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EDITORIAL FORWARD

Jeanmarie Fenrich[†]

In January 2021, UPSA Law School in Accra, Ghana and the Leitner Center for International Law and Justice at Fordham Law School in New York City, convened a virtual conference to consider *Customary Law in a Changing Africa*. The conference included paper presentations by academics and working group discussions of a range of stakeholders including traditional leaders, members of the judiciary, non-governmental organizations, and policy makers on a number of topics, such as customary law and the rule of law, substantive and procedural aspects of customary law, the relationship between customary law, statutory law and international law, and customary law institutions. Updated versions of four of the papers initially presented at the conference are published in this Special Edition of the UPSA African International and Comparative Law Journal.

In *Remodelling the Interface Between African States and Communities: A Focus on Cultural Rights*, George Fordam Otieno Wara considers African communities' struggles for survival and continuity as community systems whose cultural rights were disrupted by colonialism and relies on notions of transformative constitutions and

[†] Director, Corporate Responsibility Program, Leitner Center for International Law and Justice at Fordham Law School; Editor, The Future of African Customary Law, Cambridge University Press (2011).

constitutionalism to examine how constitutions can be instrumentalised to change the interaction between states and communities. In *Contextual Justice: African Traditional Justice Systems as an Enabler of Accesst to Justice*, PLO Lumumba and Evan Ogden also consider the impact of colonialism on African law and legal systems and explore how customary law and dispute resolution mechanisms may be used to enhance access to justice. *In The Impact of COVID-19 and Government Mitigation Regulations in Attending Customary Initiations School in South* Africa, Leroto Ngweyama explores the governmental regulatory effect on customary practices during the COVID-19 pandemic in South Africa.

In *Juvenile Matters in the Customary Court,* Elizabeth Hassan argues that the customary court system in Ghana should be used to adjudicate criminal cases involving juvenile offenders to deliver restorative justice for all impacted parties. In the final article, *Beyond Customary Justice: Exploring Non-State Actors' Roles in Kenya's Counter-Radicalisation Programmes*, Charles A. Khamala and Alexander Luchetu Likaka explore instances where coercive state power may be exercised in the name of de-radicalisation and to evaluate when, where and how such powers should be exercised with respect to non-state actors in the effort to counter radicalization of students.

JUVENILE MATTERS IN THE CUSTOMARY COURT

Elizabeth Hassan †

ABSTRACT

Juvenile justice systems are established by law and designed to ensure that the interests of the victim, juvenile and the community are safeguarded. Ghana's Juvenile Justice Act, 2003 (Act 653) establishes Ghana's juvenile justice system and regulates the treatment of children in conflict with the law. However, available evidence suggests that statutory changes in juvenile justice laws have not manifested in practice as challenges that confront the juvenile justice system continue to persist. A significant shortcoming of Ghana's juvenile justice system is this gap between legislation and practice. This article posits that this gap could be bridged by utilising the customary court system, a time-tested customary dispute resolution institution, to adjudicate criminal cases involving juvenile offenders and deliver restorative justice for all relevant parties.

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This paper, part of a more extensive study, examines the integration of customary dispute resolution practices with Ghana's juvenile justice system.

Keywords: Customary courts; Customary dispute resolution; juveniles; restorative justice.

1. INTRODUCTION

Children will always be children. Growing up involves curiosity and a thirst for adventure, which is encouraged to ensure that children become responsible adults equipped to play their roles in society as expected. A popular Fanti[1] adage is rendered, "abofra dzi, obiara ayɛ bi da na panin na obiara nnyɛ bi da." To wit, 'every one may have been a child, but not everyone is an adult.' For varied reasons, young people sometimes carry out certain activities that are inimical to society's values and norms. For instance, a child may take property from its owner without their consent or cause unprovoked or unwarranted injury to another person intentionally or otherwise. We are bombarded with news of young people committing acts that offend the sensibilities of the right-thinking members of society.[2] Such an unwelcome state of affairs necessitates that measures are put in place to communicate society's disapproval of such conduct and deter other like-minded people from engaging in such conduct.

[1] An Akan tribe, located at the coastal areas in the southern part of Ghana.
[2] Peace fm Online, 'Tears Flow for Murdered Kasoa Boy' (Peacefmonline,10 April 2021) <https://www.peacefmonline.com/pages/local/social/202104/442393.php> accessed 6 June 2022.

In jurisdictions worldwide, a child or young person who conflicts with the law may be dealt with differently from an adult as a juvenile.[3] Children are handled under a system known as the juvenile justice system. It comprises laws, policies, guidelines, customary norms, systems, professionals, institutions, and treatment specifically applicable to children in conflict with the law, as well as witnesses, and victims.[4] The sentencing of an individual convicted of a criminal offence is driven mainly by three key considerations: retribution (punishment), deterrence, and rehabilitation. In the case of juvenile offenders, the principle of rehabilitation is often assigned the most weight.[5]

2. GHANA'S JUVENILE JUSTICE SYSTEM/ RELATED LITERATURE

Ghana's current juvenile justice system was established under the Juvenile Justice Act[6] ("Act 653") and is founded on the welfare system of justice, based on the theory that the most appropriate way of handling young offenders is to identify and meet their needs instead of effecting punishment.[7] Act 653 is consistent with the 1990 Guidelines for the Prevention of Juvenile Delinquency,[8] which recommends that governments enact and enforce specific laws and procedures to promote and protect the rights and well-being of

[3] UN 'Beijing Rules' (OHCHR) <United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) | OHCHR> accessed 6 June 2022.
[4] United Nations Children's Fund *Manual for the measurement of juvenile justice indicators* (United Nations New York 2006) 1.
[5] Susan Young, Ben Greer and Richard Church 'Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective' (2017) 41 BJPsych Bulletin 21.
[6] Juvenile Justice Act, 2003 (Act 653).
[7] John Muncie, *Youth and crime* (4th edn, Sage 2014).
[8] 1990 Guidelines for the Prevention of Juvenile Delinquency also known as 'Riyadh Guidelines'.

all young persons.[9] Act 653 regulates the conduct of young people in conflict with the law. Section 2 of the Act includes a "Welfare Principle" that stipulates "[t]he best interests of a juvenile shall be (a) paramount in any matter concerned with the juvenile; and (b) the primary consideration by a juvenile court, institution, or other body in any matter concerned with a juvenile."

