

Essay

Integration of African Customary Legal Concepts into Modern Law: Restorative Justice: A Kenyan Example

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Abstract: African societies have been governed according to known norms, customs, and practices that together constitute African customary law. These societies have placed emphasis on communal as opposed to individual identity, and this has extended to their justice systems. African customary law therefore has placed emphasis on the concept of restorative justice based on the understanding of restoring the societal balance that has been disrupted by crime. This has fostered offender accountability, reparation to the victim, and full participation by the affected community members. This essay examines the resurgence of African legal philosophy and its subsequent integration into modern African formal legal systems. In particular, it interrogates the recent Kenyan example of integrating traditional dispute resolution mechanisms as one of the guiding principles for the exercise of judicial authority by Kenyan courts under the 2010 Constitution. It argues for the development of structures to properly utilize such mechanisms within the Kenyan context.

Keywords: African customary law; restorative justice; traditional dispute resolution mechanisms

1. Introduction

The notion of the non-existence of an African philosophy of law is premised on the non-existence of written records about such law. Elias [1] describes this as “the absence thesis,” which holds that African jurisprudence does not exist in as much as there is the absence of written records or work of intellectual worth. However, it is a misnomer to talk about written records when referring to the history of African societies since it is well documented that in such societies the oral tradition was the method in which history, stories, folktales, and religious beliefs were passed on from generation to generation [2]. Mbiti [3] explains the dominance of oral traditions in Africa to be due to the fact that most African societies did not have an invented alphabet for the art of reading and writing.

The paradox is that in as much as there is a claim as to the absence of African philosophy, there is still the categorization of various African civilizations as having had a philosophical foundation that is the cause of much study and debate to date, a case in point being Egypt. Durant [4] (p.195), compares and contrasts Egyptian with Greek, Hindu, and Chinese philosophy and notes that, “[t]he wisdom of the Egyptians was a proverb with the Greeks, who felt themselves children beside this ancient race.”

Within the African context, customary law is the best reflection of the confluence of law and social order as reflected in the African experience. Therefore, drawing from the various African customs we can extract an African philosophy of law. This African legal philosophy should have a pride of place in the upper echelons of African legal systems. Moreover, it has as its strongest pillar the fact that it provides a medium for society to protect certain values. Hence, African societies can ensure the preservation of some of the better African customs and cultural practices by conferring upon them legal validity. This would in turn make African legal systems truly African since they would incorporate African customs and beliefs.

2. The Underlying Legal Philosophy in Traditional African Customs

The evolution from social order to law proceeds in three phases. First, social order creates values that are the guiding beacons for societal behavior and when these values gain wholesale societal acceptance, they become the norms of a given society. Second, a collection of varied norms forms the society's customs. Third, these customs are underwritten by law and the legal process to lay their emphasis in society. This forms the basis of the body of law known as customary law and every African society had its own customs with inherent sanctions to regulate the behavior of the individual community members. Ideally, societal rules that have the force of custom should also obtain the sanction of law [5]. Therefore, African customs should, at the very least, be considered when formulating modern African legal systems.

A cross-cutting theme of legal philosophy through most African customs is the concept of restorative justice whereby emphasis is placed on restitution. Restorative justice is based on the assumption that within society a certain balance and respect exists and it is harmed by crime. Therefore, the purpose of the justice system is to restore the balance and to heal the relationships Anderson [6] observes that it is not so much about punishment but about healing the wounds caused by crime and repairing the relationships that have broken down. Punishment of the offender is pursued alongside a corresponding satisfaction of the victim; these two distinct questions must be faced if real justice is to be achieved [1]. Restorative justice is therefore a key tenet of African legal philosophy with its key attraction being that it fosters offender accountability, reparation to the victim, and full participation by all those involved (victim, offender, and affected community members).

