come up with legislation in 1955 and 1956 giving full rights of inheritance to widows and daughters, enforced monogamy and

²¹⁰ Charles Mwalimu, *The Nigerian Legal System, Public Law*, Vol. 1, Peter Lang Publishing, Inc., New York, 2005, 2007.

permitted divorce on easy terms. In 1961 legislation forbidding dowry undermined the traditional Hinduism. However, the strength of social custom in India proves that the law cannot fully do away with the customary practices of the people.

In the African traditions, marriages are arranged and a need for an intermediary is condition *sine qua non* for customary marriages. In this case bridewealth or dowry marriage custom plays a very significant role as a symbol of agreement in the African customary law system. This can be in form of precious metals, beads, earrings or clothes. In many cases dowry marriage system involves animals since the animals are considered symbols of wealth or property.

Case No. 1²¹¹

Momanyi Nyaberi (Applicant) v Onwonga Nyaboga (Respondent)

Kisii Customary Law in respect of marriage and divorce—Abuse by former husband of Customary Law regarding children.

The court held (11 December 1953) that the practice, which appears to be developing amongst the Kisii, whereby a husband refuses his wife a divorce and then unjustly invokes the Customary Law to claim all the children which she may subsequently have on the ground that bride price has not been repaid to him, is an abuse of the Customary Law and repugnant to natural justice.

Judgement: The facts are not in dispute. The District Officer, Mr. Gardner, claimed that he was giving judgement strictly in accordance with Kisii Customary Law. In our view that is not wholly correct. It is true that by the relevant Customary Law any children sired by any man other than the wife's husband belong to the husband, but we consider that the Customary Law does not give a husband the right to refuse a divorce to a woman who clearly desires it, and to which her father has agreed. Particularly, this is so in cases where the woman had no children by her husband. Childlessness in fact is a very common ground for divorce among Africans, and normally in such cases a divorce would be arranged between the two families concerned. These days there seems to be a practice

²¹¹ Cotran, E. *Restatement of African Law*, Vol. 1, pp. 182f

developing amongst the Kisii, whereby a husband refuses his wife a divorce and then unjustly invokes the Customary Law to claim all children which she may subsequently have on the ground that he has not received back his bride price. This practice we consider to be an abuse of the Customary Law and moreover, repugnant to natural justice. In saying this we, in no way interfere with the well established custom mentioned above, whereby any children born of a later irregular union, involving no question of a second marriage by Customary Law, belong to the husband of the regular union.

Accordingly the present application is successful. Momanyi is entitled to the woman and both the children which he sired by her, and the usual arrangements should be made for the payment by him of bride price and the repayment to Onwonga of the bride price which he formerly paid to the woman's father. Momanyi is to get the costs of the suit.

9.4.4 Bill On Dowry In Kenya

In 2007, the proposed marriage bill may dramatically change the scenario of dowry marriage system that is strongly represented in the customary marriage. The way Kenyans view marriages, dowry, divorce and come-we-stay relationships will change tremendously when the bill passes into law.²¹²

The customary law perspective treats dowry as a symbol of contractual marriage when there is no written agreement involved. The proposed bill elicited controversy and misconception on Kenyan legislative framework on marriage laws dating back to the British Protectorate. Kenya's Marriage Act was enacted in 1902, the African Christian Marriage and Divorce Act in 1931 and the Matrimonial Causes Act in 1941. There were some procedural amendments made in the 1960s but nothing substantial has been done to come up with legislation compatible with the needs of socio-economic development. The question of improving family law is long overdue causing some substantial conflicts with residual laws across the nation.

212 Samuel Otieno and Dorothy Ruto, "Bill on Dowry, polygamy and come-we-stay", in *The Standard*, 14 August, 2007, Nairobi. See the Marriage Bill Law Report.

9.5 LEGAL PRAGMATISM

Law works within a given practical social framework. Therefore the future of customary law in Africa can only be real when expressed in the modern judicial context. The best examples are the on-going judicial reforms that should not leave out customary law and its jurisdiction from the reform agenda.²¹³ Elders and the council of wise men and women²¹⁴ require education, recognition, formation and inclusion in the modern system. Community elders that are recognised as wise men and women should not be left in limbo. They should be helped to fit in the new judicial system. By doing so, proper jury of elders should be institutionalised and accommodated in the modern system and legal mind-set. The modernity in our legal system, the use of social media, and the use of communication and information technology, should not exclude the customary law from its agenda. It is in this modernization trend that odd practices in the traditional customs can be transformed to match the requirements of development. It is necessary for such elders and their councils to understand the challenges of our modern time without losing grip with the African cultural values and what they stand for.

The jury of elders must consist of persons with proven integrity and moral standard. They should be legitimately picked from the communities where they live. They should have family values and persons with no corruption or impunity. They should not be persons with criminal background. They must be endorsed by the members of their social group that will vet them accordingly and approve them. Modern courts will rely on their unbinding opinions in order to make fair rulings on customary trials. It is through this strategy that Africa shall terminate the existing dichotomy in her laws.

213 Reference made to law reform and judicial activism in Kenya

214 In the case of Kenya, we are referring to elders whose opinions determine the practice of customary law. We are not referring to administrative Chiefs and their subordinates since they are Government employees. Elders are not Government employees but people's employees. Countries such as Burundi have special institutionalized organs of eminent elders whose leadership is based on wisdom of African men and women. Their recommendations on cases coming from their jurisdictions are handy for the formal courts yet their decisions are not binding. They are traditional judges in quotes. Multi-ethnic countries such as Kenya can borrow a leaf from this experience in order to bridge the gap between statutory and customary law.

It is not said that customary law is for the ignorant and un-educated folk languishing in the poor rural sector²¹⁵ or when you talk about it then you are primitive, cruel, brutal, uncivilised or unlearned. It is not said that those who follow traditions and customs are primitive, conservatives, and those who think outside the box. The negative attitude about the tradition of our laws is an ingredient to the eventual failure to develop African jurisprudence.²¹⁶

Inclusive agenda must be entrenched in the law reform process so as to accommodate cultural values in order to re-enforce African jurisprudence in the long run.

The role of African courts cannot be taken for granted in this hot debate as it is the most practical way of asserting cultural values in the legal system through case-by-case law. Court is a system of rules for social ordering.²¹⁷ It is the court to interpret customary rules and apply them in the administration of justice in society.