One of the principles of a credible justice system is its ability to respond to the needs of those who use it.[10] When the parties' needs are adequately addressed, the impact of harm suffered by the victim and community is lessened, and the possibility of reprisal attacks or reoffending by the juvenile is reduced or eliminated. With the child's best interests at the heart of this approach to justice, the welfare model relies on institutions to protect, help and educate juveniles to prevent and eliminate such criminal conduct.[11] However, welfare approaches do not always lead to beneficial outcomes for young people[12] because the institutional care offered is often reflective of the custodial nature of juvenile systems.[13]

Act 653 introduces the diversion of juveniles from the criminal justice system to a restorative justice setting in line with emerging international trends. Restorative justice

[9] Paragraph 52.
[10] Woolf L 'Access to justice' (The National Archives,14 February 2006) <https://webarchive.nationalarchives.gov.uk/20060214041256/http://www.dca.gov.uk/civil/final/sec2a.htm#c1> accessed 4 June 2022.
[11] Elizabeth T Hassan, *Alternative dispute resolution for juveniles in crime: a case for Ghana's legal system* (Ph.D. Thesis, University of South Africa 2022).
[12] John Muncie, *Youth and crime* (4th edn, Sage 2014).
[13] Vesvikar M and Sharma R 2016, 'The juvenile justice system in India: observation homes and current debates' in Elaine Arnull and Darrell Fox (eds), *Cultural Perspectives on Youth Justice* (Macmillan 2016) 193.

is meant to enable the rehabilitation of the juvenile and their reintegration into the community. However, available evidence suggests that statutory changes in juvenile justice laws have not manifested in practice in Ghana and have not adequately addressed the needs of the juvenile, victim or community. The justice system's goal is to deter the offender and other like-minded members of society from future criminal conduct, principally through the imposition of custodial sentences. Nevertheless, research indicates that these ideals are not being met, as custodial sentences have adverse effects such as recidivism[14], stigma[15], victim dissatisfaction[16], or reprisal[17] for society and the individual concerned.[18] Increased crime rates in Ghana[19] and a gradual increase in retention of juveniles in the criminal justice system are some indications that Ghana's juvenile justice system is not meeting the objectives of the restorative justice approach. Unsurprisingly, community members believe that the current correctional system cannot reform offenders. [20]

[14] Alexander Antwi, *Social reintegration of offenders and recidivism in Ghana* (Ph.D. Thesis, University of Ghana 2015).
[15] Christine Glover and others, 'Risk factors of recidivism: lessons from Central Prison in Kumasi, Ghana' (2018) 5 Open Access Library Journal 1.
[16] Kwadjo Ofori-Dua, John N Onzaberigu and Richard Nimako, 'Victims, the forgotten party in the criminal justice system: the perception and experiences of crime victims in Kumasi Metropolis in Ghana' (2019) 2 Journal of Victimology and Victim Justice 109.
[17] James T Teye, *Prisoner social reintegration in Ghana through Christian social support and restorative justice* (MPhil thesis, University of Ghana 2019) 105.
[18] Henriette JAN Mensa-Bonsu, 'Transplanting the English oak legalism legality legal pluralism and the criminal law of Ghana' in H Lauer and K Anyidoho (eds), *Reclaiming the human sciences and humanities through African perspectives* (Sub-Saharan Publishers 2012) *1213*.
[19] Efua E Mantey and George Dzetor, 'Juvenile delinquency: evidence of challenges in rehabilitation' (2018) 15 American Journal of Applied Sciences 322.
[20] Dako-Gyeke M and Baffour F, 'We are like devils in their eyes: perceptions and experiences of stigmatization and discrimination against recidivists in Ghana' (2016) 55 Journal of Offender Rehabilitation 242.

This article posits that a significant shortcoming of the juvenile justice system is the gap between legislation and practice, which could be bridged by utilising the customary court system, a time-tested customary dispute resolution institution. Historically, customary courts have adjudicated both civil and criminal matters and continue to do so in some communities in Ghana today. Customary courts should be utilised now to adjudicate criminal cases involving juvenile offenders and deliver restorative justice for all relevant parties.

3. METHODOLOGY

This study is a descriptive socio-legal study that involves a review of both primary and secondary sources. Data gathered from primary sources includes interviews and questionnaires from 139 participants selected from the Kumasi metropolis. Participants included 56 juvenile offenders, 25 victims of juvenile crime, 10 traditional leaders, five magistrates, 42 legal practitioners, and a Non-Governmental Organisation (NGO) involved in rehabilitating and reintegrating juvenile offenders. The secondary sources relied upon include information gathered from textbooks, journal articles, legislation, statutes, and unpublished works in print and electronic formats constituted the secondary sources.

4. DISCUSSION

4.1 Customary Dispute Resolution

Customary dispute resolution, expressed as indigenous conflict resolution approaches, is frequently referred to as informal justice systems or traditional justice systems.[21] Informal Justice System (IJS), defined broadly, refers to the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.[22]

Traditional justice systems refer to non-State justice systems that have existed, although not without change, since pre-colonial times and are generally found in rural areas.[23] Pre-colonial African societies are reputed to hold secrets of peacemaking locked into their ways of life, customs, and traditions before the disruptive activities brought about by colonization. [24] This assertion has been substantiated by scholars who have documented the indigenous conflict management mechanisms that many societies had before the colonization of Africa.[25] Traditional justice systems are part of a well-structured, time-proven social system geared towards reconciliation and maintaining and improving social relationships.[26] The traditional concept of conflict resolution is to reconcile and

[21] UN 'Economic and Social Council Resolution' (ECOSOC) <https://undocs.org/pdf?symbol=en/e/res/2016/17> accessed 7 June 2022.
[22] UN 'Informal justice systems – charting a course for human rights- based engagement' <informal_justice_systems.pdf (un.org)> accessed 7 June 2022.
[23] OHCHR, *Human rights and traditional justice systems in Africa* (OHCHR 2016) 12.
[24] Zartman IW, *Traditional cures for modern conflict* (1st edn Lynne Rienner 1999).
[25] Adjei JK and Adebayo AG, 'Indigenous conflict resolution strategies in monarchical systems comparison of nature, effectiveness, and limitations of the Yoruba and Akan models' in Akanmu G Adebayo, Jesse J Benjamin and Brandon D Lundy (eds), *Indigenous conflicts management strategies, global perspectives* (Lexington Books 2014).
[26] Kwaku Osei-Hwedie and Morena J Rankopo, 'Indigenous conflict resolution in Ghana the case of Ghana and Botswana' in Kwaku Osei-Hwedie, T Galvin and H Shinoda (eds), *Indigenous methods of peacekeeping* (IPSHU 2012).

make peace between disputing parties, ensure the reintegration of the disputing parties into society, and promote cooperation and harmony between them that may help improve their relationship.[27] Several of the chiefs' responses during the interview confirmed that chiefs in the Ashanti kingdom have always performed judicial functions..

Customary dispute resolution forums continue to be widely used today. In some African states, customary justice systems handle 80 to 90% of the total caseload.[28] These high figures, which indicate people's preference for traditional courts over formal courts, as well as their greater physical accessibility, can be attributed to several factors.

i. Customary justice systems embrace informal modes of information gathering in contrast to the formal evidentiary rules of the State justice system.[29] The use of informal modes of information gathering makes the whole process less cumbersome and eliminates the need for legal representation. The justice systems use more understandable language, [30] as the process usually takes place in the native language. Traditional leaders in the study indicated that the medium of communication in the customary courts is the local Asante Twi language. [31] However, they were quick to add that they engage interpreters for individuals who may not understand the language. The study found that some juveniles

[27] Patience M Sone, 'Relevance of traditional methods of conflict resolution in the justice systems in Africa' (2016) 46 Africa Insight 51.
[28] UN 'Economic and Social Council Resolution' (ECOSOC) <https://undocs.org/pdf?symbol=en/e/res/2016/17> accessed 7 June 2022.
[29] Patience M Sone, 'Relevance of traditional methods of conflict resolution in the justice systems in Africa' (2016) 46 Africa Insight 51.
[30] Special Representative of the Secretary-General on Violence against Children, *Promoting restorative justice for children* (UN 2013).
[31] Elizabeth T Hassan, *Alternative dispute resolution for juveniles in crime: a case for Ghana's legal system* (Ph.D. Thesis, University of South Africa 2022).

