



Strathmore University
Law School

**AN ANALYSIS OF THE 2010 CONSTITUTION AND THE RENAISSANCE OF
AFRICAN CUSTOMARY JURISPRUDENCE IN KENYA**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR
OF LAWS DEGREE**

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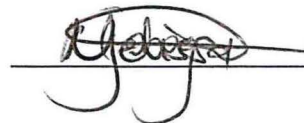


Table of Contents

ACKNOWLEDGMENTS	i
DISSERTATION DECLARATION FORM	ii
ABSTRACT	iii
LIST OF CASES	iv
LIST OF STATUTES, BILLS, AND SESSIONAL PAPERS	v
1. INTRODUCTION	1
1.1 BACKGROUND TO THE STUDY	1
1.2 STATEMENT OF THE PROBLEM	2
1.3 OBJECTIVES OF THE STUDY	2
1.3.1 GENERAL OBJECTIVE	2
1.3.2 SPECIFIC OBJECTIVES	2
1.5 LIMITATIONS OF THE STUDY	3
1.6 CHAPTER BREAKDOWN	3
1.7 RESEARCH METHODOLOGY	5
2. CONCEPTUAL INTRODUCTION	6
2.1 WHETHER CUSTOMARY LAW HAS A LEGAL PHILOSOPHY	6
2.2 AFRICAN CUSTOMARY LAW AS LAW	7
2.3 CONCLUSION	10
3. HISTORICAL CONTEXT OF CUSTOMARY LAW IN KENYA	11
3.1 THE PRE-COLONIAL PERIOD	11
3.2 THE COLONIAL ERA	12
3.3 CUSTOMARY LAW IN INDEPENDENT KENYA	13
4. THE CONSTITUTION OF KENYA 2010 AND THE APPARENT RENNAISSANCE OF AFRICAN CUSTOMARY LAW	17
4.1 CONSTITUTIONAL LAW AND HUMAN RIGHTS	17
4.2 LAND LAW	18
4.3 ALTERNATIVE DISPUTE RESOLUTION	19
4.4 FAMILY LAW AND THE LAW OF SUCCESSION	20
4.5 COUNTY LEGISLATION	21

4.6 CONCLUSION	21
5. BENEFITS OF A RE-EMERGENCE OF CUSTOMARY LAW: THE SOUTH AFRICAN EXPERIENCE	24
5.1 INTRODUCTION	24
5.2 THE CONCEPT OF UBUNTU	24
5.3 THE TRADITIONAL COURT SYSTEM	26
5.4 LESSONS THAT KENYA CAN LEARN FROM SOUTH AFRICA	29
6. CONCLUSION AND RECOMMENDATIONS	31
6.1 FINDINGS	31
6.1.1 HISTORY OF AFRICAN CUSTOMARY LAW AND AFRICAN LEGAL PHILOSOPHY	31
6.1.2 THE CONSTITUTION OF KENYA 2010 AND THE RE-EMERGENCE OF CUSTOMARY LAW	31
6.1.3 THE PROS AND CONS OF A RENAISSANCE IN CUSTOMARY LEGAL PHILOSOPHY	32
6.2 CONCLUSION	33
6.3 RECOMMENDATIONS	34
6.3.1 RECOMMENDATION 1: INCREASED INCLUSION OF CUSTOMARY LAW PRINCIPLES IN LEGISLATION	34
6.3.2 RECOMMENDATION 2: INCREASED STUDY ON CUSTOMARY LAW	35
6.3.3 RECOMMENDATION 3: TAKING ADVANTAGE OF TDRMS	35
6.3.4 RECOMMENDATION 4: JUDICIAL PRONOUNCEMENTS ADVOCATING FOR CUSTOMARY LAW	35
6.3.5 RECOMMENDATION 5: AMENDMENT OF THE JUDICATURE ACT	35
BIBLIOGRAPHY	36

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DISSERTATION DECLARATION FORM

I declare that the work on this dissertation has been carried out in accordance with the Strathmore Law School Guidelines for LL.B Dissertation and has only been submitted as partial fulfillment of the Strathmore Law School Bachelor of Laws degree. The work hereby submitted is my original work except where indicated by specific reference to other materials. All work which is not my own has been referenced according to the SLS Guidelines. All views expressed in this dissertation are those of the author.

SIGNED _____

A handwritten signature in black ink, consisting of a stylized, cursive script that is difficult to decipher but appears to be a personal name.

DATE _____

21st April 2016

ABSTRACT

The research paper aims to establish the effect of the Constitution of Kenya 2010 on African Customary law. To this end, there will be a thorough discussion of whether customary law has a philosophical underpinning (a sort of African customary jurisprudence) and subsequently, whether aspects of African philosophy have been incorporated in the constitution, or in legislation enacted thereafter.

The paper relied heavily on documentary research with great reference to journal articles (these form the greater part of the research) as well as a number of books which have been instrumental in determining the future of customary law.

Most of the findings made in this research paper will show that little is said in the Constitution regarding the place of customary law, with very narrow reference to it made in Article 2 of the Constitution. What it will show, however, is that implicitly, owing to numerous other provisions in the Constitution (many of which will be looked at in this paper) there is potential for customary law to thrive and those who largely live according to its principles have been accounted for in the current Constitution. There will also be a comparison between Kenya's and South Africa's customary law regime.

The key recommendations made in this paper are regarding research and legislation. It recommends that there should be an increase in research into the area of African customary law, and there should be increased legislation of customary principles.

LIST OF CASES

1. *Esiroyo v Esiroyo* (1973) EA 388.
2. *Obiero v Opiyo* (1972) EA 227.
3. *S v Makwanyane* (1995) 3 SA 391 (CC)
4. *AZAPO and others v TRC and others*, (1996) 4 SA 671 (CC)
5. *M v S* (2007) 12 BCLR 1312 (CC)
6. *Mdumane v Mtshakule* (1948) NAC (C&O) 28 (Bizana)
7. *Mahloane v Letele* H.C. Civ/App./93/1974
8. *R v Mohammed Abdow Mohammed* [2013] eKLR
9. *Kosele African Court Criminal case no 33 of 1966*
10. *Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango*, (Kisumu District Africa Court, CC 299/1966)
11. *Otieno v Ougo and another* [1987] eKLR
12. *Rono v Rono* [2005] 1 EA 363
13. *Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguithi & 3 others* [2014] eKLR.
14. *J.K (Suing on Behalf of CK) v Board of Directors of R School & another* [2014] eKLR.
15. *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR.
16. *Rachael Wanjiru Karanja v Nancy Wambui Kamau* [2015] eKLR.

LIST OF STATUTES, BILLS, AND SESSIONAL PAPERS

1. Constitution of Kenya 2010.
2. Constitution of South Africa, 1996.
3. Constitution of Kenya (Repealed).
4. Registered Land Act (Cap. 300) (Repealed).
5. Marriage Act No. 4 of 2014.
6. Marriage Act (Cap. 150) (Repealed)
7. Community Land Bill 2013.
8. East Africa Native Courts (Amendment) Ordinance 1902.
9. East Africa Order in Council 1897.
10. Kenya Colony Order in Council 1921.
11. Judicature Act, (Cap. 8, Laws of Kenya).
12. Magistrates' Courts Act 1967.
13. Protection of Traditional Knowledge and Traditional Expressions Bill 2015.
14. National Land Commission Act (Cap. 5D, Laws of Kenya).
15. Industrial Court Act No. 20 of 2011.
16. Black Administration Act 38 of 1927 (Repealed) (South Africa).
17. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (South Africa).
18. Child Justice Act 75 of 2008 (South Africa).
19. Traditional Courts Bill 15 of 2008 (South Africa).
20. Sessional Paper No. 10 of 1965: African Socialism and Its Application to Planning in Kenya.

1. INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Kenya's colonization changed the lives of its indigenous people forever. The colonialists changed the socio-political and legal structure in force in the region. They realized that the westernization of the people was essential for them to entrench their normative order in the region. With this in mind, they set about imposing their culture and their law on the natives. Okoth-Ogendo observed that the colonial powers in Kenya applied English law as the basic law of the land and applied it in virtually every sphere of life in the territory.¹ This illustrates the subjugation of African law during the colonial period.

The period after independence, prior to the passing of the Constitution of Kenya 2010, saw customary law recognized under Section 82 of the Constitution of Kenya (Repealed). The Judicature Act², however, placed customary law below other sources of law. Customary law was subject to written laws and would not be applied in instances where it would be repugnant to justice and morality.³ Peter Onyango observes that this provision of the Judicature Act places customary law at the bottom of the hierarchy of laws.⁴

The subjugation of customary law against other sources of law was seen even in land law. The cases of *Esiroyo v Esiroyo*⁵ and *Obiero v Opiyo*⁶ showed this when the court, despite recognizing ownership of land under customary law, declared that those customary rights were extinguished by the registration of the land under the Registered Land Act (Cap.300) (Repealed). This meant that customary ownership of land could be nullified in the event that a party proceeded to register the land in his own name.