In the following chapters we shall discuss the trend of court system and how this can rapidly enhance the development of African jurisprudence.²¹⁸

215 See the introduction and preface. See also Chapter 2.12

216 David William Cohen and E.S. Atieno Odhiambo, *Burying SM: The Politics of Knowledge and the Sociology of Power in Africa*, p. 67. On page 43 the author illustrates the knowledge gap between the few elite and their lifestyle in Kenya and that of the ordinary citizens. In the history of Kenya, the ordinary citizens' life has been sidelined by their very educated sons and daughters some of whom managed to achieve education at Oxford in the UK, Harvard in the USA, Cambridge in the UK and others. When they terminate their studies their mind-set is that of the Westerners and their attitude towards the people who brought them up is totally negative. Their achieved education only benefits them and awards them good and comfortable Western life in Kenya.

217 Richard Kuloba, *Courts of Justice in Kenya*, p. 7. Justice Kuloba adds that the major task of courts is the specific application in particular lawsuits of the general rules. It is the role of the court to interpret the law.

218 Analytical comparative case studies in chapters five and eleven are meant to illustrate the future of customary law in Kenya and other African States.

CHAPTER TEN

CRITIQUES

10.1 INTRODUCTION

It is now right to provide some critical analysis of customary courts and to question ourselves if reviving them as has been done in some African countries would make sense or not. Despite all positive attributes to customary courts it is also right to objectively look at their negative aspect and why people rapidly lose confidence in them today. The existence or non-existence of traditional courts in some African countries should be supported by reasons and circumstances that lead to such decisions. Generally, some failures could be applied *erga omnes* across the continent following some agreeable challenges. It is necessary to have a quick look into such contentions and debates.

10.2 LACK OF CONFIDENCE IN THE COURT

The operation of customary law tribunals or community courts, are not well understood by policy makers and development partners today. *Gacaca* traditional courts in Rwanda find it difficult to win the confidence of the people when they are linked to political witch-hunting and biasness in the judicial process in the modern Rwanda. The tribunals are influenced by other forces especially people in power making it a challenge to define what we exactly mean and understand by customary or traditional courts²¹⁹. Courts as the fundamental part of the system of justice must win the confidence of the people first and the experience of Rwanda presents a peculiar reality.

219 Cf. Cutshall, C.R., *Justice for the People: Community Courts and Legal Transformation in Zimbabwe*, 1991.

10.2.1 Rwandan Experience

In modern Rwanda, the *Gacaca* customary courts are designed in the ancient framework to provide service of justice in line with the statutory courts despite all the criticism as per the veracity of the function of such traditional African Courts and the political influence. The same plight is also felt with Kangaroo courts or Kangaroo trials in Kenya whose objectives and constitutional status remain unclear.

It is obvious that one of the reasons why customary courts in Rwanda had to fail is that such courts deal with people who know themselves too well and may not be practical in administering justice to the offended and the offender. It is again self-explanatory that issues that deal with criminal offences such as genocide may not find its proper interpretation in customary courts in which the offence had been politically motivated. It is among people who are politically organized in terms of families, clans, religious groups or ethnic groups. Adjudication in such courts may not respect the principle of impartiality of the judge and win the confidence of the parties. The difficulty in distinguishing the difference between criminal and civil offences at customary law also complicates the situation of Rwanda.

In disregard to the lack of scientific characteristic of customary law, as has been claimed by English empiricists/positivists, the functionality of African customs and legal traditions cannot be challenged. Once again, the praxis of law in general pinpoints the characteristics of facts (facts oriented intentions), *animus factum*, happenings contrary to abstract ideas. Law is not like axioms in mathematics that deal with formulae in form of exactness such like $1=1$, but sociological phenomena that may vary according to given contexts. They are functional customs which are generally agreed on by people whose life is affected by them. In this sense the law is functional (utilitarianism theory of Bentham), practical and concrete socio-economic phenomenon. Received laws will only bear meaning when people succeed to assimilate them within their own legal cultures, traditions and social framework without losing

their own true concepts. Knowledge of law should not neglect the customary law of the people, if we truly believe in self-determination principle of law and sovereignty of the people as in the principles of international law.

Every known world legal system has its foundation anchored on the customary law of the indigenous people (populations). English Law is the best example of a world legal system originating from the Anglo-Saxon customs or court precedents as known in judge-made law and introduced in the colonized States (at least members of the Commonwealth nations).

Ancient African regimes or pre-colonial Africa already had their judicial systems chaired by elders or wise men as found in different books of history, sociology and anthropology. Along this line, certain restrictive customs were respected and observed by the people within geopolitical and cultural boundaries from time immemorial. At common law customs that have been observed by a people from time immemorial are considered law, making some scholars refer to common law as common sense.

Legal systems in the new states realized the importance and the crucial need to recognize customary laws within the Constitutions. In Kenya, the colonial regime had in place, customary tribunals dealing with cases such as family law (Marriage Act), law of succession, burial rights, and property law. There were ways African societies dealt with civil and criminal offenses in the pre-colonial period: civil and criminal litigations, and the administration of justice in general were done in a systematic manner. Several cultural historians and ethnographers do affirm in unison that Africans have had customs with legal aspects that are defined as “customary law”. This is what is considered legal customs and therefore, enjoys the full sense of “law”. India, Ethiopia, Somalia and Kyrgyzstan are some of the nations whose consideration of customary law has been outstanding in the development of customary law. South Africa has put emphasis on the native law in respect to their harsh experience during the apartheid regime and after.

10.2.2 Kangaroo Court – Kenyan Experience

A **kangaroo court** or **kangaroo trial** is a colloquial term for a sham legal proceeding or informal court. The outcome of a trial by a kangaroo court is essentially determined in advance, usually for the purpose of ensuring conviction, either by going through the motions of manipulated procedure or by allowing no defence at all, and the book of by Justice Kuloba could shed some light on this²²⁰.

A kangaroo court's proceedings deny, hinder or obstruct due process rights in the name of expediency. Typically, a kangaroo court will deliberately abuse one or more of the following rights of the accused:

- Right to be presumed innocent until proven guilty
- Right to control one's own defence e.g. selecting one's own defence counsel
- Right to hear a full and precise statement of the charges made against the accused
- Right to have adequate time and resources to prepare a defence against the charges
- Right not to incriminate oneself
- Right to summon witnesses
- Right of cross-examination
- Right to introduce evidence which supports acquittal of the accused
- Right to exclude evidence that is improperly obtained, irrelevant or inherently inadmissible, e.g., hearsay
- Right not to be tried on secret evidence
- Right to exclude judges or jurors on the grounds of partiality, prejudice or conflict of interest
- Right to have a verbatim stenographic record of the trial proceedings created

220 Cfr. Richard Kuloba, Op. Cit. "Basic Cultural Court Conventions".

- Right to have no interference or undue influence made by external agencies e.g. political or military leaders
- Right of appeal against conviction.