preferred the involvement of chiefs in hearing juvenile matters due to the use of local language.

ii. *Traditional leaders in the community are more culturally sensitive in settling disputes among community members.* The traditional system is also more appealing for many than the formal system due to issues of cultural sensitivity. According to Pooley,[32] cultural sensitivity refers to incorporating culturally appropriate activities in interventions, such as engaging service providers from the same cultural backgrounds to design and deliver programmes and paying attention to people's language, traditions and norms during interventions. Available literature suggests that indigenous young people are more likely to perceive an intervention as credible when such interventions are carried out by someone from a shared origin, using the same language, with the same history or beliefs.[33] A study that reviewed youth offender programmes in Australia found that, out of nine programmes, five identified cultural sensitivity as critical to the effectiveness of such programmes.[34]

Customary dispute resolution systems operate per the principles of reconciliation, maintenance and improvement of social relationships. The lack of copious substantive and procedural rules, complex legalese and the proceedings being conducted in the

[32] Kamarah Pooley, 'What are the characteristics of effective youth offender programs?' [2020] *Trends & issues in crime and criminal justice* (Canberra: Australian Institute of Criminology).
[33] Shaena M Fazal, *Safely home: reducing youth incarceration and achieving positive youth outcomes for high and complex need youth through effective community-based programs* (Youth Advocate Programs Policy & Advocacy Center 2014).
[34] Kamarah Pooley, 'What are the characteristics of effective youth offender programs?' [2020] *Trends & issues in crime and criminal justice* (Canberra: Australian Institute of Criminology).

native language mean that customary justice is accessible to more people. Its relational and negotiable attributes,[35] coupled with a flexible approach in the proceedings that involve children at the chief's court, make it an appropriate medium for creating an effective juvenile justice system.

4.2 Customary courts and criminal matters

Africans have always relied on their local leaders' wisdom and judicial skills to resolve disputes.[36] As the most enduring institution in the Republic of Ghana's political history, chieftaincy has demonstrated remarkable resilience through pre-colonial, colonial and post-colonial times.[37] Over the years, the institution of chieftaincy hitherto viewed as sacrosanct due to its spiritual, legislative, administrative and judicial roles has been experiencing a diminishing legitimacy.

The study found that the customary dispute resolution process at the chief's court has similar characteristics to the formal courts in the judicial system. The parties' case is called, evidence is taken from them, and their witnesses and the parties must obey the decision the chief and elders give. A party dissatisfied with the decision may appeal against it. The study found that the Ashanti traditional system is hierarchical, with the Asantehene's court at the apex. Therefore, the parties have a right to lodge an appeal against the decision of the local customary court to the Asantehene's court. The findings

[35] Janine Ubink, 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' [2018] Development and Change 930.
[36] Aiyedun A and Ordor A, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 Law Democracy & Development 154.
[37] Isaac Owusu-Mensah, William Asante and WK Osew, 'Queen Mothers: The Unseen Hands in Chieftaincy Conflicts Among the Akan in Ghana: Myth or Reality?' The Journal of Pan African Studies [2015] 1.

confirm earlier assertions that courts in the Akan ethnic group to which the Ashanti tribe belongs are hierarchical.[38]

Differences between both systems also lie in the objectives of each system. Unlike the formal justice system, which focuses on delivering justice even at the expense of the parties' relationship, the peace and unity of the parties are at the core of customary justice systems. Therefore, all processes are geared towards this end. The legal framework for the participation of chiefs and, indeed, customary courts in criminal matters in Ghana appears contested. The recognition by Ghana's 1992 Constitution of customary law as a source of law in Ghana's legal system[39] gives individuals the right to submit their disputes to the chief's court for resolution under their customs and practices. However, under the Alternative Dispute Resolution Act,[40] only disputants in civil matters may avail themselves of non-litigious means to resolve their disputes. Parties in the criminal justice system have no such 'privileges' under this Act. Section 89 (2) of the ADR Act provides:" [e]xcept otherwise ordered by a court and subject to any other enactment in force, a person shall not (a) submit a criminal matter for customary arbitration; or (b) serve as an arbitrator in a criminal matter."

A person who contravenes this section commits an offence that attracts a punishment of up to 12 months imprisonment.[41] As a result, this section appears to make it impossible

[38] Arhin K *Traditional rule in Ghana: Past and Present* (1st Sedco Publishing Limited 1985).
[39] Article 11.
[40] Alternative Dispute Resolution Act, 2010 (Act 798).
[41] Section 89 (3).

for criminal matters to be resolved through traditional rulers in the customary arbitration process. Yet, the Courts Act, 1993 (Act 459)[42] promotes restorative justice in all courts that adjudicate criminal matters, including the juvenile court, for offences that are not felonies but misdemeanours.[43] Section 73 of the Courts Act provides that "any court with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment cases of compensation or on other terms approved by the court."

The 2008 Chieftaincy Act consolidates Ghana's laws relating to chieftaincy. Under the Act, a Traditional Council has the exclusive jurisdiction to hear matters involving chieftaincy.[44] In addition, the Traditional Council has the powers of a District Court to enable it to conduct its proceedings on civil matters under customary law.[45] The Traditional Council may, under the powers given to it by this Act, 'make an award of a civil nature including an award of compensation to an injured person.[46] However, the Traditional Council may not impose a fine or term of imprisonment as punishment.[47] The Act also confirms the power of chiefs to act as arbitrators in customary arbitration of disputes where the parties give their consent.[48] Section 30 allows for chiefs to arbitrate

[42] The Courts Act, 1993 (Act 459).

[43] Section 296.
[44] Section 29.
[45] Section 35 (1).
[46] Section 35 (3).
[47] Section 35 (4).
[48] Section 30.

disputes between parties in customary arbitration. Still, the Act does not expressly refer to or imply that chiefs or traditional councils can hear criminal matters.

Historically, the chief's court did hear criminal matters and some of the interviews in the study indicated that the traditional leaders continue to resolve criminal cases in their courts. For instance, Chief H indicated that petty offences are usually reported to their court, and they often order the offending party to make a payment for medical bills incurred by the injured party. Chief G also stated that parties sometimes prefer the chief to settle or mediate the issue, which could be criminal.

Section 89(2) of the ADR Act appears to prohibit traditional leaders from hearing matters of a criminal nature. However, upon proper interpretation, this provision does not prohibit criminal matters from being referred for customary arbitration. A criminal matter may be submitted for customary arbitration without any law preventing it and in pursuance of an order given by a court. A reading of this legislation in conjunction with section 73 of the Courts Act implies that customary courts may decide criminal cases only upon the orders of a court.