This paper posits that the passing of the Constitution of Kenya 2010 has led to the re-emergence of customary legal principles. The new constitutional dispensation has allowed customary law to

¹ Okoth-Ogendo H, 'The Tragic African commons: A century of expropriation, suppression and subversion', No. 24, *Land Reform and Agrarian Change in Southern Africa, an occasional paper series*, School of Government, University of Western Cape, 2002, 5.

² Cap 8 of the Laws of Kenya.

³ Section 3 (2), *Judicature Act* (Cap 8 of the Laws of Kenya) 1967.

⁴ Onyango P, *African Customary Law System: An Introduction*, LawAfrica Publishing (Kenya), 2013, 75.

⁵ (1973) EA 388.

⁶ (1972) EA 227.

inform legislation and judicial decisions with greater force than had been the case in the past. For instance, Article 159 of the Constitution requires courts to be guided by the principle of alternative dispute resolution including traditional dispute resolution. The Marriage Act 2014 also allows for the application of traditional forms of dispute resolution when resolving marital issues.⁷

1.2 STATEMENT OF THE PROBLEM

The subjugation of customary law was detrimental to the people who ascribed to it, particularly in personal matters. Kenya became a country where those who lived outside the dominant normative order (statutory law) would essentially be living in spite of the law and whenever the arm of the law would reach for them it would be to their detriment.

1.3 OBJECTIVES OF THE STUDY

1.3.1 GENERAL OBJECTIVE

The overall object of the research is to highlight the re-emergence of African customary jurisprudence following the promulgation of the Constitution of Kenya 2010.

1.3.2 SPECIFIC OBJECTIVES

- (i) To look into the history of customary law in Kenya and assess the place of African customary jurisprudence throughout Kenya's legal history both prior to, and after the promulgation of the Constitution of Kenya 2010.
- (ii) To highlight specific aspects of African customary legal thinking are re-emerging under the current constitutional dispensation and to show if this re-emergence can be linked to the Constitution of Kenya 2010.
- (iii) To discern the potential effects of a re-emergence of customary jurisprudence to society.

1.4 RESEARCH QUESTIONS

The following are the research questions that the study will seek to answer:

⁷ Section 68, *Marriage Act* (No. 4 of 2014).

- (i) What has been the historical development of African customary jurisprudence in Kenya from the pre-colonial period, until the promulgation of the Constitution of Kenya 2010?
- (ii) Is the whole of African customary legal thinking re-emerging or is it only specific aspects of African culture that are informing the law? Can this re-emergence be linked to the Constitution?
- (iii) What are the potential effects of the re-emergence of African customary legal thinking, positive or otherwise?

1.5 LIMITATIONS OF THE STUDY

The research is likely to be faced by certain challenges that need to be mitigated. One such challenge may be the current scarcity of written material on the subject. Most of the reference materials relevant to customary law (such as books and articles) were written prior to the promulgation of the Constitution of Kenya 2010 and thus are likely to give little insight into the effect the Constitution has on customary law.

1.6 CHAPTER BREAKDOWN

Below is the chapter breakdown:

Chapter One: Introduction

This will be the opening chapter of the study and will seek to introduce the main concepts that the study will look at. It will also serve as a guide to the structure of the study, the research questions and objectives of the study and outline the proposed structure that the study will follow. This chapter will give the reader a view into the hypotheses prior to the research so that the reader may be able to discern, by the end of the paper, whether or not the research objectives were met.

Chapter Two: Conceptual Introduction

This chapter will look into the conceptual background behind the research topic. It will seek to develop the theoretical framework behind the idea of African customary law first as being validly referred to as 'law' and as containing within it a legal theory governing the rationale for having the various customs that comprise African customary law. The chapter will be careful not to generalize African customary law given that it differs from community to community but will attempt to show that there is a rationale for every custom and so a jurisprudential dimension to African customary law.

Chapter Three: Historical Background

In this part of the chapter, the research paper shall look into historical development of African customary law pre and post colonial period. The paper will seek to show how the colonial period slowly led to the subjugation of African customary law and legal thinking.

Chapter Four: Customary Law under the Current Legal Framework

This will be the main part of the research. It will be in this topic that the research paper will give a critical analysis of the current laws and the effect they have on customary jurisprudence. It will attempt to show how customary legal thinking has informed particular fields of law. In this part of the chapter, there will be an analysis of various statutes showing evidence of legal principles that are informed by African culture and thus African customary legal thinking. This chapter will also look at jurisprudence emanating from the courts regarding the constitutional treatment of customary law.

Chapter Five: Potential Consequences of a Re-emergence of African Customary Jurisprudence from the South African Experience

This chapter of the study will attempt to predict the potential consequences of a renaissance in African customary legal thinking. It will rely on the information gathered from experts as literature highlighting a similar experience from other jurisdictions such as South Africa.

Chapter Six: Conclusion and Recommendations

The concluding chapter will show what the study was able to prove during its study and give recommendations on the way forward, factoring in the potential merits and demerits of a re-emergence of African customary jurisprudence.

1.7 RESEARCH METHODOLOGY

The research will utilize a desk-based approach to acquire the information necessary for the final paper. The desk-based approach will seek to utilize articles, books, statutes and judicial precedents relevant to the topic, which will be accessed both through e-resources, the Strathmore University Library and the McMillan Library.

The data shall be analyzed qualitatively utilizing the deductive approach of qualitative analysis. This approach entails using the research questions to group the data then looking at the similarities and differences of the information acquired. It is appropriate given the limited time available to conduct the study

The research will also have a comparative aspect with the treatment of customary law in South Africa being contrasted with the treatment of customary law in Kenya. The choice of South Africa as a case study is based on South Africa's highly sophisticated customary law regime which has a lot to teach about customary law in a pluralistic society.

2. CONCEPTUAL INTRODUCTION

The research topic seeks to establish whether the enactment of the Constitution of Kenya 2010 has led to a renaissance of African customary jurisprudence in Kenya. The first issue that the chapter seeks to determine is whether African customary has a legal philosophy. A further necessary preliminary step that this chapter will grapple with is whether customary law can validly be described as law in the first place. This chapter develops in detail a case for African customary law as law and illuminates the various arguments for and against the thought of African customary law as law and therefore capable of having juristic thought.

2.1 WHETHER CUSTOMARY LAW HAS A LEGAL PHILOSOPHY

To understand whether or not the new constitutional dispensation has ushered in a renaissance in traditional legal thinking, we must first establish whether or not one can validly speak of a 'customary jurisprudence'. If customary legal thinking does not exist, then neither can its renaissance. Some of the literature touching on African customary law has attempted to grapple with whether it is law and whether there exists an African philosophy of law, have are addressed in this review.

Holleman⁸ makes the assertion that there is no African jurisprudence. This assertion is founded on the notion that there was no formalized system of legal study in the traditional African setting. It seems to suggest that a philosophy (of law for example) requires a deliberate and systematized study. African societies had no such structured conception of the law. Holleman assumes that there needs to be a formal philosophical study of law by a society, for there to be a philosophy of law in that society. What Holleman does not recognize, however, is that the lack of deliberate discussion on the philosophy of law does not necessarily connote the lack of a philosophy behind it, just merely the lack of a structured study of it.

Ayinla⁹ agrees with this notion, however, only in so far as there was no articulation of a philosophy of law. Ayinla goes one step further to state that in African societies, there was a philosophy of society centred towards the welfare of the community as a whole and the survival of each individual. He does, however, posit that in the African context, law was not distinct from culture but was, rather, a part of their culture. This, it would seem, suggests, that within their

⁸ Holleman J, '*Issues in African Law*' Mouton and Co, 1974, 13.

⁹ Ayinla L, 'African Philosophy of Law' Vol. 6 *Journal of International and Comparative law* (2002), 152.

philosophy of society upon which their culture depended, there was a 'philosophy of law' that informed the norms and customs that would govern their societies. This study aligns itself with Ayinla's position regarding customary jurisprudence showing that through the African philosophy of society, we see an African philosophy of law.

Adewoye Omoniyi illustrated the existence of juristic thought (despite the absence of a formalized philosophy of law) in the proverbs of the Yoruba. He posits that proverbs are tools through which knowledge is transferred. They are expressions of thought, and expressions of the truth.¹⁰ Proverbs are expressions of culture and ordinarily do not have legal principles. In the African society, however, proverbs were used to convey legal realities in the respective communities. Juristic thought, given the intertwining between law and culture, was actually expressed in the various cultural expressions such as proverbs.

In discerning the existence of juristic thought among African societies, the starting point, which Elias addresses, is to determine whether the norms governing them were in fact capable of being considered law. Elias posits that customary law can validly be regarded as law despite its informal nature. The next subchapter will look into the validity of customary law as law.

2.2 AFRICAN CUSTOMARY LAW AS LAW

The question of the validity of African customary as law hinges on the age old jurisprudential question, what is the definition of law. To a positivist, African customary law cannot be regarded as law. The mention of positivism is of particular importance in the Kenyan context given that law in many common law jurisdictions is largely founded on a positivist conception of law and Kenya is no exception to this.¹¹ The approach that this study will take in developing the idea of customary law as law is to first look at the arguments put forward by positivists explaining why customary law is not law, followed by arguments propounded against those brought forward by the positivists.