10.3 THE FATE OF CUSTOMARY COURT

10.3.1 Ghanian Experience

The experience of Ghana²²¹ seems to bring the point of enhancing customary law closer to our expectations in which the role of chiefs is highlighted in the customary law. In Ghana there is National House of Chiefs that consolidates the customary law jurisdiction and its role in the national dialogue.

The advantage of traditional tribunals in Ghana is that they are more accessible to the ordinary citizens and their functions make quick response when it comes to the dispensation of justice. It avoids the clog of cases in the formal law courts where there is delay of justice due to bureaucracy in the system. The proceedings are easily understood by parties because they use the vernacular language and avoid the legalese. They provide the community with a sense of ownership and social cohesion.

They encourage mediation and reach decisions that are restorative and tend to rebuild community relations as opposed to the formal judiciary. The laws applied in the customary tribunals tend to be flexible and take into consideration local values and mores of the people.

The customary tribunals are crucial whenever the state institutions are unable to reach the people. Whenever formal institutions are unoperational because of civil war or something similar – the customary tribunals are handy in accessing justice. In Sierra Leone, Somalia and Uganda where civil war has been

221 Roberto Danino – Senior Vice President and General Counsel of The World Bank, “Leadership Dialogue with Traditional Authorities”, Kumasi, Ghana, December 5, 2005 on the Theme: Customary Law Systems as Vehicles for Providing Equitable Access to Justice for the Poor and Local Governance, the Peruvian Experience.

experienced for long periods of time, customary tribunals indeed served the communities.

The conference in Ghana highlighted the fact that Common Law Africa it is true that the judiciary has not succeeded to avail justice to the people and their communities in the quickest way possible. It is necessary to have regular ties and consistent dialogue with all social actors involved in the process of justice.

The demise of paramount chiefs in Kenya created a loophole in the development process of African customary law. Chiefs could be the custodians of customary law since they live with the communities but their role was linked to the colonial powers that made them become irrelevant to the indigenous custom. Chiefs in Kenya were misused by political regimes that made them taint their images in the communities that they were supposed to serve.

10.3.2 Kenyan Experience

The history of Kenya's judiciary can be traced back as we saw earlier, to the East African Order in Council of 1897 and the Crown regulations made thereunder, which marked the beginning of a legal system in Kenya. It was based on a tripartite division of subordinate courts: Native courts, Muslim courts and those staffed by administrative officers and magistrates. On the other hand a dual system of superior courts was also established, one court for Europeans and the other for Africans and this was short-lived.

Realising the need to have dispute resolution organs, village elders, headmen and chiefs were empowered to settle disputes as they had done in the pre-colonial time. The traditional dispute resolving organs gradually evolved into tribunals with recognition in 1907 when the Native Courts Ordinance was promulgated.

The Chief Native Commissioner was then authorised to set up, control and administer the tribunals. The ordinance also did this at the divisional level of each district and authorised the governor to appoint a Liwali at the Coast to adjudicate over matters among the Muslim community.

Appeal could be made to the District Officer, District Commissioner and finally to the Provincial Commissioner, and the final appeal lay with the Supreme Court.

In 1962, the African Courts were transferred from the administrative level to the Judiciary. In 1963, a formal, independent and impartial judiciary was set up. The independence Constitution ruled that the Supreme Court had the original, unlimited jurisdiction over criminal and civil matters over all persons regardless of their races or ethnic considerations. Judges were to be appointed by an independent judicial commission and Court of Appeal and Kadhis' Court were established by the Constitution. In 1964, when Kenya achieved the status of a Republic, the Supreme Court was replaced by the High Court.

Consequently in 1967, three major laws were enacted: The Judicature Act, Cap. 8, the Magistrates' Courts Act Cap. 10, and the Kadhis Court Act Cap. 11, and they helped streamline the administration of justice in Kenya.²²²

The fate of customary courts in Kenya has been bad from the colonial time to independence. Even the Constitution of 2010 has not made customary courts any better as it has not provided for them. The hope is left in the hands of legislators to see its worth and make legislation to develop them.

Another legal challenge in line with the Customary Law in Kenya can be noted in the burial right and the law of succession in which the main tendency is to refer to the Customary Law of the parties. The death of SM Otieno that sparked a judicial debate in 1986 set a precedent. The immediate question is, which law rules burial in Kenya? Who should have rights over the estate of the dead, his immediate kin or community members? Which are the rights of the widow after disputable death of husband? Questions related to community land that features in the Constitution of 2010 show that African customary law has potential. Community lands among the pastoralists in the northern region of Kenya and the application of the African customary laws in resolving disputes and the role of

the council of elders is felt among the Borana, Rendille, Gabbra, Samburu, Somali, Turkana, Pokot, Maasai and others. It is on this ground that interest in the African customary law will have to be addressed by legislation and not the small provision that exists in the Judicature Act of 1967, Article 3(2).

10.3.3 Ugandan Experience

The case of Uganda is interesting. Traditional or customary tribunals were abolished in 1966 by the post-independent Government, but were later re-introduced in 1986 when the National Resistance Movement (NRM) took power. Resistance Committee Council Courts (LCCs) were set up. The regime attempted to provide “grassroots” justice as part of the struggle against a hitherto oppressive government. The attempt was to bring justice closer to the people and to reconnect the people to their customary traditions²²³.

10.4 PUNISHMENT IN CUSTOMARY LAW

There are two theories of punishment in customary law, citing the work of Karibi-Whyte²²⁴ with some of dogmatism. There are retributive and deterrent theories found in the nature of African customary law. The two are complementary and in some case may not be distinguishable. They contribute to the reformation of the offender or individual criminal or any of the class.

From the dogmatic perspective African customary law regards punishment as a curse to the offender and perhaps to his or her entire family. The law in this case is linked to the appeasing of the ancestors (ancestral law). For fear of vengeance or revenge from the ghosts or spirits, individuals shall observe the law. This lame argument is challenged by Taslim in his meticulous work on forms of punishment in customary law, affirming the flexibility of judgment in civil disputes. He does not support the dogmatic theory saying

²²³ World Bank, “*New Frontiers of Social Policy: Development in a Globalizing World*” – socialpolicy@worldbank.org

²²⁴ A.G. Karibi-Whyte, “*Sanctions in Nigerian Customary Criminal Law*”, in Bello, E.G. and Prince Bola Ajibola, SAN, *African Law and Comparative Public Law – Essays in Honour of Judge Taslim Olawale Elias*, p. 550.

that African courts had the same principle of *audi alteram partem* (all parties must be heard) just as European courts²²⁵. Judicial decision at customary law and the judicial decision at common law respect modes of adducing evidence.