Participants' opinions on whether traditional authorities should be involved in criminal matters were divided. According to Chief H, investigation and prosecution of crime should not be carried out by chiefs but by the State, which already has the machinery in place. Chief A maintained that traditional authorities lack the personnel and machinery to punish adult wrongdoing. Some chiefs were not opposed to the suggestion but had reservations, such as the lack of expertise and logistics of traditional authorities to

effectively deal with certain types of crime, such as cybercrime. In contrast, Chief G and Chief J insisted that the courts hear criminal matters that were not serious offences because they reside in the community, and the chiefs, victims and perpetrators live in the community and know one another.

The foregoing discussions lay a foundation for a discussion of the theme of this article: whether customary courts may resolve criminal matters involving children as perpetrators, victims or witnesses.

4.3 Juveniles at the customary court

Ame[49] asserts that customary courts do not distinguish between adults and children in their judicial approach. As a result, customary courts may mete out the same sanctions for offenses committed by adults and juveniles in their judicial approach. When this assertion is considered in conjunction with the concept that a child's right is not known to the customary system, [50] one could conclude that some forms of customary dispute resolution could be problematic. According to the Secretary-General's Special Representative on Violence against Children,[51] one of the disadvantages of reliance on customary law is the risk of children being treated as adults at a very young age because maturity is deemed reached at ten years or even younger in many communities.

[49] Robert Ame, 'The origins of the contemporary juvenile justice system in Ghana' (2018) 43 Journal of Family History 394.
[50] (Justice for Children Policy, 2015).
[51] Special Representative of the Secretary-General on Violence against Children, *Promoting restorative justice for children* (UN 2013).

The chiefs in this study were asked whether children were subject to the same procedures as adults in their own customary courts. Chief A indicated that the court was not rigid and unbending regarding cases involving children; each case was handled based on its unique facts. There is no blanket rule for deciding cases involving children. According to Chief G, children who come to their courts do not swear an oath before giving evidence, but a parent or relative must accompany them. While these findings corroborate Ame's[52], they also introduce a significant concept. The customary courts adopt a flexible approach in children's proceedings, such as mediation sessions. This finding is consistent with Ubink's[53] opinion that the customary law system is flexible, relational and negotiable.

In considering whether traditional authorities should be allowed to decide criminal matters that involved young people, the study found that the chiefs were unanimous in hoping that the traditional court could be involved in the administration of juvenile justice. According to them, children must be protected at all costs.[54] Young people could benefit from guidance that chiefs could provide.[55] One chief stated that as the 'father' of the community, it would be helpful if the chief were involved in resolving a dispute because when a crime occurs, the injured party, their relatives and the community all suffer.[56] Moreover, Chief I felt children should not be left to the harsh court system.[57]

[52] Robert Ame, 'The origins of the contemporary juvenile justice system in Ghana' (2018) 43 Journal of Family History 394.
[53] Janine Ubink, 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' [2018] Development and Change 930.
[54] Chief F.
[55] Chief C.
[56] Chief H.
[57] Chief A.

Stakeholders' opinions about whether traditional authorities should be allowed to decide criminal matters involving young people were also sought. Among the legal practitioners, twenty-eight participants, or 66% of the practitioners in the study, indicated that chiefs should be involved in juvenile justice administration. 'LP38'[58] insisted that chiefs should settle issues affecting the youth as the Child Panels[59] were not performing as expected. 'LP39' and 'LP41' said chiefs had a lot to offer and should not be side-lined by our justice delivery system but be allowed to participate in the juvenile justice system. 'LP42' suggested that chiefs should be given basic legal training, with supervisory powers given to the court.

The 14 legal practitioners who did not think chiefs should be involved in the administration of juvenile justice offered one reason for their opposition. According to 'LP4', involving traditional authorities in juvenile justice administration could be problematic because of the difference in customs and traditions between tribes. The issue of the non-uniformity of traditional customs and traditions between tribes is legitimate, as that could mean a discrepancy in the treatment of offenders based on their geographic location. Supervisory powers of the court exercised over the customary courts could mitigate this risk.

All five magistrates indicated that chiefs should not be involved in the administration of juvenile justice but gave no reason. A rejection of the involvement of traditional

[58] 'LP38' is code for participant Legal Practitioner 38.
[59] Child Panels established under the Children's Act that supervise mediation sessions between juvenile offenders and their victims are the only avenues for exercising restorative justice in the juvenile justice system.

authorities in the administration of juvenile justice was an important finding, notwithstanding an absence of reasons for these decisions. However, it is vital to consider the possible bias in these responses. As professional officials entrusted with adjudicating disputes, the responses of these magistrates may indicate their desire not to have their professional boundaries infringed.

All the Victims of juvenile crime who took part in the study indicated that they would not want their cases to be heard by the chief and elders of the community. Two of them gave a reason for their decision: the process of the chiefs' courts is slow. A plausible explanation for the general opposition of victims may be that the victims prefer the power and force that the justice system's courts wield. Another possible explanation is that they have no confidence in the customary justice process based on factors such as the transfer and diffusion of power due to favouritism, kinship, personal ties, marriage bonds, family relationships, political affiliation, physical strength, gender, level of education, socio-economic status, and ethnicity.[60]

Some juveniles and victims had concerns that several local customs and practices were outdated. They envisaged that outmoded customs and practices could be challenging if the chiefs decided their cases. The NGO (whom we shall refer to as Evolve) opined that although chiefs used peaceful means of resolving disputes, some traditions impeded children's rights. These concerns were not unfounded as the study found that although

[60] Tat P and Bagshaw MD, 'A Search for Justice and Rights in Land Dispute Resolution in Cambodia' (2014) 32 Conflict Resolution Quarterly 203.

chiefs used peaceful means of resolving disputes, some traditions could impede children's rights. For instance, Chief D cited corporal punishment in outlining traditional practices that could benefit the juvenile justice system. Chief B suggested, "Isolate the child from his family and friends and deprive him of some food for some time." The traditional system is structured around the family unit; hence, vulnerability increases when the child's best interests do not coincide with their parents' or guardians' or close family.[61]

These findings are an indication that some customs may not have kept up with the evolving mores of society and, as a result, could be unsuitable to address the needs of all the parties. However, it is crucial to be guided by the assertion that the unique feature of customary law lies in its recognition and acceptance by the people to whom it is applicable. [62] These findings, therefore, have to be interpreted with caution.

4.4 Offences before the customary court

Based on the unanimous interest expressed by the chiefs on their involvement in resolving crimes which involve children, the study sought to find out what form of offences committed by young people would be appropriate for traditional authorities to decide.

[61] UN 'Informal justice systems – charting a course for human rights- based engagement' <informal_justice_systems.pdf (un.org)> accessed 7 June 2022.
[62] Arowosaiye YI, 'Eurocentric influence and misconception of the Islamic and customary criminal justice system in Nigeria' (2016) 4 Africa Nazarene University Law Journal 36.