Positivist legal thought as propounded by John Austin defines law as a command by a political superior to his political inferiors. He continues to define the very nature of a command as

¹⁰ Omoniyi A, 'Proverbs as a Vehicle of Juristic Thought Among the Yoruba' *Obafemi Awolowo University Law Journal* vols. 3 and 4. (1987), 1-2.

¹¹ Gachenga E. W, *Integrating Customary and Statutory Law Systems of Water Governance for Sustainable Development: The Case of The Marakwet of Kenya*, Unpublished thesis for Doctor of Philosophy, School of Law, University of Western Sydney 2012, 54.

carrying the ability of the party commanding it to inflict pain upon those who disregard such a command.¹² To Austin, such a command was characterized as being a wish of the political superior, followed with a sanction for non-compliance and promulgated through words or signs.¹³ These for him were relevant features of positive law, or law properly called, as we would call it. To Austin, then it would be improper to refer to customary law as law. One feature about customary law, as explained by Gordon R Woodman, is that customary laws have different degrees of mandatory force.¹⁴ Austin would be hard pressed to consider such a system to be law, assuming that he would recognize the political authority that the leaders of a particular African community have is valid.

Elizabeth Gachenga argues that to the modern positivist, a law, rightly called is founded on reason. So for Hobbes, the 'Leviathan' would have a reason behind the laws he promulgates, or the political superior envisaged by Austin would make commands that are reasonable, or Dworkin's 'Judge Hercules' would make a judicial decision that is founded on a higher wisdom. For the positivists, customary law developed as a result of the practices of the communities bound by it and so would have been based on the practice of the people, and not the right reason of a political authority. In any event, as Gachenga argues, if a sort of accumulated wisdom were attributed to the customs of the people developed over the years, the positivists such as Hobbes would prefer law founded on authority which would be more certain.¹⁵

Hart, in his 'Concept of Law', argues that the ordering of a society by behavioural norms cannot be deemed to be law. In his view, primitive societies are characterized by such norms and that only in societies that are 'closely knit by kinship, common sentiment, belief,' and are placed in a stable environment. Only then, according to Hart, can behavioural norms or customs be sufficient.¹⁶ And such communities, he feels are in the minority of cases and he feels then that this system is likely to fail given such norms ordinarily lack sufficient coercive power as would ordinary laws.

¹² Austin J, '*The Province of Jurisprudence Determined*', Published by John Murray, Albemarle Street London, 1832, 6.

¹³ Austin J, '*The Province of Jurisprudence Determined*', 11.

¹⁴ Woodman G, 'A Survey of Customary Laws In Africa', *The Future Of African Customary Law*, edited by Fenrich, Galizzi and Higgins, published by Cambridge University Press, New York 2011, 13-14.

¹⁵ Gachenga E. W, *Integrating Customary and Statutory Law Systems of Water Governance for Sustainable Development: The Case of The Marakwet of Kenya*, 65.

¹⁶ Hart, HLA, '*The Concept of Law*', Clarendon Press, 1961, 92.

In summary, it seems that the positivist attack on customary legal systems is founded on two dominant premises: Customs lack the requisite coercive force of a valid law, and in any event, customs are not founded on the right thinking of a political authority but are rather only merely founded on the behaviour of the people.

Legal scholars have countered these assertions through various legal arguments. First, the rationale that customary law lacks coercive force seems to ignore the fact that in many traditional societies disregard of the law often carried fear of reprimand from the deities of a particular community. In many traditional societies, much unlike their more secular modern counterparts, the way of living of the people was governed by certain norms which were intertwined with religious beliefs. Fear of the wrath of their gods served as a sufficient coercive force among the members of a particular community. Coerciveness in the traditional customary law regime is also evident where disregard of the accepted norms was followed by social disdain. In the traditional African setting honour and respect in the community was something that every family strove towards.

Woodman argues that the coercive power that legislative authorities have in a positivist system is founded in a social acceptance of the authority of the legislature.¹⁷ This, he argues is a form of customary acceptance that the legislature or the relevant sovereign charged with the responsibility of making laws is the right authority to do so. He therefore argues that it would be paradoxical for positivists to argue that customary law is invalid yet there is a customary acceptance of the authority of the sovereign to inflict pain (as Austin would put it) as punishment for disobedience. In similar vein, the coercive nature of African customary law (if such nature were to be a mandatory requirement of the validity of a law) would be founded on the belief of the people that they are bound by those laws; an *opinio juris sive necessitas*,¹⁸ so to speak.

As regards the view that customary law is not founded on the right thinking of a recognized authority, the positivists are in error given that in traditional African settings, the political authority was often held by councils of elders, chiefs, and in some cases by kings.¹⁹ These authorities were often referred to when disputes arose, and in perhaps more sophisticated

¹⁷ Woodman G, 'A Survey of Customary Laws In Africa', 11.

¹⁸ This Latin maxim represents a belief on the part of a person that they were legally bound to perform a certain task. See <http://definitions.uslegal.com/o/opinio-juris-sive-necessitatis/> accessed on 16th March 2016.

¹⁹ Kenyatta J, 'Facing Mount Kenya: The Tribal Life of the Gikuyu' Mercury Books, London, 1967, 186-201

societies such as the Baganda who had a legislative body referred to as the *lukiiko*²⁰, these authorities made the laws of the land rather than aimlessly following the customary practices of the people. These political authorities were required to exercise wisdom in the application of the laws that governed the people so as to safeguard harmony in the community.

Some legal theorists are of the view that law in its broader sense, going beyond legislation or any other formal rule-making processes while criticizing the positivist view of law. Nyasani, speaks of law as being a paradigm that guides the actions of rational as well as inanimate beings²¹ The law of gravity, for instance would qualify as a law, same as the law of contract. He embraces the fact that the unwritten laws still falls within the broader conception of law such that though unwritten and informal forms of law may have limited legal impact, they still control the actions of people and in that sense, they are in fact laws. To Nyasani, customary law would thus be validly perceived as law.

Taslim Olawale Elias²² grappled with the notion of whether customary law can validly be considered as law. He points out that the mechanism for securing social order in a society need not be so highly institutionalized to be regarded as law. He asserts that the existence of a legal framework need not depend on the formalization and institutionalization of the law.²³ So long as there is a normative order through which society is governed, there in itself exists a law, devoid of the formality that is characteristic of Western systems of law. Therefore according to Elias, it would not be proper to disregard customary law on account of its informality.

2.3 CONCLUSION

The study has established that despite the various arguments to the contrary, African customary law is law and has a legal philosophy guiding its principles. The philosophy of society, which guides African culture as a whole, provides the basis for African customary law as well.

²⁰ <http://afritorial.com/tribe-the-baganda-ugandas-royal-kingdom-past-present/> accessed on 23rd March 2016

²¹ Nyasani M. J, '*Legal Philosophy: Jurisprudence*', Consolata Institute of Philosophy Press, 1995, 11.

²² Elias T, 'Legal Theory: A Nigerian Perspective' in M.I Jegede, *Nigerian Essays in Jurisprudence*, Lagos: MIJ Publishers LTD, 1993, 12-13.

²³ Elias T, 'Legal Theory: A Nigerian Perspective' in M I Jegede, *Nigerian Essays in Jurisprudence*, Lagos: MIJ Publishers LTD, 1993, 12-13.

3. HISTORICAL CONTEXT OF CUSTOMARY LAW IN KENYA

This chapter aims to look at the treatment of African customary law in Kenya during the colonial period as well as after independence but under the previous constitution. This chapter will attempt to show how the events occasioned by colonialism led to the subjugation of African customary law. It will then proceed to analyze the effect of independence on the place of customary law. The latter analysis will attempt to show what steps, if any, were taken to see a revival of African customary law, or which further subjugated it.

3.1 THE PRE-COLONIAL PERIOD

Prior to the arrival of the British into East Africa, customary law was applied extensively to all spheres of life and was the dominant normative order among the communities in Kenya.²⁴ George Otieno Ochich argues that given the lack of a centralized system of law-making, customary law had to be applicable as it was, that is, in all spheres of life.²⁵ Most communities had a governance structure that began from the family, which was secondary to the clan which, together with the other clans, were governed by a council of elders.²⁶ The clan would be comprised of various families sharing a common ancestor.²⁷ Some communities in Kenya, however, were ruled by a single ruler such as the *Nabongo* who was the king among the Wanga sub-community.²⁸ Other communities such as the Nandi and the Maasai had influential individuals who known as the *orkoiyot* and the *oloibon* (respectively). The influence that these individuals had was as a result of their role as religious leaders²⁹

These authorities were the custodians of the law of the society and were often charged with settling disputes between the parties. This role meant that these authorities would articulate the law and to some extent make the law. These authorities governed the various communities in Kenya prior to the coming of the colonialists.

²⁴ Ochich G O, 'The Withering Province of Customary Law in Kenya' in Fenrich, Galizzi and Higgins, *The Future of African Customary Law* Cambridge University Press, 2011, 104.

²⁵ Ochich G O, 'The Withering Province of Customary Law in Kenya', 104.