At customary civil procedure, the offender shall be ordered to redress the injury through exchange with animals (compensation). In several customs cows, goats, camels or donkeys would be used as pecuniary measures to punish the offender. In some cases the offender could be punished by exclusion (prison-like condition) in which he may be barred from participating in community functions or drinking from the same pot. This is to deter the offender from repeating the same offense.

The work of T.O. Elias offers what I would consider the best illustration of the concept of sanction at African customary law²²⁶. John Austin's theory of the command from the commander, or command from the sovereignty as a fundamental aspect of law is taken care of in the African customary criminal law. Criminal offences such as felony were considered and due penalty was given to the perpetrator accordingly. Yet it is clear that in many customs there was hardly any structured prison as in the European context. Nonetheless, the obligation aspect of law is quite evident in the African legal system. Compulsion as sanction refers to obligation or to the answer to why we should obey the law. In the rule of law system, law is the social control through the systematic application of the forces of politically organized society²²⁷. Besides force there must be some other reasons that compel people to obey the law which include indolence, sympathy, deference, fear, and reason.

Punishment in all its facets at customary law aims at producing varied effects and it would satisfy various needs of members of the society. The concept of punishment at customary law is projected to mean sociological sanctions, psychological sanctions, economic sanctions (pecuniary) and moral sanctions. Many legal writers agree that the main goal of law is to establish social equilibrium in the

225 T.O. Elias, Op. Cit., p. 243.

226 Cf. T.O. Elias, *The Nature of African Customary Law*, pp. 56-75.

227 *Idem*, p. 57.

human society and likewise, this is what law was doing in the pre-British Africa.

Punishment is perceived at customary law as psychological and spiritual contrition other than corporal and physical punishment in terms of confining a convict in a closed house (prison). There is no sufficient information of cases of mutilation, amputation or disfigurement of the body of a convicted person in the records. Such penalties, through compensation in civil cases and retributive justice, were widely practised by various communities such as Yoruba, Igbo, Kikuyu, Luo, Kamba, Zulu, and others.

Some learned authors assert that retributive justice is deep-rooted in the instinctive and emotional nature of human beings. A group may recognize vengeance as instant punishment of the offender as reported by some studies in African law.

In some other contexts, assault would be punished by assault. Retribution also may take the form of expiation. For example, an act of arson would be punished through cleansing by blood, common among the Kamba²²⁸, Luo²²⁹ and the Gikuyu²³⁰ in form of an expiation through paying *ng'ombe ya mbanga*. Among the Luo in Kenya a goat must be paid in ransom by the offender as an act of ritual cleansing²³¹. The goat must be slaughtered and blood smeared on the offender to cleanse him from his offensive and illegal act. Ethically, the punishment shall correct the behavior of the person towards his community. Cases such as murder were treated with severity among many communities across Africa.

Societies with very limited and underdeveloped system of investigation of crimes make us understand that they would resort to other methods of preventing commission of crimes. The punishment

228 D.J. Penwill, *Kamba Customary Law*, Kenya Literature Bureau, Nairobi, p. 105.

229 Cfr. Jane Achieng, Paul Mboya's Luo Kitgi Gi Timbegi, p. 9.

230 Cfr. Jomo Kenyatta, *Facing Mount Kenya*, EAEP, Nairobi, 2011.

231 Gordon Wilson, *Luo Customary Law and Marriage Laws Customs*, 1968, p. 110. Goat of Unity: Diend rip- As soon as the husband of the girl is able to, he sends her a goat which is called the goat of unity or allegiance which symbolizes the new relationship established by the marriage.

is to instil into the individual sense of pain and suffering whenever the law is contravened.

Banishment or exclusion is used to deter the offender from committing the same offence. It is the emphatic denunciation by the community of crime.

Lynching and maiming a thief was to protect the society. Another measure was exclusion, in which the culprit was isolated from the society. Public ridicule also is used to deter a person from certain forbidden or illegal acts. All types of punishment are the reaction of the society from the threat or insecurity and the society's revulsion of the conduct²³².

10.5 THE PERSPECTIVE OF INTERNATIONAL JUSTICE SYSTEM

10.5.1 Bill of Rights

At this point, it is apt to consider the relationship between the International Law of Human Rights and its effect on African customary law. The truth is that the new tendency in legal development has a lot to do with the entrenchment of international law in the domestic laws. Through the process of adoption and adaptation, ratification, many young African states have opted to become *de jure* members of the international community and there is no much chance for them to develop their own legal systems without interfering with some of the international conventions. As has been demonstrated in the earlier chapters on principles of international law - *pacta sunt servanda* and *jus cogens* - bind all the state members to respect the treaties. Where domestic law is believed to contravene latter then the international law shall prevail. This narrows down the chance for African customary law to prosper and reach its desired status.

Customary Law v Common Law Marriages:A Hybrid Approach in South Africa,

232 Cfr. A.G. Karibi-Whyte, "Sanctions in Nigerian Customary Law", in Bello and Ajibola, Op. Cit. pp. 554f.

Marissa Herbst and Willemien du Plessis could provide us with some guidelines.

It is true that African customary law is in conflict with English Common Law²³³ and Marissa Herbst and Willemien du Plessis state that, “The conflict between customary law and common law is a theme that permeates the history of colonialism in Africa. In the English speaking colonies customary law was, according to Allott, recognised as a result of treaties, the economic benefit of allowing traditional leaders to handle traditional disputes instead of government courts, the idea that English law was too advanced to be understood by traditional communities and the fear of conflict. The so-called “repugnancy” test was introduced as a measure. Hooker states that “repugnancy is a term used to indicate that customary law will not be admitted ‘if repugnant to justice, morality, or good conscience’. A similar approach to customary law initially was followed in the Cape. With the introduction of the Black Administration Act 38 of 1927, formal provision was made that Blacks could conclude common law marriages but customary marriages were not recognised owing to their polygamous nature. The only favourable provision of the Act in reference to customary marriages was that a court could not find that the tradition of *lobola* (bridewealth) was against²³⁴ natural justice and public policy...”