The chiefs were unanimous in their response to this question. The consensus was that chiefs could hear non-serious offences committed by young people. Three magistrates and twenty-nine legal practitioners suggested that it would be appropriate for traditional authorities to decide cases of misdemeanours. Evolve suggested that if chiefs were allowed to participate in the juvenile justice delivery system, they might decide on "petty theft, or assault with no serious damage to property." These suggestions reflect the commitments made under the Kampala Declaration on Prison Conditions in Africa, drafted in September 1996 by the African countries and especially noted by the ECOSOC in its Resolution 1997/36 of 21st July 1997.[63] Among the commitments made, *petty offences should be dealt with according to customary practice* or mediation without recourse to the formal system*; petty offences should be dealt with according to customary practice*, provided that this meets human rights requirements and those involved agree.[64]

An unanticipated finding from an experienced magistrate and five legal practitioners who suggested that traditional authorities hear serious offences involving juveniles.[65] This finding indicates some confidence in the customary justice system and the restorative justice it affords parties. It also acknowledges the healing available to victims with profound needs, which are rarely met by the criminal justice system. [66] It is vital to

[63] ECOSOC, 'UN Economic and Social Council Resolution 1997/2: Agreed Conclusions' (Refworld, 18 July 1997) <Refworld | UN Economic and Social Council Resolution 1997/2: Agreed Conclusions> accessed 17 June 2022.
[64] Id. (emphasis added).
[65] Serious offences include robbery, rape, defilement, murder, indecent assault involving unlawful harm, robbery with aggravated circumstances, drug offences and the use of firearms. Sections 46 (8) & 60 of the Juvenile Justice Act.
[66] Skelton A, 'Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa' [2007] Acta Juridica 228.

note that Act 653[67] forbids diversion for serious offences. The law could be amended to allow children who have committed severe violations to be diverted from the criminal justice system with or without conditions.

4.5 Sanctions under customary courts

Sanctions imposed under customary justice systems are meaningful and purposive. In prehistoric Ashanti practices, the severity of an offence determined the punishment meted out, such as ostracism, stigma, ridicule, fines, trial by ordeal, banishment or capital punishment.[68] The findings of this study revealed that the punishments of the chiefs' courts today are in the form of fines, compensation, apology, shaming and counselling.

Conspicuously absent are capital punishment, banishment and trial by ordeal. Such forms of punishment are anathema to juvenile justice systems' goals and underlying principles. The non-existence of such forms of punishment under customary justice systems today places traditional courts in good stead to contribute meaningfully to achieving juvenile justice in Ghana.

The customary justice process addresses the needs of parties affected by a crime committed by a juvenile, including an appropriate sanction. Incarceration as a punishment under the formal courts is foreign to those who prefer compensation for the victim. In addition, communities are concerned about the effect incarceration would have

[67] Section 25 (2).
[68] Robert S Rattray, *Ashanti law and constitution* (1st edn Oxford University Press 1969).

on the defendant's family and their ability to provide for themselves.[69] The findings from the study indicate that the payment of fines and compensation are the most prevalent forms of sanctions imposed by the traditional courts, which often hand down an order for compensation to be paid to the victim for the injury or loss they may have suffered. This finding is consistent with the assertion that a fundamental principle that African communities relied on to maintain peace was the correction of wrongdoing through compensation, rather than punishment, except in serious offenses such as murder. [70]

The rationale for compensation is to recognize and pacify the victim for the loss or suffering and punish the offender by compelling him to part with his resources. Sometimes, the compensation order is in addition to the payment of costs due to the assailant's wrongful conduct. The payment of compensation addresses the needs of victims who often feel left to fend for themselves with little or no support from the State, while the offender is supported at the expense of the State.[71]

The findings also indicate that shaming is a punishment for wrongdoing among members under the customary justice system. Shame or stigma is expected to follow a rebuke from the chief and elders since it is given openly. The offender is expected to desist from such wrongful conduct, and other like-minded individuals will be deterred from such behaviour. These findings confirm earlier writing by Rattray that stigma was a form of

[69] OHCHR *Human rights and traditional justice systems in Africa* (OHCHR 2016).
[70] George BN Ayittey, *Indigenous African institutions* (2nd edn, Transnational Publishers Inc 2006).
[71] Fhameda Qudder, 'Crime victims' right to compensation in Bangladesh: a comparative Approach' European Scientific Journal 11 (2015) 305.

punishment under the Ashanti customary system.[72] As a homogeneous community, shaming and stigmatizing operated as an effective social control tool, and their potency can be deduced from this Twi idiom: '*animguaseƐ ne fƐreƐ deƐ, fanyinam owuo*,' translated to mean 'I would rather die than be disgraced.' This idiom reflects how dreadful the punishment of shame or stigma is viewed under the customary justice system.

4.6 At what stage is the traditional ruler involved?

The involvement of the customary court in juvenile matters will operate as a diversion because the parties are taken away from the formal justice system to access justice in a restorative justice setting. Diversion of juveniles from the formal justice system is premised on the notion that while a young person has been involved in antisocial behaviour, it is more damaging to put young offenders through the criminal justice system.[73]

The diversion of a juvenile from the formal criminal justice system can be made as an alternative to prosecution.[74] A juvenile charged with an offence may also be diverted from the criminal justice system by the court under Act 653.[75] In line with international practice, allowing for diversion at several stages of the criminal process, a child justice court may divert a child from the criminal justice system after he/she has been

[72] Robert S Rattray, *Ashanti law and constitution* (1st edn Oxford University Press 1969).
[73] Penal Reform International, 'Integrated Report on Gacaca Research and Monitoring' (Penal reform, December 2005) <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf.> accessed 14 June 2022.
[74] Allison Morris and Gabrielle Maxwell, *Restorative justice for juveniles* (1st edn, Hart Publishing 2001).
[75] Section 25.

convicted.[76] However, diverting a child after he/she has been convicted is not the law in Ghana. The study found that three magistrates and five legal practitioners suggested traditional authorities should be involved in the juvenile justice system post-sentence. Eighteen legal practitioners indicated that traditional authorities could be involved in the juvenile justice system after the juvenile's arrest. Nine legal practitioners indicated that traditional authorities could be involved in the juvenile justice system after the arraignment of the perpetrator.

Diversion of juveniles from the formal justice system is premised on the notion that while a young person has been involved in antisocial behaviour, it is more damaging to put young offenders through the criminal justice system.[77] It would be ideal if criminal cases involving children are diverted at the beginning of the criminal justice process to customary courts because the latter are equipped to adjudicate them effectively. This can be effectively done with the court retaining supervisory jurisdiction. Alternatively, the customary courts may also perform a restorative role after the child has been found guilty.

4.7 Customary practices suitable for the juvenile justice system

Participants were asked to identify traditional practices that would benefit juveniles, victims and community members. In response to this question, the chiefs mentioned that

[76] Section 73 of South Africa's Child Justice Act No. 75 of 2008.
[77] Penal Reform International, 'Integrated Report on Gacaca Research and Monitoring' (Penal reform, December 2005) <https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-ga7-2005-pilot-phase-en_0.pdf.> accessed 14 June 2022.

fines, compensation, community service, apology, shaming, corporal punishment and counselling would benefit the juvenile justice system. Some of the chiefs were doubtful about the effectiveness of paying a fine or community service orders against children. An additional finding was that the offending party could be made to offer a public apology.

Corporal punishment could be a potential abuse of children's rights.[78] Under Article 2 clause 1 of the 1992 Constitution, customary law practices such as corporal punishment, which purport to infringe fundamental human rights of individuals, will be rendered void and of no effect. The finding that most legal practitioners prefer traditional authorities to adjudicate matters involving juveniles based on a combination of traditional practices and modern legal principles sets the tone for introducing an effective juvenile justice system that harnesses both systems' strengths.