²⁶ <http://www.meac.go.ke/index.php/2014-08-29-09-36-03/2014-08-29-09-46-25> accessed on 23rd March 2016

²⁷ <http://www.meac.go.ke/index.php/2014-08-29-09-36-03/2014-08-29-09-46-25> accessed on 23rd March 2016

²⁸ <https://abawanga.wordpress.com/> accessed on 23rd March 2013;

²⁹ Okoth A, *A History of Africa: African societies and the Establishment of Colonial Rule 1800-1915*, East African Educational Publishers, 2003, 35; Cheater A, *Social Anthropology: An Alternative Introduction* Tyler and Francis e-library, 2005, 99

3.2 THE COLONIAL ERA

The arrival of the missionaries is arguably what marked the beginning of the subjugation of African customary law. Christopher Allen argues that missionary education legitimized Europeanization and therefore formed a basis upon which the authority of the Colonial government would be accepted.³⁰ Much as it is largely accepted that this was an unintended consequence on the part of the missionaries, some African customs would often be condemned by the missionaries as repugnant and backward. Western civilization was taught and emphasized. Allen notes that among the Kikuyu, Christianity had led to the adoption of new customs, evidence of the impact of missionary work on customary law.³¹ Once the people began to change their way of life, their customs began to change and so their 'customary law'.

The passing of the East Africa Order in Council in 1897, conferred on the Commissioner of the Protectorate (as Kenya then was) the power to legislate under the Queen's regulations.³² This effectively meant that he could make the law governing the Protectorate (in total disregard of the African political authorities that existed in Kenya at the time). The Order in Council only allowed African Customary law to be applicable to natives and in so far as they are not repugnant to justice and morality. The standards of justice and morality were not set in the legislation and thus were wholly dependent on the Commissioner. This saw the emergence of what has come to be known as the repugnancy doctrine a doctrine of law in colonial Africa that saw the disregard of any African laws deemed to be inconsistent with European notions of justice and morality. This is why the repugnancy clause has been regarded by some scholars as being an engine of cultural imperialism.³³

Section 20 of the East Africa Native Courts (Amendment) Ordinance 1902 is regarded by some as the one of the earliest steps in subjugating African customary law in Kenya.³⁴ It stated that, "*In all cases, civil and criminal to which natives are parties, every court (a) shall be guided by native law so far as is applicable and is not repugnant to justice and morality or inconsistent*

³⁰ Allen C, 'Missions and the Mediation of Modernity in Colonial Kenya' Volume 20 Issue 1 (Spring) *Penn History Review* (2013), 23.

³¹ Allen C, 'Missions and the Mediation of Modernity in Colonial Kenya', 23.

³² Ochich G O, 'The Withering Province of Customary Law in Kenya', 105.

³³ Okoth-Ogendo H, 'Customary Law in the Kenyan Legal System-An Old Debate Revived', in Ojwang JB and Mugambi JNK, '*The SM Otieno Case: Death and Burial in Modern Kenya*' Nairobi University Press, 1989, 143.

³⁴ Ochich G O, 'The Withering Province of Customary Law in Kenya', 106.

*with any Order in Council, Ordinance or any Regulation or Rule made under any Ordinance...*³⁵

Section 7 of the Kenya Colony Order in Council 1921 replicated Section 20 of the 1902 Ordinance but this time mandated every court in the colony to apply African customary law only so far as it is consistent with the laws made in the colony. Since the colonial administration was effectively and a white dominated Legislative Council (in 1921 it was wholly comprised of Settlers), it came as no surprise that the laws that were adopted in the colony were essentially European laws. Since these legislators had no idea or understanding of African customary law, the laws they made would conflict with African customary law more times than it would be consistent with it; and since by law it superseded African customary law whenever there was inconsistency, African customary law was essentially headed towards its demise. Customary law had moved from being the dominant normative order in the land to being at the bottom of the hierarchy of laws.

3.3 CUSTOMARY LAW IN INDEPENDENT KENYA

The ushering in of Independence saw great hope among the African Kenyans. The struggle for an end to white supremacy saw the return of Kenya to its rightful owners, the Africans. It was now the time of the newly independent Africans to exercise sovereignty over their own land that they had been denied for generations.

The importance of African tradition to the Independence government was evident in Sessional Paper No. 10 of 1965 on African Socialism, which sought to create a new economic system founded on African traditions of political democracy and mutual social responsibility³⁶ and non-aligned to either capitalism and communism. The paper seemed to be advocating for a system that would be a hybrid between what is indigenous to Africans and borrowing the best practices learned through the colonial era.

Section 82 of the Independence Constitution states that, although no law shall be valid under the Constitution if it is discriminatory, such a law may be valid if it makes provision for the application in the case of members of a particular race or tribe of customary law with respect to

³⁵ East Africa Native Courts (Amendment) Ordinance 1902.

³⁶ Sessional Paper No. 10 of 1965, paras 8,9, 10.

any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.³⁷ Peter Onyango argues that this provision was a safeguard of African customary law.³⁸ The negative aspect of this provision, however, was that it only meant that customary law would be applicable even if it contravened the Constitutional right against discrimination.³⁹ In that sense, it is arguable whether it safeguards customary law as a whole.

The reality, however, after Kenya attained its independence, was that the interests of the remaining settlers formed a key element in the negotiations during the Lancaster Conferences. There were fears among the British that a total handover of government to the Africans would leave the settler populations vulnerable. These concerns were voiced by Lord Colyton in the House of Lords debate on the Kenya Conferences in 1962.⁴⁰ In order to safeguard these European interests, Otieno Ochich argues, the English laws that had been passed prior to independence were retained and renamed from Ordinances to 'Acts'.⁴¹ The retention of these English laws meant that African Customary law would continue to be subjugated.

The Judicature Act, Cap. 8 of the laws of Kenya was passed in 1967 and gave the hierarchy of laws applicable in courts. Rather than raising the position of African customary law, as may have been intended by the independence government, section 3 of the Act placed customary law at the bottom of the hierarchy of laws, beneath the Constitution, Acts of Parliament and even the Common Law and the doctrines of Equity. The Act also saw the return of the repugnancy clause stating that customary law would only be applicable provided that it isn't repugnant to justice and morality. It is worth noting, however, that the standards of justice and morality remain those which the British had instilled in Africans during the colonial period. The colonial message was that Africans needed to be westernized to become civilized and so the Western standards of justice and morality would be the yardstick upon which the repugnancy of African customary laws would be judged.⁴²

³⁷ Section 82 (4), *Constitution of Kenya* (Repealed).

³⁸ Onyango P, '*African Customary Law System: An Introduction*', 73-74.

³⁹ Kamau, W, '*Customary Law and Women's Rights in Kenya*', accessed at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> on 16th January 2016, 10.

⁴⁰ http://hansard.millbanksystems.com/lords/1962/may/15/kenya-conferences#column_530 on 18th January 2016.

⁴¹ Ochich, '*The Withering Province of Customary Law in Kenya*', 107.

⁴² Buluma B, '*The Case for the Supremacy of Customary Law in Kenya*' accessed at https://www.academia.edu/9132576/The_Case_for_the_Supremacy_of_Customary_Law_in_Kenya on 19th January 2016.

The repugnancy test may also be criticized for its uncertainty as evident in *Otieno v Ougo and another*⁴³ popularly known as the *SM Otieno* case. In this case, the court found that there was no law that contradicted burial according to customary law, nor did he find it repugnant to justice and morality, in that particular case for the deceased to be buried at his ancestral home. Legal scholars, have, however, criticized the position taken by court from the standpoint of gender equality. April Gordon argues that the case is a clear example of the place miserable place of African women.⁴⁴ Oketch-Owiti is of the view that the court erred in finding in favour of a law that denied a woman from participating in making decisions affecting them.⁴⁵ The question that arises is whether such a discriminatory law may be is or is not repugnant to justice and morality. Some judges may have found such a law to be repugnant.

The Magistrates' Courts Act 1967, also adversely affected the application of customary law. Prior to the passing of this Act, African courts had could hear matters relating to African customary law. These courts applied customary law in all aspects including criminal law. For instance, in *Kosele African Court Criminal case no 33 of 1966*, the accused was ordered to pay a customary fine after being convicted of indecent assault.⁴⁶ In *Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango*,⁴⁷ the court heard a complaint from the plaintiff regarding defamation contrary to Luo customs. The Magistrate's Act converted these informal African courts into Magistrates' courts and limited the application of customary law to matters of land, intestacy, family, seduction of unmarried women and girls, enticement of married women to adultery and status of women and children.⁴⁸

Another example in the post-independence period of the subjugation of customary law is in the land regime. Under the old land laws, particularly the Registered Land Act, all title in land was only respected so long as it was registered and so a first registration would triumph over other interests in land.⁴⁹ The cases of *Esiroyo v Esiroyo* and *Obiero v Opiyo* (referred to in Chapter

⁴³ (1987) eKLR.

⁴⁴ Gordon A, 'Gender, Ethnicity, and Class in Kenya: "Burying Otieno" Revisited', *Vol. 20, No. 4, Postcolonial, Emergent, and Indigenous Feminisms*, (Summer, 1995), 883-912, 885.