The declaration of the Universal Human Rights in 1948 has demonstrated that several customary norms may not hang on for long. Worse still is the entrenchment of Human Rights laws in the national legislations of the member states of the United Nations, a force that may see most of the customary laws, especially in Africa, emulating the new trend of legal thinking. The pressure to generate African jurisprudence is long overdue and time is now for law scholars, practitioners and courts to promote this good course.

The recognition of cultural rights and self-determination principle contained in the same international law system cannot be assumed. At the same time, Human Rights provisions may not rule out the fact that populations have right to respect and use their

233 <http://www.ejcl.org/121/art121-28.pdf>

234 Op. Cit.

customary laws as long as they do not fail the repugnancy test and other conditions recognised by the international community.

See the Banjul Charter, Article 17-

“Every individual shall have the right to education.

2. Every individual may freely, take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State²³⁵.

The principle of the self-determination of a people as a nation has been highlighted also in the second generation of the human rights: economic, social, cultural human rights. Richard Rwiza refers to these rights as those of equality and liberty²³⁶. The contribution of Africa to the world legal systems requires the backing of the Governments and vigorous innovative research into the customary laws that many African people still conserve and practise. It would be a pity to let go legal traditions some of which make more sense to the indigenous people than the borrowed adopted legal systems that may not be in line with local conception of justice.

The second generation of human rights came as a response to the exploitative capitalist ideas introduced through European imperialism of the 18th-19th Centuries. It was embedded in the revolutionary theory of social context in its role in the French Revolution. Revolutionary approach may not explain how African states may strengthen their legal systems but it is all about distributive justice which is a basic element in the revolutionary trend.

Every single independent African state has its freedom to make policies that shall contribute to its holistic development.

Promoting research and funding African law project requires political will *in primis*. There is no way academicians may succeed with the project without the input and the asserted political good will of the ruling class. Promotion and protection of morals and

235 African Charter on Human and People's Rights 1981 (Banjul) – Article 17.

236 Richard N. Rwiza, *Ethics of Human Rights: The African Contribution*, p. 174.

traditional values of the people rely on serious commitments by the African intellectual community.

Allegations against the African customary law do not mean that all African states share the same difficulty in promoting African legal system based on African jurisprudence. It is a matter of fact that not all African traditional societies present themselves in the same framework. Pre-British African societies are classified into two groups according to Elias²³⁷ depending on how they are politically organized. Group A category in Elias' book are those with central authority, administrative machinery, and judicial institutions. Group B category are composed in a very rudimentary political arrangement without any strong central authority, administrative machinery or judicial institution. In the Group A category are considered more advanced with a paramount chief or King – in council. The Group B category is the chiefless societies whose political organization appears to be loose and fragile in pattern.

It could be tricky for African states to reorganize such societies and re-enforce their traditional juridical systems without some risks. Given the diversities and pluralism within every single state the restatement of customary laws would be an ideal project to carry forward. African states are experiencing a complex situation that make it relatively paradoxical to embark on pure African studies and render the research more profitable and useful.

Naturally it follows that we need to give credit to the few intellectuals who have dedicated their work to elevate African studies including African customary law. In the following chapter we shall discuss certain personalities whose contribution has made it possible for this manual to come up.

237 T.O. Elias, Op. Cit., p. 11.

CHAPTER ELEVEN

PROTAGONIST OF THE PRIMITIVE LAW

11.1 INTRODUCTION

Introduction to African customary law system cannot be exhaustive or conclusive in its coverage of the topic. The discussions have been more illustrative other than descriptive on certain particular sectors to avoid over specifications or the fallacy of over-generalization.

A part from the Anglo legal researchers that already had done some substantial work on the African legal discourse, there are some African personalities with vested interests in African legal knowledge such as legal philosophy. African nationalists and writers such as Dr. Kwame Nkurumah of Ghana, Jomo Kenyatta of Kenya among many others, had written books touching on African traditional societies and how they were organized. Referring to *Facing Mount Kenya*, a book written by Jomo Kenyatta of Kenya explains how the Gikuyu society was organized and structured. This reflects customary norms of the Gikuyu people and how it was operating²³⁸.

The modern time, or rather, post-modernism era represents in its totality increasingly complex societies and rapidly changing legal scenario²³⁹ that we cannot afford to ignore. The movement of populations has become more fluid making it possible for several people of all variant legal divides and walks of life to easily intermingle and intermarry. Consequently, this trend and new lifestyle is pushing us to make inquiry into the definition of customary law system and how important it is to our judicial system. The bottomline is not the status quo but to venture into the depth of legal meaning of our laws and how they can be relevant to the requisite changes. Questions such as how Africans were dealing with

238 Cfr. Jomo Kenyatta, *Facing Mount Kenya*, 1938.

239 Cfr. Daily Nation, Monday, 5 September 2011, pp. 2-3 of DN, focuses on how Customary Law still haunts Kenyan Judiciary. African customary law is not silent even if the regimes tend to thwart it and even remove it from the academic profile.

their criminal and civil disputes, how they understood the distinction between private and public law, and how they handled legal issues shall depend on African understanding of justice. We do not need to refer to English conception of offences and their differences in order to find out if African societies had similar views. It would be enough to analyze some of the customary laws as has been well illustrated by Justice Elias earlier in his book²⁴⁰.

11.2 THE DREAM IS ON

Another reality of our time is the rapidity of communication facilitated by digital technology that is responsible for accelerated social changes across the globe (social media). This makes movements and interactions more fluid than ever before. Intermarriages, interreligious marriages, and life in the modern cities are already proofs in themselves that it is high time that Africa embarked on *Customary Law Research Project* in order to come to terms with her rapidly changing socio-economic scenario and formulate documentations and codifications that should abet the legal conundrum in the current judicial system. Policy makers have no option but to embark on uniform Customary Law that would replace the Common Law system. To change Customary Law to produce uniformity will take a massive effort of legislation, public education in the village level, and responding decisions by courts and customary tribunals²⁴¹.

Persistent return to traditional laws of the African people in the modern courts is sufficient reason to call for an urgent need to address the problem from the ontology of the indigenous people before specializing in borrowed Anglo-American laws and Western legal concepts and theories that might be irrelevant. African independent states may not find it convenient to satisfy themselves with foreign laws or borrowed legal concepts from other cultures, such as English Common law as applied in the Commonwealth countries if they truly believe in law reform process. Failure to do so will push the

240 T.O. Elias, *The Nature of African Customary Law*, pp. 121ff.

241 J.W.Van Doren, "African Tradition and Western common Law: A Study in Contradiction", in Ojwang' J.B., and Mugambi, J.N.K., The S.M. Otieno case, p. 131.

