

## **PLURALISM AND THE FULFILLMENT OF JUSTICE NEEDS IN AFRICA**

by

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For many people in Africa, lack of a functioning justice system is a life and death matter – families unlawfully deprived of their ancestral lands and livelihood by the rich and powerful without notice, compensation, or relocation; grieving widows dis-inherited by surviving in-laws who grab assets of the dead with calculated disregard for the traditional obligations of kinsfolk to the surviving children; traditional and bureaucratic institutions that impoverish beneficiary communities by privatizing their service provision responsibilities for unlawful reward; communities driven by a long history of failed or unresponsive government to evolve mechanisms of existence outside the reach or care of the state. Each of these and similar examples that abound in everyday African life presents a compelling need for redress; most of these needs will remain unfulfilled.

The African state has mostly been unable or unwilling to guarantee the existence of and access to mechanisms of justice. For the few whose justice needs ever receive some attention, the meaning of justice is uncertain, its content varies from place to place and the outcome of the process of getting it depends invariably on where they live, who they know, how much they can afford, and the extent to which the effective coverage of state authority extends to their neighborhood. For arguably a majority of the people of the continent, the rather limited scope of the effective African state means that most of their justice needs are fulfilled outside the state.

Yet, when justice sector reform advocates in Africa and their international partners set to work to re-calibrate justice delivery systems in different countries, it is not clear that the resulting package addresses the complex mix of variables, including limited state capacity, patrimonial contexts, pervasive poverty, and legal pluralism that determine the viability or otherwise of the continent's various justice mechanisms. Their primary focus is usually the efficient resolution of commercial disputes involving investors and business people. More recently, the reform of formal criminal justice systems has been recognized as a priority. But in country after country, the relationship of the informal justice mechanisms to the formal or state sector institutions is inadequately digested or considered entirely irrelevant. This brief article demonstrates the significance of informal justice delivery systems founded on custom and tradition, and suggests ways in which justice sector reform processes may more respond to their popularity and adapt them to the justice delivery needs of Africa's poor.

### **Pluralism and its Discontents**

A justice system is said to be plural when it draws the rules and institutions of its laws from two or more normative traditions. This is true of every African country. In Egypt, for instance, the major sources of law are as varied as the Napoleonic Codes and Islamic Sharia. In Nigeria and Sudan, a constitutional, statutory, and civic system of laws co-exists uneasily with both Islamic Sharia and indigenous African customary norms and institutions. The South African Constitution, widely admired as possibly the most advanced on the continent, accommodates traditional legal systems subject to overarching constitutional principles of equality and non-discrimination. Statutory and civic norms are established in written, formal instruments of law. Similarly, Islamic Sharia is characterized by the existence of formal sources. Indigenous and traditional customs are mostly uncodified.

Statutory and traditional systems are widely believed to be spatially and normatively separated from one another. For the most part, however, their operation is shaped by the essential patrimonialism of the African state system, marked by high levels of personalized dispensation of favours and diminution of notions of entitlement through both formal and informal networks of power and patronage. This patrimonialism dates back to the colonial origins of contemporary African legal systems when the authority of local elites – as chiefs or other bag carriers of the colonial administrators – was conscripted in the service of the goal of dominating local populations. The transfer of power at independence from white to black “masters” was not accompanied by the creation of mechanisms of local accountability. Following independence, therefore, traditional power structures adapted to the new power dynamics – often remarkably similar to the old – in return for continuing relevance.

States bear the basic obligation to guarantee the existence, availability, and effectiveness, of the infrastructure of justice delivery. In a 1994 case against it before the United Nations Human Rights Committee, Zambia sought to argue -- but the Committee disagreed -- that a developing country such as it is could not be expected to have the resources to fund adequate justice provision.<sup>1</sup> In Africa, the justice infrastructure must take responsibility for not only civic and statutory systems but also informal and traditional mechanisms. The mechanisms of formal or statutory justice delivery such as the police, bureaucracies of administrative justice and government, courts, lawyers, and judges, are mostly found in urban areas. They are maintained at the expense of public taxes and appropriations. Informal mechanisms on the other hand, such as traditional chiefs, vigilantes, neighborhood, faith-based, and age-grade institutions, are found in all forms of human settlements in Africa.