⁴⁵ Gordon A, 'Gender, Ethnicity, and Class in Kenya: "Burying Otieno" Revisited', 885

⁴⁶ Cited in Kariuki F, '*Customary Law Jurisprudence from Kenyan courts: Implications for Traditional Justice Systems*' <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf> on 20th January 2016.

⁴⁷ Kisumu District Africa Court, CC 299/1966.

⁴⁸ Section 2, *Magistrates' Act* (Cap 10 of the Laws of Kenya).

⁴⁹ Section 28, *Registered Land Act* (Cap 300) (Repealed).

One above) stated that customary rights to land were extinguished by registration of title under the Registered Land Act. This, the court held, would be the case despite there being customary rights to the land.

In the context of succession law, parliament passed the Law of Succession Act (Cap. 160 of the Laws of Kenya) in 1981. Prior to the passing of the Act, African estates were governed by either the relevant customary law, or under the African Wills Ordinance 1961.⁵⁰ The 1981 Act limited the application of customary law. Section 2 (1) states that the provisions of the Act apply to all succession matters in unless provided otherwise by the Act or any other written law.⁵¹ Justice Waki held in *Rono v Rono*⁵² held that this section meant that customary law was expressly excluded unless provided for by the Act. The only instances where customary law is applicable under the Act is; in estates where the deceased died prior to the application of the Act; where a testator provides in a will that his property is to be divided according to customary law; and where Section 33 applies in the event of intestacy.⁵³

During the post-independence period, there was little by way of reform that was intended to correct the injustices occasioned by the prior subjugation of African customary law, a subjugation which had been intended to further the Colonial agenda.

⁵⁰ Musyoka W, '*Law of Succession*' LawAfrica Publishing 2006, 9-11.

⁵¹ Section 2(1), *Law of Succession Act* (Cap. 160, Laws of Kenya).

⁵² [2005] 1 EA 363

⁵³ Musyoka W, '*Law of Succession*', 22

4. THE CONSTITUTION OF KENYA 2010 AND THE APPARENT RENAISSANCE OF AFRICAN CUSTOMARY LAW

This chapter will attempt to show how the new constitutional dispensation has affected the place of customary law and customary legal thinking. This in effect will look into the main issue in the research topic, and will do so at considerable depth. The key hypothesis in this study is that customary law is undergoing a renaissance under the current constitutional dispensation in Kenya. Therefore in assessing the validity of the hypothesis, the study will look at various branches of the law and see whether there is such a re-emergence; and if there is such a re-emergence, the study will use provisions of the Constitution to show whether it is the Constitution that is causing this re-emergence.

4.1 CONSTITUTIONAL LAW AND HUMAN RIGHTS

Article 2 (4) of the Constitution of Kenya states that customary law which is inconsistent with the Constitution shall be void. It has been argued by some scholars that this provision acknowledges customary law but in a negative sense.⁵⁴ Some of these scholars argue that the effect of the Constitution is to further subjugate customary law.

This study will show that there are other provisions in the Constitution that serves to enhance customary law, or at the very least, encourage legislation that will seek to entrench certain principles that are originally African.

Article 11 (1) of the Constitution recognizes culture as the foundation of the nation. Recognition of culture under this article gives, to a certain extent, legitimacy to customary normative systems.⁵⁵ This is so because it is difficult to allow people to live according to their culture and yet deny them the opportunity to abide by the laws governing that culture. After all, as discussed in chapter two above, African culture was often intertwined with African law. Therefore to allow one without allowing the other would be an oxymoron.⁵⁶ The declaration that culture is the foundation of the nation, however, is subject to limitations. In *Peter Karumbi Keingati & 4*

⁵⁴Lumumba PLO, Franceschi L, 'The Constitution of Kenya, 2010: An Introductory Commentary' Strathmore University Press, Nairobi, 2014,71.

⁵⁵ Gachenga E, 'Customary Law Systems for Water Governance in Kenya' in Martin P, Bigdeli S, Daya-Winterbottom T, du Plessis W, Kennedy A, 'The Search for Environmental Justice' IUCN Academy of Environmental Law Series 2012.

⁵⁶ Ayinla L, 'African Philosophy of Law', 152.

*others v Dr. Ann Nyokabi Nguithi & 3 others*⁵⁷ the court was of the view that Article 11 (1) cannot be used to promote cultural practices that are negative, discriminatory or retrogressive as the Constitution cannot possibly have envisaged that it may be used for that purpose. Justice Kimaru was of the view that this article was envisaged to promote all the positive aspects of culture.

The Constitution goes further to protect the right to culture and language under Article 44. In protecting the right of Kenyans to live by a culture of their choice and to belong to a cultural or linguistic community, the Constitution thus allows the norms of these cultural and linguistic groups to regulate the lives of the people who subscribe to these groups. The net effect of this is to provide further legitimacy to customary law as a normative system. In *J.K (Suing on Behalf of CK) v Board of Directors of R School & another*,⁵⁸ the court held that in relying on Article 44 protecting the right to culture, a petitioner ought to prove the cultural practice intended to be protected is in fact a part of the culture that he ascribes to.

Article 11 (2) provides for the protection of traditional knowledge, mandating parliament to enact legislation to protect the cultural heritage of the various communities in Kenya by ensuring that those who borrow from the heritage of these communities compensate them, as well as requiring that royalties are paid to the community for the use of their cultural heritage. This recognizes a property right that has its origins in customary law, that is, the communal ownership of the intellectual property of the community handed down from generation to generation. In furtherance of this aim, Parliament enacted The Protection of Traditional Knowledge and Traditional Expressions Bill 2015 which is yet to be passed into law.

4.2 LAND LAW

The customary principle of communal ownership is also evident in Article 63 of the Constitution which recognizes communal ownership of land.⁵⁹ Okoth-Ogendo notes that to the British colonialists, the notion of *res communis* was the same as their concept of the commons and was therefore declared *res nullus* (nobody's property).⁶⁰ After Independence, there was an attempt to allow communities to own land under the Trust Lands Act but that Act never formally

⁵⁷ [2014] eKLR.

⁵⁸ [2014] eKLR

⁵⁹ Article 63 (1), *Constitution of Kenya* (2010).

⁶⁰ Okoth-Ogendo H, '*The Tragic African commons: A century of expropriation, suppression and subversion*'.

recognized ownership of the land by the community but rather bestowed ownership on the group representatives who would register the land in their names on behalf of the communities they represented. This led to numerous instances where the land was mismanaged for the benefit of the registered owners of the land.

The constitutional recognition of communal ownership in land has in this way led to the re-emergence of the customary principle of communal ownership of land. It has further protected it from being disregarded as a system of ownership as was seen in cases such as *Esiroyo v Esiroyo* (discussed above) which declared that registered title trumped customary title to land.

The problem facing the actualization of communal land ownership is the continued delay in passing the Community Land Bill. Justice Nyamweya notes in *Joseph Letuya & 21 others v Attorney General & 5 others*⁶¹ (the Ogiek case) that although the Constitution recognizes the communal ownership of land, the operation of this constitutional provision has been delayed by Parliament's reluctance to pass the Community Land Bill into law. The delay seems to be caused by disagreement between the national government, the National Land Commission and the County Governments and parliament, over various clauses in the Bill.⁶² Hopefully, for the sake of the various communities which will depend on this legislation, their best interests will be factored in when the legislation is finally passed.

4.3 ALTERNATIVE DISPUTE RESOLUTION

The Constitution continues to give legitimacy to customary normative structures by providing in Article 159 that judicial authority ought to be guided by, among other things, promoting alternative dispute resolution mechanisms including traditional dispute resolution mechanisms (TDRMs).⁶³ Although it goes on to provide that the use of TDRMs is limited by the Bill of Rights or their inconsistency with either justice and morality; or the Constitution itself or any written law, this provision seems to give legitimacy to African customary methods of dispute resolution. This provision has been replicated in a number of statutes (which shall be looked at in great depth later in the paper). To the extent that practically TDRMs are considered when delivering justice, this provision has provided a re-emergence of customary principles which

⁶¹ [2014] eKLR.

⁶² <http://www.standardmedia.co.ke/article/2000178543/20-coast-mps-and-national-land-commission-reject-proposed-community-land-bill> accessed on 24th March 2016

⁶³ Article 159 (2) (c), *Constitution of Kenya* (2010).

would undoubtedly be at the heart of the TDRMs. In future this may lead to an increased body of customary juridical principles as the use of TDRMs becomes more widespread.

Francis Kariuki argues that Article 159 has been interpreted by courts as not limiting the application of African customary law to civil matters⁶⁴ and evidence of this is in the decision in *R v Mohammed Abdow Mohammed*⁶⁵ where the court allowed for a settlement in a murder case according to Somali customary law. This is very different from the position in the Judicature Act.