African legal system to a weaker status in which African cultures, traditional legal values, moral values and the remaining relics of African traditional lifestyle risk total demise. In its place powerful legal systems shall emerge and fill the gap.

By and large, some modern African lawyers and law scholars (jurists) unfortunately tend to underestimate, undervalue and ignore the legal status of African customary law, and its relevance or its importance in developing real African jurisprudence. This tendency stands to be challenged by another school of thought that argues:

the basis and strength of a nation is rooted within its customs, habits, rules, beliefs and traditions that for years immemorial have been systematically and consistently considered as legal principles by the people subjected to them.

This is the definition given to customary law at Common law. John Henry Merryman²⁴² admits that though the scholarly attention given to customary law is great, its importance is slight and decreasing as we shall find later in this research paper. Yet the enthusiasm of working on customary law project has not faded away and more than ever law scholars are directing their attention to customary law as a core discipline that orientates the minds of African lawyers and jurists.

11.3 T.O. ELIAS ET AL

The best piece of work on African customary law has been found in the research by Hon. Justice Taslim Olawale Elias, an African jurist and law exponent born in Nigeria in 1914. Dr. Elias died in 1991 but left a great legacy for the African legal literature as a whole²⁴³. The first African jurist to hold the position of President of the International Court of Justice, an office that he held courtesy of being the first Chief Justice of the Independent Federal Republic of Nigeria and Attorney-General of the government of Nigeria. He served in various legal offices in his capacity as a researcher,

242 Wikipedia Free Encyclopedia, 2011. John Henry Merryman, *The Civil Law Tradition*, p. 23 (2d Ed. 1985).

243 Cfr. Bello, E.G. and Agibola, A.P.S., *Essays in Honour of Judge Taslim Olawale Elias*, Vol. II.

legal Counsel and lecturer²⁴⁴. He is honoured as the first African jurist with the academic acumen to attempt to explore a systematic professional study for the first time on African customary law, which was published in 1956 under the title “*The Nature of African Customary Law*”²⁴⁵. He endeavoured to clear all doubts and prejudices that world famous jurists have had about the African legal system for years. Dr. Elias was the first jurist to venture into the jurisprudence of customary law as it ought to be. Being vast with legal science and its conceptual, normative and subjective aspects, he had the courage to give the study of African customary law its real and clear meaning in the academic line.

There have been some African jurists interested in African customary law, mainly from the Western Region of the continent. Paul Kuruk from Ghana comes up with a description of customary law as the indigenous customs of traditional communities. Every ethnic group in Africa has evolved its own discrete customary legal system of rules that are binding on its members²⁴⁶. He admits that customary laws are not uniform across ethnic groups as we shall see later in this work. He alludes that customary law is in the folklore of the African people that require copyright protection.

Another emerging researcher is Kwame Akuffo – Re-Thinking African customary law has renewed controversy²⁴⁷ about African law as a legal discourse. New trends of African jurists are coming up with renewed vigour to define African customary law and to put it in its proper place among the world legal systems. The late Prof. Okoth-Ogendo²⁴⁸ of the University of Nairobi has been applauded by high ranking Kenyan academicians and politicians as an African

²⁴⁴ His knowledge of customary law and love for the legal culture of his people made him be what he became. Elias shall remain an exemplary and shining brain behind the study of customary law in African law schools.

²⁴⁵ T.O. Elias, *The Nature of African Customary Law*, Manchester University Press, 1954.

²⁴⁶ “*African Customary Law and the Protection of Folklore*”, by Paul Kuruk, Prof. University of Ghana: Temple University School of Law.

²⁴⁷ Kwame Akuffo, “*Conception of Land Ownership in African Customary Law and its Implications for Development*”, in *African Journal and Comparative Law*, Vol. 17, pp. 57-78.

²⁴⁸ H.W.O. Okoth-Ogendo, “*Customary Law in the Kenyan Legal System: An Old Debate Revived*”, in JB Ojwang and JNK Mugambi, *The S.M. Otieno case: Death and Burial in Modern Kenya*, Nairobi University Press, 1989, pp. 135-147.

law scholar with geniality and academic audacity. It is his knowledge of African traditional legal system, vis-à-vis the customary law that made him be one of the brilliant brains behind law reform process in Kenya. The late Prof. Henry Odera Oruka, an African philosopher will always shine among African scholars who have ventured into the study of African intellectual world, especially through his scholarly work²⁴⁹ in African philosophy. He clearly defines the distinction between the good and the bad spirits from African traditional perspective in a manner that shows the trail of justice. Justice Jacton Boma Ojwang is currently one of the shining judges that are keen on African customary law in the Kenyan Supreme Court created by the new Constitution of 2010 with vast knowledge and interest in customary law²⁵⁰. Dr. Willy Mutunga, Chief Justice of Kenya in 2011, is one of the legal personalities keen on customary law and Africanizing the judicial system by denying wearing English wig and gown as official and traditional attires defining judges at Common Law system. Dr. Mutunga has gone against the routine and his cause can be a great contribution to the great project on juridical value of customary law in African legal system²⁵¹ as a way of tracing identity of African legal system. The same love for African customary law had been expressed by his predecessors such as Justice Miller in the 1980s who saw a lot of meaning in the African customary law. Advocate Gibson Kamau has written on customary marriages and land law and customs in Kenya.

Prof. Prince Bola Ajibola of Nigeria (once Chief Justice) and served Nigeria in different legal capacities is one of the prominent African figures inspiring the study of African customary law. Dr. Elias wrote his PhD thesis on the Land Law and Customs in Nigeria in 1951, a work that deserved publication at the University of London

249 H.Odera Oruka, "Traditionalism and Modernisation in Kenya Customs, Spirits and Christianity", in J.B. Ojwang and J.N.K. Mugambi, *The S.M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi University Press, 1989, pp. 79-87.

250 J.B. Ojwang', "Death and Burial in Modern Kenya:An Introduction", in J.B. Ojwang and J.N.K. Mugambi, *The S.M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi University Press, 1989, pp. 3-10.

251 Cf. The sentiments of Professor Okoth-Ogendo, "Customary Law in the Kenyan Legal System: An old Debate Revived", in *The S.M. Otieno Case: Death and Burial in the Modern Kenya*, p. 135.

but perhaps would not have received the same resonance in Nigeria or elsewhere in Africa.