The finding in respect of compensation is consistent with the assertion that a fundamental principle that African communities relied on to maintain peace was the correction of wrongdoing using compensation rather than punishment, except in serious offenses such as murder. [79] Chief D indicated that an order of compensation might be directed at persons responsible for the juvenile. This assertion confirms the idea of collective family responsibility in African society.[80]

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[78] Special Representative of the Secretary-General on Violence against Children, *Promoting restorative justice for children* (UN 2013).
[79] George BN Ayittey, *Indigenous African institutions* (2nd edn, Transnational Publishers Inc 2006).
[80] Joan Mbagwu, 'Border disputes in Africa and traditional approaches to resolving them' in AG Adebayo and others (eds), *Indigenous conflict management strategies in West Africa beyond right and wrong* (Lexington Books 2015); Chris Abotchie, *Social control in the traditional southern Eweland of Ghana: relevance for modern crime prevention* (1st edn, Ghana Universities Press 1997).

An additional finding was that the offending party could be made to offer a public apology under customary practice. An apology from offending children to their victims or other persons affected by the crime is a feasible option under Ghana's Children's Act.[81] The study found that none of the victim participants suggested an apology from the juvenile as an appropriate punishment. Evolve maintained that an apology is often considered insufficient punishment for an offender.

The findings also reveal that under the customary justice system, the shame or stigma that follows a public rebuke from the chief and elders is considered punishment for wrongdoing. These findings confirm earlier writings that stigma was a form of punishment under the Ashanti customary system. [82] The findings also indicate that stigma in the juvenile justice system is an unintended consequence of detention. For instance, XJ33's[83] family members do not want to associate with him; XJ34 has lost most of his schoolmates and friends, and XJ37 insists, "many people are now avoiding me because of the time I spent in the correctional centre." Evolve also maintains that stigma among juveniles is relatively high. These findings match those observed in previous studies[84] on the stigmatisation of former juvenile inmates.

Shame as a sanction under the customary justice system is to be distinguished from stigmatisation under the formal criminal justice system. While the former is purposive

[81] Section 32.
[82] Robert S Rattray, *Ashanti law and constitution* (1st edn Oxford University Press 1969).
[83] XJ33 is code for participant Ex-Juvenile 33.
[84] Nana Yaa A Nyarko and others, 'Juvenile delinquency: its causes and effects' (2019) 88 Journal of Law, Policy and Globalization 166.

and a social control tool intended to coerce the offender to desist from reoffending, the latter is an adverse effect of incarceration, which causes juveniles more harm than good.

4.8 Criticisms of customary justice systems

i. Human Rights Implications

There are claims that traditional justice systems do not always adhere to international human rights standards.[85] This criticism is rooted in the widely-held belief that traditional practices discriminate against certain groups. Indigenous dispute resolution systems are sometimes rooted in traditions and customs that marginalize vulnerable groups such as women and youth. Some grounds for discrimination include age, gender or race. Children and women are disadvantaged in informal justice systems, which tend to be dominated by middle-aged and older men as adjudicators.[86] While this criticism of gender-based inequality is accurate in some instances, it should be noted that not all customary courts in Ghana have males as adjudicators.

Under Article 277 of the Constitution of the Republic of Ghana, a chief is 'a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a Chief or Queen Mother in accordance with the relevant customary law and usage.' The 1992 Constitution of Ghana, the grundnorm, through its definition of a chief, recognises that males and females perform

[85] Dani W Nabudere and Andreas Velthuizen, A *restorative justice in Africa from trans-dimensional knowledge to a culture of harmony* (1st edn, Africa Institute of South Africa 2013).
[86] UN 'Informal justice systems – charting a course for human rights- based engagement' <informal_justice_systems.pdf (un.org)> accessed 7 June 2022.

that role. Like their male counterparts, female chiefs in Ghana often perform judicial functions. For instance, the court of the Asantehemaa, the Queen Mother of the Asante, which meets at her palace every week, hears disputes such as theft, verbal offenses, and marital issues among individuals who live in the Ashanti Region.[87] Arguably, the existence of queen mothers' courts helps to negate the effects of patriarchy in Ghanaian society.

ii. Non-adherence to due process

The right to a fair hearing is enshrined under Article 19 of Ghana's 1992 Constitution, implying that parties can tell their side of the story and question the other party and their witnesses. However, this study discovered that an approach to dispute resolution in the customary courts is to 'let sleeping dogs lie.' Here, parties must refrain from giving evidence and accept the opinion or judgement of the adjudicator or mediator. This practice is intended to prevent parties from opening up old wounds and slowing the healing process.

Findings from the study indicate that asking parties to 'let sleeping dogs lie' when deciding cases is a customary practice used in certain circumstances. For instance, it could be utilized to truncate otherwise lengthy hearings where the parties have consented. As part of the study, the chiefs were asked to comment on the practice where an adjudicator could prevent a party from giving evidence by saying 'm'atu me nan asi so' (translated

[87] Beverly J Stoeltje, 'At the Queen Mother's Court: Ethnography in Kumasi, Ghana' [2013] Counterpoints 370.

literally to mean 'I have stamped my foot on this issue, there is no need to recount what happened as it will open old wounds').

The practice could also be employed where the dispute is between an older and younger person, and the former is at fault. In that case, no further evidence must be given since it is culturally inappropriate to scold an older person in the presence of a younger person and favour the younger person. When the dispute is between family members, the practice encourages an amicable settlement by avoiding the need to declare a guilty verdict, which is the natural consequence of litigation. However, this practice is not applied in criminal matters. This finding is pivotal for this study as it implies that the practice of letting 'sleeping dogs lie' will not be used when a juvenile appears before the chief's court. These findings on the practice of '*m'atu me nan asi so*' corroborate the view that customary justice systems embrace informal modes of information gathering, [88] in contrast to the formal evidentiary rules of the state justice system.

iii. Lack of privacy

Most juveniles and victims indicated that they would not want their cases to be heard by the chief and elders of the community. The right to privacy in a criminal trial implies a right to have the individual's identity kept from the public. Ghana's Juvenile Justice Act stipulates that the juvenile has a right to privacy from the time of arrest and through to any stage of the matter.[89] The Act also makes it an offence to release information or

[88] Patience M Sone, 'Relevance of traditional methods of conflict resolution in the justice systems in Africa' (2016) 46 Africa Insight 51.
[89] Section 3 (1) of the Juvenile Justice Act.

publication that may lead to identifying the juvenile within that period. A person found liable could be imprisoned for up to twelve months or liable for a fine not exceeding 250 penalty units.[90]

The right to privacy in criminal matters is important; hence its alleged absence from the customary justice system had to be investigated. The study found that chiefs were unanimous that their court sessions were held openly to educate community members on the norms and values of their culture. This finding corroborates the assertion that it is predominantly through being present at traditional dispute settlements that people learn the rules and norms and what is regarded as proper behaviour during a court hearing, as well as how they may access justice from the traditional court. [91]

However, a further finding was that the customary court's lack of privacy during hearings is not universal, as some issues are given due privacy. For instance, marital problems and family issues often require confidentiality, and the public is excluded from the hearings in those cases. This finding implies that juveniles who appear before the customary courts may be given due privacy by having their cases heard away from the public. The chief and his elders make such decisions based on the circumstances of the case.