The National Land Commission Act⁶⁶ as well as the Industrial Court Act⁶⁷ both mandate the National Land Commission and the Industrial Court to encourage the application of traditional dispute resolution mechanisms⁶⁸ when determining the relevant disputes brought before them. This provision is largely driven by Article 159 of the Constitution which seeks to promote TDRMs as an alternative to the court system. This provision appears again in the Environment and Land Court Act⁶⁹ where the court is allowed to be guided by principles of alternative dispute resolution mechanisms such as TDRMs. In this way, we see the place of customary methods of dispute resolution being elevated into statutory law.

This shows an attempt by the new constitution to elevate the position of customary law given that there are several people in the country who have suffered great injustices due to the subjugation of the customary law regime.

4.4 FAMILY LAW AND THE LAW OF SUCCESSION

The Marriage Act 2014 allows for customary marriages⁷⁰ and provides that these marriages are to be governed by the customary law of one or both of the intended parties.⁷¹ It further provides that parties in customary marriages may opt for traditional dispute resolution or mediation in the settlement of their disputes (provided that these are in conformity with the Constitution). This is evidence of a deliberate attempt by Parliament to codify the validity of customary marriages.

⁶⁴ Kariuki F, 'Customary Law Jurisprudence from Kenyan courts: Implications for Traditional Justice Systems' 11.

⁶⁵ [2013] eKLR.

⁶⁶ Cap. 5D.

⁶⁷ No. 20 of 2011.

⁶⁸ Section 5 (1) (f) *National Land Commission Act* (2012); Section 15 (1) *Industrial Court Act* (2011).

⁶⁹ Section 20, *Environment and Land Court Act* (2011).

⁷⁰ Part V, *Marriage Act* (2014).

⁷¹ Section 43, *Marriage Act* (2014).

Under the Repealed Marriage Act, Cap 150, the provisions of the Act were not applicable to marriages celebrated in accordance to customary law.⁷² This meant that there was no regime governing the application of customary law under the Act. With the 2014 Marriage Act we see an opportunity for couples to marry under customary law and have their marriage protected under statutory law. They are required, however, to prove the existence of the customary marriage if the matter came before the courts. In *Rachael Wanjiru Karanja v Nancy Wambui Kamau*⁷³ The court held that customary marriages must be proved in court by any party that alleges its existence.

As things stand, the Law of Succession Act 1981 is still the definitive law governing succession matters and therefore the place of customary in the context of succession law remains as was the case prior to the passing of the Constitution. Therefore, as explained in Chapter 3 above, customary law is only applicable in succession cases where the Law of Succession Act or any other written law permits it.

4.5 COUNTY LEGISLATION

Peter Onyango argues that County legislations may also provide an avenue through which customary law may inform legislation. Generally speaking, members of the counties in Kenya tend to be either from the same community or from communities that have their ancestral homes in adjacent counties. The Constitution empowers counties to make legislation under Article 185, as read with the Fourth Schedule (which provides what matters fall within the jurisdiction of the county government). In this way, communities may begin to incorporate principles which are similar to those making up their customary law. Notably, the county legislation is limited only to those matters allocated to the county government lest a situation arises where a dominant community imposes its way of life upon the minority in a particular county. Nonetheless, there is a possibility for customary law principles to be introduced into county legislation.

4.6 CONCLUSION

Scholars point out that unlike the repealed constitution which made an explicit statement regarding the position of customary law, the current Constitution only directly mentions customary law within the context of stating its inferiority to the Constitution. It may also be

⁷² Section 37, *Marriage Act (Repealed)* Cap. 150.

⁷³ [2015] eKLR

argued that Article 159 (3) (c) in providing that TDRMs shall not be used in any way that is repugnant to justice and morality, shows the intention of the Constitution to maintain the status quo of looking into the repugnancy of a TDRM method without setting out what criteria are to be applied in determining the standard.

What is worth noting as well is that the Judicature Act which is the ultimate authority on the hierarchy of laws in Kenya, still remains in force and so its provisions are applicable in cases where customary law is brought up. The lack of a definitive statement in the Constitution either correcting or continuing the application of the Judicature Act and its position regarding the place of customary law as a source of law; doesn't serve to promote customary law as the provisions discussed in the previous section would seem to suggest.

The question that then comes up is whether customary law as a body of law is re-emerging, or whether it is customary principles that are beginning to find their place in the sources of law higher up in the hierarchy of laws. The primary hypothesis of this paper is that although we have not seen a heightened position of customary law itself, principles largely associated with African customary law as opposed to English law (whose principles largely guided legislation) are appearing more clearly in current legislation.

Take for example the Protection of Traditional Knowledge and Traditional Expressions Bill 2015. Although it is yet to be passed into law, it provides for a means through which intellectual property may be owned by a community. The Community Land Bill also, when passed, would provide a mechanism by which communal rights to land may be registered, how land disputes are to be settled, how the community may acquire land etc. These two Bills allow communities to own property, a concept which the colonialists completely disregarded despite being a principle that was common to traditional African communities.

These few statutory examples show what seems to be the trend towards codifying principles that are original to Africans and are relevant within the African context of those under whom the law applies. What is worthy of note, however, is that traditionally, courts have tended to be guided by the hierarchy of laws under the Judicature Act and so there is a possibility that most of these statutes advocating for an elevation of customary principles will conflict with the Judicature Act. Given that those provisions such as Section 15 of the Industrial Court Act and Section 20 of the

Environment and Land Court Act merely provide that a court may be guided by principles of TDRMs, the attitude of the courts may be to continue to subjugate customary law by not applying these principles.⁷⁴

⁷⁴ Kariuki F, '*Customary Law Jurisprudence from Kenyan courts: Implications for Traditional Justice Systems*' 12.

5. BENEFITS OF A RE-EMERGENCE OF CUSTOMARY LAW: THE SOUTH AFRICAN EXPERIENCE

5.1 INTRODUCTION

Although South Africa isn't the only country in Africa that boasts of a regime that recognizes customary law, it has one of the most sophisticated African customary law regimes in Africa. The concept of *Ubuntu* has found its way into the formal South African court system and this only serves to complement the great work done by the traditional court system which runs parallel to the formal courts in South Africa. In this chapter, the discussion will look at the customary law regime in South Africa, first looking at the concept of *Ubuntu* and how it plays a role in judicial making even in the highest levels of the South African judiciary. The chapter will then proceed to look into the traditional court system currently present in South Africa, highlighting the pros and cons of the system as whole and then the chapter will conclude by making a comparison between the present system in South Africa and the current regime in Kenya pointing out what lessons Kenya could learn from the current regime in South Africa.

5.2 THE CONCEPT OF UBUNTU

The principle of *Ubuntu* is widely known as the means through which African customary law has found its place in the modern legal framework in South Africa. It is defined loosely as a concept of humanism, fairness, solidarity and generosity⁷⁵ quite similar to 'utu' its Swahili counterpart. Desmond Tutu defined the concept of *Ubuntu* as one where a person is open to others knowing that he/she belongs to a greater whole and is diminished when others are humiliated or depressed.⁷⁶

The system of *Ubuntu* has much been likened to the English doctrine of Equity⁷⁷ given its basic premise of treating everyone fairly and in a humane way. At the end of Apartheid, there was an opportunity for the elevation of the status of African law in South Africa after the continued oppression of the native Africans during colonialism and (thereafter) during the Apartheid era. With the Apartheid legacy at the back of their minds, the concept of *Ubuntu* emerged in the legal

⁷⁵ Ochieng P, '*African Customary Law: An introduction*', 113.

⁷⁶ <http://www.peoplesawa.com/fr/bnnews.php?nid=1987> accessed on 23rd February 2016

⁷⁷ Bennet T, '*Ubuntu: An African Equity*' accessed on

<http://dspace.nwu.ac.za/bitstream/10394/4677/1/2011x14x4UbuntuBennett.pdf> at page 21, accessed on 23rd February 2016.

sphere to ensure a level of fairness that may not be attained as easily in a legal system that largely favoured a written form of law but did not match the reality of many Africans who lived according to the customary law of their communities.

As a result of this, the courts in South Africa have applied the concept of Ubuntu in determining cases in all spheres. In public law matters for instance, the Constitutional Court in South Africa first expressly referred to Ubuntu in *S v Makwanyane*⁷⁸ where Justices Mokgoro and Langa spoke of the concepts of communality and the notion that all human beings should be accorded the dignity inherent with their human nature.

In *AZAPO and others v TRC and others*,⁷⁹ the Constitutional court had to grapple with the issue of whether the Truth and Reconciliation Commission had acted unconstitutionally in allowing amnesty for Apartheid perpetrators. The court held that given the circumstances, the principles of fairness (alluding to the concept of Ubuntu) required that there be amnesty for those who come forward, otherwise there nobody would ever come forward and so many crimes would have gone unpunished.

We see also the concept of restorative justice (a concept borrowed from the Ubuntu concept) applied in South African criminal law when it comes to matters of sentencing. In *M v S*⁸⁰ the court held that in that particular case social rehabilitation was more useful to the accused rather than incarceration and the potential loss of the his job. The court assessed the facts of the case and looked to the principles of fairness to determine what would be the most relevant form of delivering justice in that case.