Law as a discipline continues to attract considerable attention in the modern African universities and the need to re-think African customary law is preeminently called for. Renowned personalities as we know them have had a great deal to do with the power of their culture²⁵² and it would be unfair for our legal education policy makers to neglect the *animus* and *factum* of law which define cultural roots of our laws today.

²⁵² Cfr. P. Onyango, *Cultural Gap and Economic Crisis in Africa*, Fast-Print, Peterborough, England, 2010.

SUMMARY AND CONCLUSION

Restatement of African Law by Justice Eugene Cotran has been the only outstanding and standardized document on African customary law extensively cited by law students and practitioners in Kenya. It seems that the dream started by him died with him the time he left Africa in the early 80s.

We understand that his masterpiece has been meticulous, yet a lot more is still found within African geopolitical space concerning legal development with African customary lawyers and scholars taking a new twist in the academic line. The French speaking West African countries appear to be more touched by customary law than the Anglo-phone Africa where shift to Western civilization is quite fast. Academicians such as Kéba M'Baye who worked on *Le droit de la famille en Afrique noir et à Madagascar* have done wonderful work. Not forgetting Paul Ndiaye of Dakar debate *Sur le résistance du droit Africain*.

There are commendable documents in terms of essays, articles, symposium papers, lecture notes and written work on African law by Africans with no cognizance in the African legal systems. African Law Reports, Kenya Law Reports, East African Law Reports, and accurate documents obtained from Institutes of African Studies in Belgium, France, Britain, Germany, and America.

Law Reform Commission Act, 1982, section 3(2).

It will not do any justice if we avoid mentioning the effort already made by Kenyans and their Governments to improve the African customary law. The setting of the Law Reform Commission Act of May 1982 has been exemplary. The Commission is to keep under review all the law of Kenya, to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modification.

Hon. Justice Cotran commented during his lectures that the establishment of the Commission would settle once and for all the controversy that had been raging in Kenya for some time as to the proper agency for law reform²⁵³.

If by then the sentiment was that the Law Reform Commission would rely on the scrutiny by Parliament, then it is right to overtly put it that the success of African customary law relies more on the legislature than the judiciary. In 1982, during the Presidency of Daniel Arap Moi, the call for law reform was more than urgent and the participation of the Law Reform Commission required proportional collaboration of the Attorney-General and the Chambers.

The Republic of Kenya has gone down the records in the endeavor to study her laws with the aim of improving the legal system in place. It cannot go without saying that the best Kenya could do was seen only in 2010, the change of Constitution, a fruit of many sacrifices and labour. The supreme document appraises ethnic, cultural and religious diversities in the preamble. The law begins with provision stating that the sovereignty belongs to the people of Kenya.

Having this constitutional appraisal, Kenya has no option than to develop her uniform Customary Law as residual laws in order to settle some of the intriguing legal issues such as land law, marriage, divorce, succession and burial laws. These are matters that require immediate attention and are expected to keep the Law Reform Commission on its toes for a long time to come.

It is an open secret that in Marsabit, Wajir, Garissa, and Turkana districts in the northern region of Kenya, African customary law is enforced by the pastoralist communities as the *modus operandi* for the administration of justice. The ethnic groups inhabiting this part of Kenya are faithful to their traditional laws more than the formal statutory laws including the Constitution²⁵⁴. For example,

²⁵³ E. Cotran, “*The Future of Customary Law in Kenya*”, in Ojwang’ J.B., and Mugambi, J.N.K., *The S.M. Otieno case*, p. 148.

²⁵⁴ This information was traced at the Peace and Justice Office of the Catholic diocese of Marsabit. The reality of law practice in this part of Kenya is particularly of the

the Borana community whose King resides in Southern Ethiopia, have more faith in him than the laws of Kenya. Pastoral communities settle their disputes by resorting to the customary rules in the form of Council of Elders that is not captured in the new constitution of 2010.

There is no doubt that the Law Reform Commission in Kenya has a number of issues to deal with. Several agencies have been established to look into the legal matters, – the Law Reform Committee of the Law Society, or ad hoc Commissions for particular subjects of the law like the Commissions on the law of marriage and divorce, the law of succession and the law of adoption or proposals generated as Bills by the Attorney-General's Chambers – have tried to deal with law reform.

The question that underlies the interest of this book is, how can African customary law become an asset other than a liability for the Kenyan Legal System? With reference to the ongoing debates on “bad laws” and “good laws”, will the political leadership see sense in harmonizing the laws of Kenya into a uniform law that will prominently highlight the legal culture of the people as envisaged in the Constitution?

While appreciating the efforts made in the case of African customary law in Kenya, it is imperative to revisit the topic at the national level and address the challenges that may water down the positive gains the new Constitution portends. The devolved system of Government and the County regimes should not be seen as division in themselves. It would be tricky if the ethnic-based politics takes another twist and makes County governments a sanctuary for propelling inter-ethnic divisions instead of uniting the people into one cultural group.

It is affirmatively stated that the Republic of Kenya now needs to consider developing legislations that shall give juridical guidelines for the application of Customary Law by courts. The provision of the Judicature Act, Cap. 8, on African customary law as a “guide”

dichotomous laws. Studies should be conducted to harmonize, codify and make such rich African legal concepts available for an effective development of the philosophy of African laws.

is hardly enough and more is expected from the Law Reform Commission, Attorney-General's Chambers, the National Assembly, the Senate and the County Assemblies. The African customary law project must engage with all the people of Kenya in order to be accepted as law and this calls for collective involvement of the political class, academicians and the judiciary.

ANNEX²⁵⁵

Our Esteemed Readers,

First, my apologies for the delay in the release of this edition. I hope that the breadth of its content will compensate for that. Evidently, the legal and judicial space has been in a state of flux – quite expectedly so – since the promulgation of the Constitution of Kenya, 2010. In the wake of this new ‘constitutional dispensation’ there has been a lot to write about – developments in the transformation of the Judiciary, and of course the emerging jurisprudence from the interpretation and application of the new Constitution.

At the Council, we are also undertaking an editorial transformation exercise whose purpose is best captured by The Hon. Justice (Dr.) W.M. Mutunga, the Chief Justice: “...The Council is now discharging its mandate in the context of a country that has enacted a new Constitution and a Judiciary that is going through a phase of transformation. Its role in the creation of a robust, indigenous, progressive and patriotic jurisprudence cannot be underestimated.”