A good example of attempted application of this African legal philosophy within the context of English common law is seen in the East African case of *Lokililte ole Ndinoni v. Netwala ole Nebele* 7 EALR 14 (1917). The court deliberated on the Masaaï custom for blood money whereby the victim's family sought compensation from the killer's family under the custom thirty-five years after the killing of their kin. The Appeal Court rejected the claim on the grounds that it was repugnant to entertain a claim of this kind after such a long time. The repugnancy clause was commonly invoked by English colonial courts to invalidate African customary law based on the rationale that the legal philosophies behind some of those customs were repugnant to justice and morality. For example, in the case of *R v. Amkeyo* (1952) 19 E.A.C.A., the court invalidated a marriage validly contracted under African Customary Law on the basis that such a marriage was a wife purchase and repugnant to law. The court held that, "the elements of a so-called marriage by native customs differ so materially from the ordinarily accepted idea of what constitutes a civilized form of marriage, that it is difficult to compare the two." This was in 1917. If we are to go by the court's logic, then most marriages being conducted in Kenya in 2019 are also invalid since the custom of paying dowry or bride price to the family of the woman, as well as the practice of polygamy, is still prevalent amongst all Kenyan tribes.

However, the repugnancy argument is wanting when examined in light of the fact that African customs have their own internal mechanisms of getting rid of customs that have outlived their usefulness. This is because, as society evolves, societal rules and norms also evolve resulting in a change in the particular society's customs. Whatever the merits of the received law from the colonial era are, it was based on customs peculiar to England and therefore incapable of satisfactory application in the East African context without judicious modification and alteration [7].

Conversely, Smith [8] argues that African people only know of customs, not law; therefore, even if Africans had indigenous systems of social control, they lacked any trace of legality, legal concepts, or legal elements. Gluckman [9] in countering Smith's argument states that this denial of African legal philosophy is a mistaken position arising from an understanding imbued with ignorance about how the law works among Africans. Gluckman further argues that Africans have always had an idea of natural justice, law, and a legal system, although they may not have developed them in abstract theoretical terms.

Moreover, Elias [1] observes that the two chief functions of law in any human society is the preservation of personal freedom and the protection of private property. African law (just as much as

English law) aims at achieving both these desirable ends. Cotran [10] was able to come up with some examples of crimes in African societies, these included offences against the person such as homicide, assault, and sexual offences; offences against property such as theft; offences against tribal authorities such as treason and contempt of elders; and offences against basic beliefs such as witchcraft or violation of tribal taboos.

Applicability of African Legal Philosophy in Africa Today

African philosophies of law are fast finding themselves incorporated into the formal legal system as African states seek to embrace legal philosophies that are a true reflection of their individual societies. Mapaire [11] contends that there cannot be regional or continental integration without law or without a common theory of law and such integration requires a coherent and consistent value system that originates from the people or societies that are integrating. The basic tenets of African legal philosophy that promote reconciliation, social justice, and the rebuilding of African societies are being seen as a better alternative to the retributive justice principles of Western jurisprudence, especially in post-conflict societies. Just as African law of the past was never just about custom, African laws of the future cannot just be about state-made laws or international norms.

By and large the foundation of African justice sector reforms has been western legal and institutional transplants. Chirayath et al. [12] attribute deficiencies in building effective legal and regulatory systems to an inadequate appreciation of the social and cultural specificity of the particular context in which they operate. Similarly, Upham [13] cautions against developed countries' persistent attempts to infuse such transplants into developing countries without paying attention to indigenous contexts. He emphasizes that successful legal reforms ought to acknowledge, respect, and have a detailed understanding of the conditions of the African societies and their preexisting mechanisms of social order.

African traditional justice systems place emphasis on reconciliation as the main mechanism of dispute resolution within the community for both civil and criminal matters. This serves to promote offender accountability, reparation to the victim, and full participation by all those involved (victim, offender, and affected community members). As such, even today, rather than go to court, most members of African communities still opt to resolve internal disputes, where possible, through the available traditional justice systems. This is especially the case where both the offender and the victim come from the same community and live within the same region as members of that community. There is thus need to acknowledge and incorporate these informal justice systems, rather than excluding them, owing to their widespread usage.