Although recognized by the state all over Africa, traditional justice systems do not necessarily owe their existence or viability to the state. In Ghana, for example, a viable traditional justice system defied its formal abolition by the regime of President Kwame Nkrumah. Informal justice mechanisms enjoy uneven degrees of integration into the state. At one extreme, those founded on chieftaincy institutions are the best integrated into the structures of government. There are good examples of the integration of informal into formal systems in many parts of Southern Africa, including Botswana, Lesotho, and Swaziland, where the courts of traditional chiefs are well integrated into the authority and power structure of government. In Botswana, for example, the *Kgotla*, a traditional court, exercises considerable statutory jurisdiction over criminal matters, extending to powers of imprisonment for up to four years. In Sierra Leone, chiefdoms are recognized as the basic unit of administrative and judicial power within the state. In most Common Law African countries, customary arbitration is recognized as a mechanism of judicial settlement and the integrity of its decisions is preserved by the formal state system through judicial doctrine (*res judicata*) that precludes re-litigation of matters that have already been judicially settled.

At another extreme, faith-based mechanisms are often the least integrated. By way of illustration, in those parts of Africa where Islam is the dominant faith, religious and ethnically founded norms and institutions converge to the point of being indistinguishable. Thus, in the Sahel regions of Africa, *Marabouts*, the *Ulema*, and leaderships of religious Brotherhoods have for long exercised both temporal and religious authority irrespective of the disposition of the state. In Senegal, for instance, this phenomenon is colloquially referred to as the *Wolofisation* of Islam.

To those operating within the formal or statutory justice system, the non-state or informal system is variously called customary, traditional or religious law in different places. In many places, the

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<sup>1</sup> *Lubuto v Zambia*, Case no. 390/1990, Views adopted on 31 October 1995.

line between traditional and religious law is normatively unclear. In Nigeria, for example, the application of both Sharia and ethnic customary norms in any particular case is subject to a test of repugnancy whose origins are founded in outdated notions of imperial Victorian jurisprudence.

Expressions such as “customary” or “traditional” law are only convenient labels for what is in fact a very complex set of rules that, in particular localities have, over time, acquired the force of habit backed by mechanisms of social coercion and, in most cases also, of state power. While common or convergent principles may be discerned from a comparison of these rules across different communities, the manner in which they are constituted, their content, and the mechanisms of their enforcement usually varies from place to place.

### **Popular Myths about Customary Law**

Mahmood Mamdani demonstrates in his *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996), that the system referred to in Common Law Africa as customary law, or in Civil Law countries as *droit du coutumier*, is in fact a collection of rules, norms, and institutions of dubious provenance, including judge-made law, mutations of inherited colonial practice, and indigenous values and practice of various African communities refined through decades, possibly centuries, of inter-migration and interaction with one another. Judge-made law in this context includes the recognition of customary law by the formal courts through the notion of *judicial notice*, by which the Common Law doctrine of judicial precedent provides a back channel for judges to refer to customs applicable in one place in another locality in which they often bear limited, if any relevance.

It is widely claimed that *droit du coutumier* is alien to the homogenous formalized justice systems of civil law Africa. This, it is explained, is because the *Assimilation* policy of French colonial administration allowed only for the supremacy of post-Revolution, egalitarian French legal traditions, with no room for any interloping indigenous norms or institutions. The reality is somewhat less categorical. In many French-speaking West African countries, such as Senegal and Guinea (Conakry), traditional *Marabouts* and *Serignes* exercise considerable civic, adjudicatory, and spiritual authority founded on a unique mix of ethnic identity and religious moorings. In Rwanda, the government of this former Belgian territory excavated a customary institution of considerable antiquity in the *Gacaca*, to deal with an unprecedented crisis of justice delivery following the elimination of that country’s formal justice personnel during the Genocide of 1994. In Gabon, the highest Court has held that a custom known as *Ntoumou* among that country’s Nkodje Clan precludes civic inter-marriage among clan members irrespective of whether or not consanguinity or affinity between them was established.<sup>2</sup> These examples tend to suggest that customary norms and institutions retain considerable relevance even in Civil Law Africa.