5. CONCLUSION

[90] Section 3 (2) & (3) of the Juvenile Justice Act.
[91] Janine Ubink, 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' [2018] Development and Change 930.

Customary justice processes ensure community reintegration of offenders as they address the needs of all the parties. Offenders are accountable for their actions through appropriate punishment, and victims receive reparation. Therefore, customary justice processes could be combined with the formal juvenile justice system as a diversion option to assist children in conflict with the law and the persons affected by their actions. To ensure that the juvenile justice system adheres to international restorative justice practice, Act 653 must be amended to unambiguously allow for diversion at several stages of the criminal process and provide various options for diversions.

Education and legislation are tools societies could utilise to guarantee the protection of the human rights of persons involved in the justice system. This is necessary to alleviate the shortcomings of the indigenous dispute resolution system and gain public confidence in the ability of traditional institutions to protect the interests of vulnerable groups.

Chiefs are aware of the limitations of the customary justice system and are prepared to mitigate its impact on the delivery of justice in their courts. Legislation must be promulgated to co-opt traditional authorities into the juvenile justice system. Such legislation would make the chief's courts an avenue for juveniles diverted from the formal justice system at any stage of the process, to access restorative justice. It would also vest supervisory authority in the courts to curb excesses of customary dispute resolution systems and ensure the adherence and observation of human rights. The legislation could also ensure training for traditional authorities on information communication technology

and cooperation with security agencies to ensure they are abreast with modern changes, further enhancing justice delivery.

Equipment and modern tools such as computers, printers and recorders to mediate juvenile crime would have to be made available to traditional authorities. Similarly, security agencies would have to be trained to work with traditional authorities to ensure justice is delivered to parties in the juvenile justice system.

All these steps are necessary to improve juvenile justice delivery in Ghana because children will always be children!

Beyond Customary Justice: Exploring Non-State Actors' Roles in Kenya's Counter-Radicalisation Programmes

Charles A. Khamala † Luchetu Likaka††

ABSTRACT

How does the state perceive and construct radicalisation of religious extremists? This article deconstructs Kenyan policymakers' responses to the radicalisation problem in Nairobi County. Combining social movement and socio-psychological theories, we evaluate efforts to enhance non-state counter-radicalisation programmes. For example, a 2018 Bill to amend the Prevention of Terrorism Act sought to impose positive obligations and punish institutional administrators who fail to report student radicalisation. Its orientation was tested against empirical evidence. Considering Kenya's war with Al-Shabaab in Somalia, if counter-radicalisation relies on collective coercion by traditional elders to reintegrate ex-Al-Shabaab recruits, then customary justice may backfire. Nonetheless, homegrown processes are more legitimate and sustainable than punitive criminal justice responses. Thus, we evaluate counter-radicalisation methods and processes deployed by non-state actors and their perceptions of relevant programmes.

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Evidence shows that skills and vocational training on countering terrorism are the most used education and re-education de-radicalisation strategies. Others include global partnerships for education, career guidance initiatives, demobilization and reintegration programmes and counter-terrorism studies in schools. Non-state actors perceive counter-radicalisation strategies as successful. However, the duration and impact of programmes employed are too short and inefficient. Non-state actors should extend their methods and strategies for a sufficient duration to increase their impact.

Key words: customary justice, counterterrorism, de-radicalisation, Prevention of Terrorism (Amendment) Bill, strain theory, violent extremism

1. INTRODUCTION

A. Africa's Quest for Counter-Radicalisation Measures

(a) Criminalising Radicalisation in the Great Lakes Region

Terrorism in Kenya today is part of a regional threat posed by the proximity of the Horn of Africa to the Middle East conflict epicentre, regional state instability and the Somali state crisis, which have exposed the Nile Valley, Horn of Africa and Great Lakes region to terrorist acts, including those by individuals or groups claiming to be part of Al-

Shabaab, a regional Islamic fundamentalist group.[1] Such terrorist acts have included mass deaths, inflicting catastrophic injuries, destroying property, kidnappings and rape and constitute a threat to national security. Pressure to contain them emanates not only from the local population and domestic organisations, but also from the African Union (AU) and the international community. Intergovernmental actors, including the AU, the Intergovernmental Authority on Development (IGAD) and the United Nations have developed frameworks for countering radicalisation and terrorism in the continent. The AU Convention on Prevention and Combating Terrorism[2] provides standards according to which African nations should formulate their counter-terrorism efforts. It has also prompted the establishment of IGAD's capacity building program against terrorism (ICPAT) based in Addis Ababa in 2006.[3] That framework comprises the criminal justice system (police, prosecutors, courts and prison authorities), social authorities, religious leaders and voluntary organizations which can help guide former extremists back into society.

Under international criminal law, states have a positive obligation to create particular criminal offences, for example to criminalise genocide.[4] However, as a general rule,

[1] David M Anderson and Jacob McKnight, "Kenya at War: Al Shabaab and its Enemies in East Africa" (2015) 114 (454) *African Affairs* 1. DOI: https://doi.org/10.1093/afraf/adu082 (accessed on July 29, 2021).
[2] OAU Convention on the Prevention and Combating of Terrorism adopted at Algiers on 14 July, 1999, entered into force 6 December, 2002 at https://au.int/sites/default/files/treaties/37289-treaty-0020_-_oau_convention_on_the_prevention_and_combating_of_terrorism_e.pdf (accessed on January 22, 2022).
[3] Institute for Security Studies, "The Launch of the IGAD Capacity Building Programme Against Terrorism and the Opening of the ISS Office in Addis Ababa" 21 June 2006 at https://issafrica.org/about-us/press-releases/the-launch-of-the-igad-capacity-building-programme-against-terrorism-and-the-opening-of-the-iss-office-in-addis-ababa (accessed on January 22, 2022).
[4] Andrew Ashworth, *Positive Obligations in Criminal Law* (Oxford and Portland Oregon: Hart Publishing, 2015) 196.

liability does not attach to omissions or the failure to prevent certain crimes from taking place.[5] For instance, the Rome Statute does not equate omissions under certain conditions with active conduct.[6] Kenya has now proposed a statute that would impose positive obligations on institutional administrators to put measures in place in their respective learning institutions to prevent radicalisation and violent extremism.[7] Problematically, these administrators will be held liable for radicalisation of learners under their care. Our paper seeks to identify instances where this coercive power may be exercised by the state in the name of deradicalisation and to evaluate when, where and how such powers should be exercised. It contributes to the "jurisprudence of dangerousness," jurisprudence of security and the literature of the preventive state.[8] We critically analyse the empirical responses made to radicalisation by both state and intergovernmental actors and how effective these measures have been.

(b) Institutionalisation of Non-State Actors in Kenya's Counter-Radicalisation Measures

[5] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford: Oxford University Press [2005] 2013) 52. Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Weidenfeld and Nicolson, 1993) 138.
[6] ibid, 226.
[7] The Prevention of Terrorism (Amendment) Bill, 2018, Kenya Gazette Supplement No. 104 (Senate Bills No. 20) Kenya Gazette Supplement Senate Bills, 2018 Nairobi, 19 July, 2018.
[8] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014) 12.