Chirayath et al. [12] observe that, where state and non-state systems have developed in relation to each other, they often serve to complement and reinforce socially accepted codes and rules. Conversely, in communities where the state systems lack legitimacy and/or political reach, informal and customary systems often act wholly independent from the state legal system, which may be rejected, ignored, or not understood. In most developing countries, customary systems that operate outside the limits of the formal justice systems are the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa [10]. The preference of customary law is due to its underlying philosophy of restoration and restitution.

3. Integration of Restorative Justice into the Modern Kenyan Legal System

The United Nations Handbook on Justice for Victims acknowledges the victim's involvement in mediation, conflict resolution, and traditional proceedings. The handbook notes that the use of informal procedures has been considered by many to provide a number of benefits over formal procedures. In informal procedures, the two parties immediately concerned (victim and offender) can generally take an active part in deciding the appropriate outcome. Additionally, all underlying circumstances can be considered and social pressure can often be exerted on the offender to comply with the decision and provide restitution.

The hierarchy of the Kenyan legal system is outlined in Section 3 of the Judicature Act. Section 3 (1) provides that all Kenyan courts are to exercise their jurisdiction in conformity with (a) The Constitution; (b) subject to the Constitution, all other written laws, including Acts of Parliament of the United Kingdom; and (c), subject to the Constitution, and as far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1897, and the procedure and practice observed in the courts of justice in England on that date. The lingering dominance of English law is evident in its retention in Sections 3 (1) (b) and (c). Even now, under a new Constitution passed in 2010 [14], the Kenyan legal system still places reliance on English legislation, procedure, and practice from the 1800s. This is in spite of the fact that the Judicature Act came into force in 1967 (four years after independence in 1963) and has been amended several times since then, with a revised edition coming into force in 2018.

With regard to applicability of African Customary Law within the Kenyan context, Section 3 (2) of the Judicature Act permits the court to be guided by African Customary Law only 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.” Therefore, within the Kenyan context, the integration of African customary legal concepts is restricted to civil cases; even then one or more of the parties must be subject to or affected by it. Furthermore, such integration is only permissible where it would not result in injustice to any of the parties and is consistent with all Kenyan laws.

The new Kenyan Constitution was promulgated on 27 August 2010 after a referendum that saw it endorsed by 68.85% of Kenyans [15]. Migai [16] considers it to be a transformative constitution that emphasizes the protection of fundamental human rights and the rule of law. The term “transformative constitution” has come into popular usage to describe the aspirations of a constitution as a tool to bring about positive change in society. Article 159 (2) (c) of the 2010 Constitution provides that, “alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted subject to clause (3).” Clause (3) states that traditional dispute mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or is inconsistent with this Constitution or any written law.

Article 159 (2) (c) of the Kenyan Constitution therefore incorporates African legal philosophy, as captured within traditional dispute resolution mechanisms, within the modern formal legal system. However, by retaining the repugnancy clause, it gives with the right hand and takes away with the left. An alternative approach would have been to allow for a legal system that incorporates the codification of acceptable customary laws, and in that manner do away with those which have outlived their usefulness. In this manner, the repugnant customs would be legislated out of existence by omission; hence, there would be no need for a repugnancy provision. Undoubtedly, the customary law applied must be up to date. As held by Speed, Ag. C.J. in the case of *Lewis v. Bankole* (1908) 1 N.L.R. 81 at 85, the native laws and customs, which the courts enforce, must be existing native laws and customs and not those of bygone days. Lord Atkin further echoed this sentiment in the case of *Eshugbayi eleko v. Government of Nigeria* (1931) A.C. 162 AT 673:

Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character as custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in the form to regulate the relations of the native community.