The courts in South Africa haven't limited the Ubuntu concept to public law but have also found a place for the doctrine in private law. The application of Ubuntu in the private sphere has, however, been far less welcome than in public law.⁸¹ In Private law it has largely been felt in cases under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, as well as the Child Justice Act. Ironically, it has seldom been applied in the law of tort in South

⁷⁸ 1995 3 SA 391 (CC).

⁷⁹ 1996 4 SA 671 (CC).

⁸⁰ 2007 12 BCLR 1312 (CC).

⁸¹ Bennet T, 'Ubuntu: An African Equity' 40.

Africa despite it being similar to principles of Equity and tort law requiring standards such as reasonableness, duties of care, etc.

5.3 THE TRADITIONAL COURT SYSTEM

Aside from the Ubuntu concept, the presence of customary law in South Africa is felt through the traditional court system. This court system has been in place from as early as 1927, with the passing of the Black Administration Act⁸² which allowed traditional authorities to conduct judicial activities which were recognized by the state whose decisions may be appealed to the magistrates' courts. The power of these courts was respected and its decisions were given effect even by the higher courts. Doubts about the authority of the traditional courts were set aside in *Mdumane v Mtshakule*⁸³ where it was held that the judgments of the traditional courts were binding on the parties.

By 1994, South Africa had as many as 1500 traditional courts⁸⁴ and their existence is safeguarded in the South African Constitution 1996.⁸⁵ These courts function in a distinct manner from the rest of the South African court system with unique structures, rules of procedure as well as jurisdiction. Notably, the courts have both criminal as well as civil jurisdiction⁸⁶ where their civil jurisdiction is limited to matters governed by customary law (excluding the nullity or validity of marriages) while their criminal jurisdiction is over matters under customary or common law. Prior to the repeal of the Black Administration Act, the criminal jurisdiction was limited by the Third Schedule of the Act. Their criminal jurisdiction was also limited only to native Africans and the punishments that they can give were also limited by the Act. The traditional courts are presided over by chiefs and deputies.

The traditional courts are known to be easily accessible to the people, as nearly every village has at least one court. They are also known to be cheaper since these cases don't require a lawyer and since they are closer to the people, the transportation costs are often negligible.⁸⁷ The traditional courts are not regarded as courts of record and so most of the proceedings are

⁸² Act 38 of 1927 (Repealed).

⁸³ 1948 NAC (C&O) 28 (Bizana).

⁸⁴ Koyana D, 'Traditional Courts in South Africa in the Twenty First Century' in Fenrich, Galizzi and Higgins, *The Future of African Customary Law* Cambridge University Press, 2011, 229.

⁸⁵ Item 16 (1) of Schedule 6, *Constitution of the Republic of South Africa* (1996).

⁸⁶ Section 12 (1) and section 20, *Black Administration Act* (Act 38 of 1927).

⁸⁷ Koyana D, 'Traditional Courts in South Africa in the Twenty First Century', 231.

conducted orally with only the particulars of the parties, the particulars of the claim and the defence, and the judgment being recorded. Often, the language used in the proceedings is the language of the region where the case is being conducted and so is easily understood by the parties. The procedure in the courts is also often simple since the same procedure is followed both in civil and criminal cases and often the distinction is not as pronounced in the traditional court system as it is in the formal court system.⁸⁸ Another characteristic of these courts is that they promote reconciliation rather than retribution which mirrors the values of the traditional African society.

Certain criticisms have been made regarding the traditional court system in South Africa. One such criticism is levied against the barring of legal representation before the traditional courts. Some scholars even called for the abolition of these courts due to what may have been termed as a deprivation of the right to representation before these courts. This very issue was litigated in *Mahloane v Letele*⁸⁹ where the High Court affirmed the decision of the magistrate's court that the wisdom of the Legislature was well founded in barring representation in the traditional courts based on the fact that these courts mostly dealt with matters which were relatively simple and could adequately be dealt with by the chiefs (who are not judicially trained).

The fact that the chiefs presiding over these courts are not judicially trained leads to another criticism in that they do not meet the constitutional requirement⁹⁰ that judicial officers ought to be appropriately qualified. Some argue that since they are largely untrained in the law, the chiefs and deputies presiding over these courts are not appropriately qualified and so ought not to hold office. The other side of the argument would be, however, that these chiefs are usually well versed in customary law which is the relevant law for the bulk of, if not all, the cases brought before them. In this sense one might argue that they are appropriately qualified to handle the cases that would largely be brought before them.

Traditional courts are equally criticised for the lack of a role for women. For one, women are not allowed to be chiefs, and further, female litigants are not allowed to present their own case and must appoint a male relative to represent them. This issue was meant to be addressed in the

⁸⁸ Bekker J, Rautenbach C and Goolam E, 'Traditional Authority Courts' in *Introduction to Legal Pluralism in South Africa* LexisNexis/Butterworths 2006, 144.

⁸⁹ H.C. Civ/App./93/1974.

⁹⁰ Section 174 (1), *Constitution of the Republic of South Africa* (1996).

Traditional Courts Bill, but unfortunately since the Bill was not passed (some sources feeling that the Bill will never be passed⁹¹) the discrimination of women in these courts continues.

The procedure in the traditional courts is also seen as unfair on the part of accused persons when criminal matters are brought before them. This is so because it places the burden of proof on the part of the accused and therefore obliges him to speak in total disregard of the right of an accused person to remain silent.⁹²

Other critics say that the system ignores the fundamental principle of the separation of powers since the chiefs who are appointed to preside over the matters in the traditional courts are also executive officials. The responses put forward to this particular criticism are that historically the African communities didn't have a doctrine of separation of powers and so the establishment of these courts needed the political leaders of the community to be appointed so as to grant the court the legitimacy it required.⁹³

Some commentators have gone further to criticise the unlimited monetary jurisdiction of the traditional courts. They argue that since the courts deal with matters that are simple, and since the officers presiding over them are not educated enough to deal with complex cases, then the courts should be limited to handle matters of relatively small pecuniary value. This was to be addressed by the Traditional Courts Bill which has not been passed as yet.

What is perhaps the most damning criticism about the traditional courts is that it is a relic of the Apartheid era. Some people see their existence as a continuation of the segregation i.e. natives are governed by native law while. The preamble of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005⁹⁴ notes that this is one of the justifications of repealing the Black Administration Act.

All in all, despite some of the weaknesses of the traditional court system, it is remarkable how the courts provide a way through which African customary law can play a significant role in the modern African society.

⁹¹ <http://www.iol.co.za/sundayindependent/who-killed-the-traditional-courts-bill-1654811> accessed on 24th February 2016.

⁹² South Africa Law Commission, 'The Harmonization of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders' Discussion Paper 82 (May 1999), 2.

⁹³ Koyana D, 'Traditional Courts in South Africa in the Twenty First Century', 233.

⁹⁴ Act No. 28 of 2005

5.4 LESSONS THAT KENYA CAN LEARN FROM SOUTH AFRICA

From this discussion above, it is evident that South Africa has a much more sophisticated system of African customary law than Kenya does. First, African customary law has a subtle influence on the formal judicial system through the *Ubuntu* concept. Although there is nothing akin to this doctrine of fairness based on the principle of communality, the recognition of customary law as a source of law, and the fact that courts may be guided by the principles of traditional dispute resolution mechanism pursuant to the Kenyan Constitution provides an opportunity for customary law to be applied in the dispute resolution process.

The difference, however is that the judicial history in South Africa shows a level of respect accorded to the *Ubuntu* concept by courts as high as the Constitutional Court. The Kenya context on the other hand shows the continued legacy of the repugnancy clause in the Judicature Act. The effect of this clause has been to subjugate customary law even after independence when Africans had the opportunity to impose their values into the new society.

Another rather significant difference between the two nations is the continued existence of traditional courts in South Africa as distinguished from the abolishment of the Native courts in Kenya. This has also contributed to a significant difference in the sophistication of the African customary law systems given that in South Africa traditional courts are empowered to rule according to customary law while in Kenya, customary law is left to the optional application of the courts in the formal systems. This inevitably leads to a higher place for customary law in South Africa as compared to Kenya.

It may be argued that the difference between the two states is due to the difference in their historical development. While Kenya was dominated by the colonialists who left after independence, the Africans in South Africa continued to be dominated by the Afrikaner minority even after the British colonialists had left. This meant that in the case of the latter, the longer subjugation, coupled with the violent history that is associated with the Apartheid system meant that for harmony to be restored, the place of African law had to be elevated. In Kenya on the contrary, the colonial government left but required the African government to compromise so as to protect the settlers who remained behind. This meant that the Kenyans had to maintain several of the colonial laws.

The difference may also be attributed to a societal perception among the Africans in the two nations. In the Kenyan context, there may be a possibility that many of the elites, upon being educated looked down upon the African aspects of their culture compared to their native South African counterparts who may have associated everything Western with Apartheid. This meant that the transition to majority rule meant a more aggressive push for the Africans to maintain the system that allowed them to live according to their customary law, and to allow an element that is indigenous to them to be applicable in the law.

All in all, there are several lessons we may learn from the system of African customary law in South Africa.