Hasty generalizations about the relationship of civic to customary or traditional law and institutions in Africa would generally be ill-advised. Three broad trends, however, suggest themselves. First, there are those countries, mostly the English-speaking countries with dominant Common Law or Roman-Dutch Law (in Southern Africa) formal traditions, in which the existence of customary and traditional law is expressly recognized but limited in application to civil, including personal status and succession, matters. Even within this category of countries, the nature and relationship of customary to civic law varies. In Zimbabwe and Sierra Leone, for instance, constitutional prohibitions of discrimination do not extend to customary law. This constitutional provision enabled the Zimbabwean Supreme Court in the *Magaya* case to hold that

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<sup>2</sup> Court of Cassation (then known as the 2<sup>nd</sup> Civil Chamber of the Judiciary) of Gabon, in the case of *P.E.N. & F.E.O. vs. D.N.B.*, Case no. 13/95-96, reprinted in 1:1 *La Revue du CERDIP*, 131 (2002)



a rule of customary law of succession of the Shona people that allegedly preferred males to females as heirs did not breach the prohibition of discrimination in Article 23 of Zimbabwe's Constitution, because sub-articles 23(3(a) and (b) exempt provisions relating to devolution of property on death and to the application of customary law.<sup>3</sup> In placing customary law above the Constitution in this way, the constitutions of these countries effectively create two categories of citizens, one (rich minority) able to use both customary and civic law, and the (poorer) other, imprisoned in any injustices of the customary system.

This result would be unthinkable in South Africa where the application of customary law is subject to the constitutional clauses of equality and non-discrimination. In Nigeria, the situation is somewhere between these two examples. Nigeria's Constitution expressly prohibits discrimination on several grounds, including sex and status. Since much of personal status is a matter of customary law, and sex discrimination is very much entrenched in customary law, the tools of constitutional interpretation and application suffice to ensure that the constitutional prohibition of discrimination can extend to discrimination founded on customary law.

Second, there are a few countries, the best example being Botswana, in which the application of customary law extends to criminal matters. In Mauritania and Nigeria, among a few African countries, the application of Islamic Sharia extends to crimes of *Huddud* or, essentially, faith-based morality regulated by Islamic theology whose application as criminal law is legislated by the state. Thirdly, there are also many Civil Law countries in which, as illustrated above, customary justice systems are in fact part of the living experience of ordinary people, although the contrary is asserted.

It is usually suggested that the difference between customary and civic/statutory law replicates the separation between rural and urban spaces in Africa, with the result that customary law applies in rural spaces while civic law applies in urban spaces. Again, this oversimplifies experience at best in many ways. In the first place, as many African cities sprawl into the bush and rustic slums at their margins, urban and rural spaces are very much permeable. Secondly, the distinction between rural and urban life forms in the African context, often refers not to physically separated spaces but is rather used as a short-handed reference to degrees of acceptance of westernization among varying levels of elite structures. In this sense people are composites of both the rural and urban, and the difference between urban and rural is merely situational. Far from being absolute, it is a matter of degree. Thirdly, customary law, as a regime of personal status, identity, and indigeneity, follows those to whom it applies everywhere irrespective of whether they are in rural or urban locations.

When all these factors are understood, it is necessary and possible to re-conceptualize the central functions of customary in contemporary African justice systems. Founded as it is on notions of indigeneity and localized alienage, the justice system of African customary law reflects the post-colonial balance of power in which indigenous elites replaced a foreign minority as the dominant decisional force. Contemporary customary law in this context became essentially one of the mechanisms for indigenization of unaccountable elite power, largely undifferentiated in its functions and outcomes from formal state systems. Unlike the administrative machinery, however, customary law is a racialized system, the assertion of whose exclusivity is not extended to perceived "settlers", such as Asian or Caucasian communities in Africa. The Constitutional Assembly that negotiated Uganda's 1995 Constitution, for instance, denied the request of Uganda's sizeable Asian community to recognition as an ethnic group, which would have meant,

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<sup>3</sup> *Magaya vs. Magaya* [1999] 3 *Law Reports of the Commonwealth*, 35



among other things, formal recognition of the customary norms and institutions of that community.

A second conclusion flows necessarily from this: that customary law affords Africa's dominant indigenous elites a mobility of both forum and location for the fulfillment of their justice needs, a mobility that is not available to the overwhelming majority of the continent's poor people. Quite often, the determining factor in resolving competing claims founded on customary law is a calculus of the relative power and convenience of the claimants. The assertion that powerful men are liable to and do in fact get a better deal out of the application of customary law is obvious. This is particularly the case in disputes concerning personal status, marital rights in customary law, and ancestral land. This makes it possible for the rich to enjoy the benefits of statutory property law for their urban, personal property, while simultaneously using customary law mechanisms to grab ancestral lands in rural communities. These rural lands are then taken into the orbit of statutory law through the cynical manipulation of complex rules of conflict of laws that are unintelligible to local people poorly equipped to defend themselves with the law against abuse of power.