Additionally, the Doctrine of Judicial Precedent does not apply to customary law. This is because customary law is possessed of a flexible nature capable of adjustment to unforeseen circumstances. Therefore, customary law cannot be applied within the rigidity of judicial precedent, each case must be decided on its own merits without regard to precedent. Customary law is dynamic and in a state of

constant evolution which parallels societal changes. That is why a system of precedent is not applicable to customary law, hence the observation by Palmer and Poulter [17] that “[a] decision on a matter of customary law given ten years ago cannot be blindly followed today as it may no longer represent the law.”

During the colonial era, the repugnancy clause applied across all of British East Africa as set out in the East Africa Order in Council of 1902. However, upon independence, Tanzania repealed the clause through the enactment of the Tanganyika Magistrates’ Court Act of 1963, and Uganda did the same vide enactment of the Buganda (Constitution) Order in Council of 1962. Kenya retains it to date. The effect of the repugnancy clause within the meaning of Article 159 (3) of the Constitution is to tether the application of customary law in Kenya to the narrowest of senses, and it remains inferior to the substance of the common law as per the provisions of Section 3 (1) (c) as read with clause (2) of the Judicature Act. Contrary to this stand of the Kenyan legal system, Palmer and Poulter [17] observe that “African law stands on an equal footing with common law. In no sense is customary law [to be] placed in a fundamentally inferior or subsidiary position as it is in some other African countries.”

Despite the new Kenyan Constitution having a provision for traditional dispute resolution mechanisms, it does not have any provisions as to the structures for such mechanisms or their composition, jurisdiction, staffing, infrastructure, or anything else for that matter that would help bring about the development of their jurisprudence through their application of customary law. Fortunately, Kenya always had a system of native/traditional courts in place during the colonial era. The British Empire employed a system of indirect rule that permitted the continued function of native administrative and judicial systems under British control and supervision. This provided an avenue for the application of customary law in the British East Africa protectorate comprised of present-day Kenya, Uganda, and Tanzania. The native courts settled disputes amongst Africans by applying the respective native law and were administered under the Native Tribunals Ordinance of 1930. This experience can be used to come up with the requisite framework within which such a court system is to be functional [4]. There is also experience to be drawn in from countries that have in place a system of traditional courts such as Ghana, Botswana, Lesotho, and South Africa [18].

The next step in developing a body of customary law within the Kenyan legal system would be the codification and eventual unification of customary laws in Kenya. Such unification and codification would have the ultimate objective of coming up with a uniform system of customary law that would be applicable across the board. Such an objective is not lofty but, to the contrary, is attainable [19]. At the core of any argument for the establishment of a customary legal system in Kenya is the fact that Kenya’s legal system should be an accurate biography of the Kenyan people. Article 159 (1) of the Constitution states that judicial authority is derived from the people, this phrase acknowledges the fact that law emanates from the society as expressed through the particular society’s customs. Moreover, the Article goes on to say that such judicial power should be exercised, “...in conformity with the values, norms and aspirations . . . ” [20] of the people. What better expression of such is to be found outside that of the people’s customs?

The custodians of customary law are the elders of the respective communities. Thus, the judicial system must turn to them for advice when establishing what is custom and what is not. This is inevitable since the judges lack formal training in customary law, the rules of which are generally inaccessible in written form [21]. The custodians of customary law, community elders, in doing so should be accorded a status similar to that of expert witnesses as provided for in Section 51 of the Kenya Evidence Act. This principle was emphasized in the case of *Joel Mitsoene v. Sir Edward Harding* (1954) H.C.T.L.R 1 by Huggard C.J. who held that, when dealing with a custom, you are dealing with an unwritten law, and the best evidence one can obtain regarding it is the evidence of those who by virtue of their experience may be expected to be familiar with it. Similarly, in the South African case of *Van Breda v. Jacobs* (1921) A.D. 300 the requirements of an enforceable custom were listed as follows: firstly, the custom must be ancient or long established; secondly, the custom must have been uniformly observed; thirdly, the custom must be reasonable; and finally, the custom must be certain.