In this edition, we have featured an article by Ms. Monica Achode, the Team Leader of the Editorial Department, which has more information on the key aspects of the editorial transformation. The transformation is inspired by The Hon. The Chief Justice and recommendations expressed to the Council by The Hon. Justice (Prof.) J.B. Ojwang, Judge of the Supreme Court. It is informed by the advice of the Council’s Board of Directors.

We are re-engineering the Council’s role in the nurturing of a ‘robust, patriotic and indigenous jurisprudence’ by effectively monitoring and reporting on judicial opinions that contribute to the development of jurisprudence. The editorial emphasis will not be on the hierarchical standing of a court but on the place of the court’s judicial opinion with regard to the existing jurisprudence

255 Murungi, M.M. Editor/CEO, in The Bench Bulletin, Issue 19, April-June 2012, Judiciary Transformation Framework, by The Hon. Dr. W.M. Mutunga, D.Jur., S.C., E.G.H. Chief Justice of the Republic of Kenya, President of the Supreme Court and Chairman, National Council for Law Reporting.

on the subject at hand. The Council will also partner with the Judiciary Training Institute, the Bar, the academia, civil society and other institutions in stimulating scholarly discourse and improving the quality and quantity of scholarly legal research material. The discourse will not only focus on Kenyan jurisprudence but also place that jurisprudence in the context of comparative international jurisprudence, not merely for the purpose of ‘benchmarking’ against it but in order for Kenya’s emerging jurisprudence to serve as a ‘product for export’ to other jurisdictions.

In reclaiming ‘lost jurisprudence’ – past judicial opinions that are key to the development of Kenyan jurisprudence that may not have been given reporting consideration – we are engaging a Consulting Editor to supplement our team of Law Reporters and work with us in identifying, collecting and reporting these opinions. Finally, we will continue to avail ourselves of all the opportunities for interacting with and obtaining the feedback of Judges and the judiciary community at large.

GLOSSARY

Ab initio – from the beginning

Actus reus – meaning criminal act/a culpable act

Ad hoc – for this special purpose

Ad valorem – in proportion to the value (tax law)

Aedificatum solo, solo cedit- what is built on the land becomes part of the land

Amicus Curiae- A person permitted to present arguments bearing upon issues before a tribunal yet not representing the interests of any party to the proceedings.

Animus factum- The spirit of law is on facts. Animus means an intention, state of mind.

Animus manendi- an intention to remain.

Animus revertendi- an intention to return.

Audi alteram partem – meaning that both sides must be heard

Autrefois acquit- formerly acquitted, a plea that the person had previously been acquitted of the same offence

Autrefois convict – a plea that the person had previously been convicted of the same offence

Bona fide- in good faith

Brutum fulmen – an empty threat

Capias – literary means you may take. It is a writ of arrest or arrest warrant

Caveat – Warning in form of entry in a register

Caveat emptor- let the buyer beware

Caveat venditor – let the seller beware

Certiorari - literary means to be informed, a writ from a superior court directing that a record of proceedings in a lower court be sent for review.

Cogitationis poenam nemo patitur – meaning thoughts and intents of men are not punishable by law

Compromis- A special agreement between states to submit a particular issue either to an arbitral tribunal or to the International Court.

Conditio sine qua non – conditions without which nothing can happen

Consuetudo Juris – Customary law

Corpus delicti – the substance or the body of the crime

Corpus juris – A body of law

De lege ferenda- Relating to the law as it should be if the rules were changed to accord with good policy.

Erga Omnes – applying to all members or parties. Opposable to, valid against, all the world, all other legal persons irrespective of consent on the part of those affected.

Ex Equo et Bono- Equity in the most general sense.

Ex Proprio Motu – of his own motion. Term applied to an action taken by the court on its own initiative.

Ex-gratias – meaning out of grace or favour, the power given to the President to pardon prisoners and detainees out of mercy – a matter of discretion.

Extra-partes – without the parties

Force majeure- Under the influence of duress

Habeas corpus- Applies when the court asks a person in detention to appear

Ignorantia Juris- meaning ignorance of the law

Ignorantia Juris Neminem Excusat- Ignorance of the law is no excuse to violate it.

In propria causa – meaning in his own case

Intra-partes- Between the parties

Intra-vires- Using the powers from within

Ius in personam- Law of persons

Ius in rem- Law of property (things)

lacunae legis- absence of law (legal vacation)

Leben Zeit- Life experience (from German language)

Lex facit regem – It is law that allocates power

Lex sequitur actionem – law follows action

Mala fide- in bad faith

Malum in se- repugnant

Malum prohibitum- an act that is repugnant – prohibited act – illegal act

Mandamus- is the power of the Supreme Court to ask for information from the subordinate courts

Mens rea – meaning criminal mind/mind that is guilty

Modus Operandi- means of operation

Mutatis Mutandis- as it is without changing its original meaning

Nemo iudex in re sua – meaning that no one can be judge in his own case

Nolle prosequi – there is no reason to carry on with the case

Nulla Poena sine leges- meaning where there is no law there is no punishment

Nemo dat quod non habet- one cannot give rights that he does not possess

Omnis actio tendit ad finem- an act must terminate in a correspondent effect

Onus probandi- burden of proof

Opinio Juris – meaning legal opinion

Pacta Sunt Servanda – The agreement is binding on the parties to it

Prima faci – appearing for the first time

Pro Bono – Lawyers providing services for gratuity

Ratio decidendi- the reason or rationale for which the decision is made by the court

Res Ipsa Loquitur- the thing itself speaks.

Res judicata – decided matter in court and one that could serve as precedent. It is judgement against which no further case can be entertained

Rex facit legem- it is power that institutes law

Stare decisis- Literally to stand by the decided matters; doctrine according to which the previous judicial decisions must be followed; stand by precedent and not disturb the settled points.

Sub judice- When the public is involved in the case already in court, creating contempt of court of Justice

Sub silentio – under silence. This is supposed to be a precedent without authority on a matter that is not fully argued in court, nor perceived. The matter escapes the court's attention.

Sui generis – Peculiar / its own nature. Atypical not falling within the normal legal categories.

Summum jus summa injuria – meaning too much insistence on the law can as well result in too much injustice

Super partes – meaning impartiality in law – the judge is above the parties

Tolle legem – means repeal or rescind or revoke or abrogate the law

Travaux préparatoires - Preparatory work; preliminary drafts; minutes of conferences, and the like relating to the conclusion of a treaty.

Ultra Vires – Out of your own powers/unauthorized by legal authority

Vinculum Juris – bond / binding force of law (obligation)

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