For the powerful, customary law affords a freedom of choice of both law and forums based on situational convenience. When it suits them, they use the formal courts, police and state paraphernalia; when they calculate it more favorable, they can deploy the norms or institutions of the country side whence they came. At other times, it is also possible to deploy a cross-over of customary norms into the formal legal system through expensive judge-made law that only the rich can afford. Juxtaposed besides the formal justice system in this way, customary law could be described as one half of a composite system of line-item public ethics that makes it possible, for instance, for a powerful man to implausibly accept marital equality (under civic law) but reject gender equity (pleading customary law) and get away with it (because the patrimonial system allows it). This system of line-item public ethics creates a credibility crisis for the entire justice system and reinforces the marginalization of the average African from the legitimate space of the civic state.

### **Conclusion: When the Law Comes to the Village...**

A majority of Africans experience customary law. Its norms and institutions determine the fates of a significant proportion of the Continent's population. The African state has facilitated this state of affairs without having necessarily created it. The reality is that for most of the continent's people, the obstacles in the path of making demands on the formal structures of justice delivery are overwhelming. In many countries, mechanisms of formal justice delivery have been destroyed by a succession of venal government or war. Where these mechanisms exist, they are dysfunctional, inaccessible, or lacking in credibility. Lawyers are too few, court houses are mostly in the capital and other metropolitan areas, judicial processes are very technical and poorly funded. There is insufficient penetration of the structures and personnel of formal justice delivery into communities isolated by reason of their being rural, desert or semi-desert, mountain, or water-bound settlements. Public transport is too inadequate to ensure access to the presumed portals of justice. With absolute poverty pervasive -- over 70% in many African countries -- too few people can afford to use the formal justice systems. Social networks of the family and community discourage the transfer of disputes from the intrusive, paternalistic family networks to the anonymous mechanisms of the formal justice system. When all these obstacles have been navigated by the obdurate few with means, most African governments and their officials still pick and choose which court orders to obey and which to disregard.



In the end, a justice system is only as good as its capacity to respond to the demands made on it. Given that most Africans rely on the traditional or informal systems, this means that reform efforts must focus on those systems. Some basic changes are required to encourage people to make demands on it and enable it to respond to the justice needs of its numerous users in Africa. If we get these right, they will transform customary justice both as a matter of its normative content and at the point of its application.

To begin with, customary law must not in fact or in law be placed above accepted constitutional standards. Given that all African countries have Bills of Rights, this can be achieved by eliminating outdated doctrinal tests of repugnancy and replacing them with a unified test of compatibility of norms of customary law with the constitution. Second, all administrators of customary justice mechanisms -- by whatever name called -- should be required to undergo essential and regular training in basic constitutional standards. Relevant curriculums should be developed in both official and African languages. Popular versions of national constitutions with illustrations of how the constitution governs neighborhood customary issues must be produced for this purpose. Electronic means of diffusion through radio and television will get this message to the villages and countryside. Third, it is necessary to address the over-reliance of customary law on - often only supposedly - ancestral traditions transmitted through oral cultures. Without necessarily altering the content of customary norms as such, it is surely possible and necessary to create a system for recording evidence of interests founded on customary law. Systems can be created for registration or notification of customary marriages; of interests in customary and ancestral lands; and of decisions of customary arbitrations, to cite three examples. Such systems would not require lawyers. They can be operated by para-legals, local teachers, and other lay people. Finally, mechanisms can be created to monitor the application of customary law. For this purpose, community legal services must be institutionalized through private-public partnerships in the training and deployment of community-based para-legals. Such para-legals will enable ordinary people to make demands on the system and ensure proper oversight of mis-conduct by the administrators of the customary law system.

There are varying policy and philosophical dispositions towards the relationship of customary to civic or formal law. Abolitionists want customary law eliminated by state *diktat*. Customary law has survived many legislative authorships of its obituary, of which some of the better known examples include the French colonial administration and President Nkrumah's attempt in post-independence Ghana. Hybridization has also been attempted in places like Sudan with unhappy consequences. Cognizant of the resilience of local ways of life, British colonial policy preferred to co-opt (integrate) customary law into the state system with its variant of separate-but-equal doctrine based on indirect rule. This tendency, as Mamdani pithily explains, ultimately decentralized despotism. Reform will entail maintaining the decentralization while eliminating the despotism. Achieving this requires a package of measures that actively re-engineers norms of customary law by positively transforming the mechanisms by which they are applied.