6. CONCLUSION AND RECOMMENDATIONS

6.1 FINDINGS

6.1.1 HISTORY OF AFRICAN CUSTOMARY LAW AND AFRICAN LEGAL PHILOSOPHY

The study sought to achieve a number of objectives. The first objective was to outline the history of customary law and customary legal philosophy. It found that during the pre-colonial period, most African societies were ruled by councils of elders at the highest level, while the family was the basic political cell of the society. These councils of elders solved disputes in their communities and used the customs of the people passed down from generation to generation. These customs were informed by a community's philosophy of society. There was never a distinct philosophy of law among African societies but their cultural philosophy also informed their legal philosophy.

The contact between Africans and Europeans, first through the missionaries, then through colonization, led to the subjugation of customary law. The conversion of the people to Christianity made them view their cultural ways as backward and repugnant, while the subsequent colonization by the British led to the imposition of British laws and the formal subjugation of African law.

The attainment of Independence in Kenya led to very little change in the place of customary law. The passing of the Judicature Act created a repugnancy test which would be applied when courts were to determine whether customary law would be applicable or not. It also limited customary law to civil matters. The Magistrates' Act (repealed) effectively led to the end of the traditional court system and placed the power of determining customary law matters in the hands of magistrates. The net effect of this was to further subjugate customary law and customary law institutions.

6.1.2 THE CONSTITUTION OF KENYA 2010 AND THE RE-EMERGENCE OF CUSTOMARY LAW

The study has found that the Constitution of Kenya 2010 has led to a re-emergence in customary law. This re-emergence, however, is subtle given that it has no specific provision calling for the renaissance of customary law. In fact, article 2 (4) is widely regarded by constitutional scholars as only recognizing customary law in a negative sense; as being void if inconsistent with the Constitution. Despite this, a number of constitutional provisions seek to create an establishment

that is distinct to the Kenyan situation, by recognizing certain principles that originate from the culture of the people themselves and are not borrowed from the British, whose influence in our law is still strong.

By recognizing the right to culture and the protection of traditional knowledge and the cultural heritage of the people of Kenya, communal ownership of land, and by advocating for traditional dispute resolution mechanisms, the constitution has led (indirectly) to the recognition of concepts which would have been alien to the British who colonized us. This is what this study refers to as the renaissance of African customary jurisprudence.

6.1.3 THE PROS AND CONS OF A RENAISSANCE IN CUSTOMARY LEGAL PHILOSOPHY

One of the underlying objectives of the study was to attempt to predict what the advantages or disadvantages of having a customary system would be. Evident from the *SM Otieno* case, as well as judging from some of the criticisms about the traditional court system in South Africa, we see that one of the first disadvantages of customary law is its patriarchal nature. As Woodman points out, customary laws tend to sustain inequalities in the social order.⁹⁵ Discrimination against women was common in most if not all African communities and so the laws of these communities reflected the lowered status of women in society.⁹⁶ Women did not have the right to inherit, nor did they have the right to be heard when a matter was brought before the adjudicatory bodies in the communities (in most societies a council of elders).⁹⁷

In other societies, some practices such as female circumcision, were essential to the community and were advocated for in the law. These practices have been found to be repugnant and dangerous. A total re-emergence of customary law might lead to the return of some of these practices.

A re-emergence of customary law, however, would be advantageous when dealing with some of the historical injustices caused by its subjugation. These injustices arise in a pluralistic society where some people live according to one normative order (such as customary law), but

⁹⁵ Woodman G, 'A Survey of Customary Laws in Africa', 12.

⁹⁶ Ndulo, Muna, "*African Customary Law, Customs, and Women's Rights*" Cornell Law Faculty Publications, (2011) accessed on <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1186&context=facpub> on 24th February 2016, 89.

⁹⁷ Koyana D, 'Traditional Courts in South Africa in the Twenty First Century', 232.

simultaneously in conflict with a higher normative order (statutory law). The renaissance of customary law may accommodate those who would otherwise be disadvantaged.

The renaissance of customary law further increases avenues through which disputes can be settled. For instance, the development of TDRMs in Kenya may ease the pressure on courts, particularly where the appropriate remedy would be found in customary law principles. This would increase ways through which Kenyans can access justice.

These are just some of the pros and cons of a re-emergence of customary law.

6.2 CONCLUSION

The study has been able to highlight the place of customary law in Kenya. It has shown the effect of colonialism on African customary law. The perception of African law, the culture of the Africans themselves would never be the same again. Customary law was replaced by written law and the English Common law. The subjugation of African customary law was dealt a great blow by the repugnancy clause which still operates today as long as the Judicature Act is in force.

Although the statutes continue to reign above customary law, the inclusion of principles which are more African in origin seems to point towards a harmonization of statutory law with customary law. In this way, some principles which are more associated with African customary law gain the binding force of being a statutory provision unlike only being part of body of customary law which is at the lower end of the hierarchy of laws.

Customary law is also a very malleable thing in itself. It consistently changes with the time. So much so that it may be difficult to say that the customary law practiced among the communities today is the same customary law that Justice Cotran attempted to codify in his Restatement; and neither can it be definitively state that that codification reflects customary law as was prior to independence. This may show an element of uncertainty in determining what the law actually is.

The issue regarding the place of customary law is one which is dependent on more than just the law. The difference between Kenya and South Africa is historical as well as societal. Historical in the sense that while Kenya's subjugation of customary law may have seemed as a compromise in favour of the colonialists, South Africa's elevation of the status of customary was a necessary compromise for the safeguard of harmony at the end of the Apartheid era.

The issue is societal because the value system within the two societies regarding the place of African culture differs. In Kenya, for instance, the national and official languages are English and Swahili⁹⁸ while in South Africa there are eleven official languages.⁹⁹ This could be seen as an attempt to promote more ethnic languages in South Africa based on a policy decision. This in turn shows the importance placed on the preservation of African culture in South Africa. It would be safe to say that if it were a priority for Kenyans then there might be more effort placed in reinstating customary law as a dominant normative order.

What this study shows is that under the current constitutional dispensation in Kenya, some attempt has been made to bring back some of the principles of customary law though not necessarily changing the status it has in the hierarchy of laws. This is evident since it has no express provision contradicting or over-ruling the Judicature Act. What it does do, however, is to put in place a system of rights and principles that have continued to affect legislation bearing in mind the historical injustice that many Kenyans have faced due to a total disregard of their rights due to falling outside the statutory normative order. Although at present it seems limited, the current state of affairs shows a potential for the renaissance of African customary law, though not as customary law, but through various provisions in statute. Only time will tell if this renaissance will continue as we continue to implement our constitution.

6.3 RECOMMENDATIONS

6.3.1 RECOMMENDATION 1: INCREASED INCLUSION OF CUSTOMARY LAW PRINCIPLES IN LEGISLATION

Several injustices occur in a pluralistic society such as ours especially where one normative order is subject to another dominant order. Whenever a certain aspect of the subservient normative order is inconsistent with the dominant order, then it is invalid. The best way to deal with such issues is through harmonisation. If we legislate customary law principles, limiting their application to those who ascribe to customary law, then we create an opportunity for them to live in accordance with their culture without living outside of the law.

⁹⁸ Article 7, *Constitution of Kenya* (2010).

⁹⁹ Section 6, *Constitution of the Republic of South Africa* (1996).

6.3.2 RECOMMENDATION 2: INCREASED STUDY ON CUSTOMARY LAW

It is important for greater study to be put into the area, particularly by legal scholars. Though it may be difficult to codify customary law, scholars may work hand in hand with anthropologists to ascertain what customary principles need to be embodied in the law to ensure that a greater deal of Kenyans are not disadvantaged by the current status of customary law.

6.3.3 RECOMMENDATION 3: TAKING ADVANTAGE OF TDRMS

Traditional Dispute Resolution Mechanisms create a wonderful opportunity for customary law to impact the lives of those who live according to it. The added advantage is that these mechanisms are guided by customary law and so will guarantee its application where it is just as opposed to the courts which have traditionally applied the repugnancy clause largely to the detriment of customary law.

6.3.4 RECOMMENDATION 4: JUDICIAL PRONOUNCEMENTS ADVOCATING FOR CUSTOMARY LAW

The renaissance of customary law and customary legal thinking is largely dependent on jurisprudence emanating from the courts. The courts give a clear interpretation of the laws and as such play an instrumental role in understanding the legal philosophy behind the law. If the courts make more pronouncements in favour of customary law (in so far as the law does not contravene any Constitutional rights) then the renaissance of customary law may be realised.

6.3.5 RECOMMENDATION 5: AMENDMENT OF THE JUDICATURE ACT

Section 3(2) of the Judicature Act requires courts not to apply customary law in cases where it would be repugnant to justice and morality. The problem is that it does not provide a yardstick for determining what standards of morality should be applicable. This study proposes that this section should be amended to include a subsection clarifying what exactly constitutes repugnancy. Borrowing from the Constitution,¹⁰⁰ repugnancy should be based on the contravention of the Bill of Rights, and the national values.¹⁰¹ This basis provides a neutral standard for determining the repugnancy of customary law.

¹⁰⁰ Article 159 (3), *Constitution of Kenya* (2010)

¹⁰¹ Article 10, *Constitution of Kenya* (2010)

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