However, as Juma [22] correctly observes, any modern day attempts to claim space for African customary legal concepts are usually hindered by arguments centered on its alleged inability to adjust to the demands of the international human rights regime. Such accusations are based on the assumption that African Customary Law is static and hence cannot evolve (and has not evolved) in tandem with the evolution and recognition of individual rights and freedoms guaranteed by modern constitutional and international human rights instruments. Nevertheless, from the foregoing discussion, it is evident that African customs are not rigidly static and what was custom a decade ago cannot be blindly followed, as it may not reflect the actual custom today. Moreover, customs are based on social norms that are in turn based on social behaviors, which are in turn based on social values, which are in turn based on social order. If a society evolves, it follows that its order, values, behaviors, norms, and ultimately customs also evolve.

With specific regard to the Kenyan context, such fears are unfounded and have been taken care of at two levels: (a) by restricting application of African Customary Law to civil cases where one or more of the parties is subject to it or affected by it, and even then limiting it to instances which would not result to injustice to any of the parties, and (b) by observing Article 44 (3) of the Constitution, which prohibits any person from compelling another to perform or undergo any cultural practice or rite. Therefore, there will never be a situation where the application of restorative justice would be legitimate where it would result in the violation of any person's fundamental rights and freedoms as guaranteed under constitutional and international human rights instruments.

Therefore, it can be said that the acknowledgement of the traditional dispute mechanisms in Article 159 (2) (c) of the Constitution is the first step towards formal recognition of the existence of a uniquely Kenyan philosophy of law. However, there is need to go beyond mere textual provision for the application of a system of traditional dispute resolution in Kenya; it is necessary to develop legislation to regulate such a system as well as establish the attendant structures for its implementation. As the world becomes more of a "global village," people are becoming increasingly wary of losing their individuality and are seeking to reaffirm the same. Poulter [21] reflects that there appears to be a global phenomenon with illustrations on all five continents of people being concerned for, and seeking to preserve, their distinctive customs and traditions.

4. Conclusions

The philosophy of reconciliation is a major part of daily African life. As it was in history, African life today is still family-based, with the families linking up to form the clans, the clans linking up to form the tribes, and the tribes linking up to form the nation. Just as it was in the past, disputes are largely resolved in a manner that promotes reconciliation and restitution since both the offender and the victim are to continue living within the same community. Community members resort to elders to adjudicate personal disputes.

It is evident that the denial of the existence of an African philosophy of law is premised on ignorance about the nature of African realities. This is further fueled by colonial attitudes towards the African, some of which have transcended into the present day. Even where it is acknowledged that African societies had rules and customs, they are negated by the opinion that they were characterized and dominated by belief in magic and supernatural blood-thirstiness, cruelty, rigidity, automation, and an absence of broader sentiments of justice and equity [20]. However, it has been established that arguments against the existence of an African philosophy of law are not founded on the true principles of empirical history which are experience and observation [10]. The African philosophy of law, which favors restoration and reconciliation, is generally couched in the term of "oneness." Archbishop Desmond Tutu [2] describes this:

Ubuntu . . . I am human because you are human . . . you must do what you can to maintain this great harmony, which is perpetually undermined by resentment, anger, desire for vengeance. That is why African jurisprudence is restorative rather than retributive.

As seen from the Kenyan example, African philosophies of law are fast being incorporated into the formal legal system as countries seek to embrace legal philosophies that are a true reflection of their individual societies. The recent effort undertaken in coming up with a new Kenyan Constitution that is reflective of Kenyan society is commendable. In fact, in the preamble it acknowledges this when it states that, “We the people of Kenya . . . exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution . . . adopt, enact and give this Constitution to ourselves and to our future generations.” This attempt at indigenization of the fundamental law of the land should be replicated across the length and breadth of African legal systems. This is a marked departure from the independence constitutions, which Kioga [23] notes were given to us by Europe at independence and were only poor imitations of the European model.

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