Kenya's counter-terrorism responses began by relying on state actors to prosecute and punish ordinary crimes.[9] They evolved into enacting terrorism offences.[10] A 2018 proposed amendment to the Prevention of Terrorism Act now aims to punish non-state actors for culpable omissions on failing to detect student radicals.[11] Significantly, all pending bills lapse upon dissolution of Parliament. Thus in August 2022, the PTAB expired before substantive debate or passage. Whether or not it shall be republished by Kenya's 13th Parliament inaugurated on October, 12 2022, and if so in what form, remains to be seen. Section 2 of this article highlights non-state actors' perceptions of counter-radicalisation programmes. Given that an insurgency or other belligerence may be legitimate, socioeconomic strains and cognitive dissonance create problems, if states label all forms of resistance against their rule as terrorism. These assumptions thus anchor the paper on social movement theory, particularly strain theory.[12] Strain theory explains attributes individual deviance to a disjunction between socially acceptable goals and the means available for achieving these desirable ambitions. Lack of access to means generates a strain culminating in normlessness or anomie.[13] Strain may be attributable to social and economic inequalities, blocked opportunities or structural limitations. Anomic individuals develop coping mechanisms, including resorting to crime. Through

[9] Jude Howell and Jeremy Lind, *Counter-Terrorism, Aid and Civil Society: Before and After the War on Terror* (Basingstoke, Hampshire: Palgrave MacMillan, 2009) 138-141.
[10] Charles Alenga Khamala, "Oversight of Kenya's Counter Terrorism Measures on Al-Shabaab" (Jun 2019) 12(1) *Law and Development Review* 79.
[11] PTB, n 7 above.
[12] Hans J Giesmann, "Fundamentalism, Extremism, Terrorism, Commonalities, Differences and Policy Implications of 'Blacklisting'" in Bruce A Arrigo and Heather Y Bersot, (eds) *The Routledge Handbook of International Crime and Justice Studies* (London and New York: Routledge, 2014) 516, 523.
[13] Robert K Merton, "Social Structure and Anomie" (1938) *American Sociological Review*, 3, 672–682.

establishing measures to satisfy individuals deprived by relatively lower economic statuses, institutions respond to counter such anomie.[14] Our contribution distinguishes terrorism from fundamentalism, extremism or radicalisation. The aim is to demonstrate the risks of collective punishment and inappropriateness of punitive orientations of counter-radicalisation measures, if the state wishes to reintegrate ex-combatants. Before considering enforcement of de-radicalisation programmes, we evaluate the efficacy of existing government policies in countering-radicalisation.

Section 3 of this article asks whether the proposed imposition of positive obligations[15] and punishment for institution administrators who fail to report radical students is a more effective alternative counter-radicalisation policy. In as much as interventions by non-state actors are effective, the fact that policymakers now seek to incorporate them into counter-radicalisation programmes is partly because of diminishing returns upon reliance of punitive responses to radicalisation and partly due to atrophy in ethno-justice,[16] particularly in urban areas. We trace the evolution of Kenya's policing structure from precolonialism, to reception under colonial repression, neopatrimonial continuity, until its modern day incorporation of community policing.[17] We dissect the weakening of customary justice which necessitates a new Bill's provision mandating administrators

[14] Steven F Messner and Richard Rosenfeld, *Crime and the American Dream*, 3rd edn (Belmont, CA, USA: Wadsworth/Thomson Learning, 2001).
[15] Andrew Ashworth, *Positive Obligations in Criminal Law* (Oxford and Portland Oregon: Hart Publishing, 2015).
[16] Janine Ubink and Anna Rea, "Community Justice or Ethnojustice? Engaging with Customary Mechanisms to Reintegrate Ex-Combatants in Somalia" (2017) 11 *Journal of Transitional Justice* 276, 290.
[17] David J Francis, "Understanding Policing in Transition Societies in Africa" in David J Francis, (ed) *Policing in Africa* (United States: Palgrave Macmillan, 2012) 3.

with the duty "of ensuring measures are put in place in their respective institutions to prevent radicalisation and violent extremism."[18]

Section 4 argues that skills and vocational training on countering terrorism are the most used education and re-education deradicalisation strategies in Nairobi based on data collection and analysis. It opens by depicting our research methodology and design from which evidence was collected. This section also discusses global partnerships for education, career guidance initiatives, demobilization and reintegration programmes and counter-terrorism studies in schools. Our analysis on the efficacy of existing government policies in countering radicalisation concludes that non-state actors can reduce radicalisation, specifically in educational institutions. We endorse inclusion of non-state actors in countering radicalisation that the PTAB proposed to introduce. We recommend public participation to validate these findings through public *barazas*, community dialogue, and *nyumba kumi* meetings, making of local laws, information-sharing concerning youths and self-help groups meetings, before codification in legislation.

2. PREVENTIVE AND PUNITIVE COUNTER-TERRORISM MEASURES

A. De-Radicalisation and Counter-Radicalisation

(a) De-Radicalisation

[18] PTAB, n 7 above.

Growing research indicates how and why terrorism ends. Such insights are used to develop de-radicalisation programmes, including some that target specific groups such as Islamist or right-wing extremists. The literature distinguishes "between behavioural change (disengagement) and change in attitudes and beliefs (de-radicalization)" with the latter alleged to reduce "the likelihood of re-engagement."[19] States have different response-oriented measures to terrorists, referred to as retaliation. The terms "disengagement" and "de-radicalisation" consider the radicalised person "as an actor with no legitimacy and without any genuine political commitment."[20] However, the objective of such an approach achieves neither deradicalisation nor disengagement, meaning they change the person's vision and lead them to relinquish vi olence, but not "re-commitment."[21] Thus, some scholars recommend the "necessity for inmates to be offered a safe space to verbalise their anger and feelings of injustice."[22]

Punishing ex-terror recruits, while expecting their rehabilitation or reintegration, is futile. More recent radicalisation literature attempts to discern patterns for possible utilisation of de-radicalisation campaigns. The literature has found that, first, terrorism and political violence are not phenomena unto themselves. They represent the outgrowth of a political activism cycle. Second, the terrorist's "philosophy" is an aberrant extreme of more widely held beliefs. Third, structural causes of discontent alone are insufficient for radicalisation

[19] Willem Koomen and Joop van der Pligt, *The Psychology of Radicalization and Terrorism* (London: Routledge, 2016) 225, 234.
[20] ibid
[21] ibid
[22] Bartolomeo Conti, "Between Deradicalisation and Disengagement: The Re-engagement of the Radical Actor?" in Shashi Jayakumar, (ed) *Terrorism, Radicalisation & Countering Violent Extremism: Practical Considerations & Concerns* (Singapore: Palgrave MacMillan, 2019) 45-46, 56.

to take off. Crucially, to transform one from an aggrieved person into a fanatical terrorist, an enabling environment must resonate with such individual. Facilitators of this "resonance" are often radical propaganda and a recruitment process.[23]

Radical group membership provides an additional escalatory effect on the individual. First, because such membership often provides inducement to more effective forms of political expression. Second, because most individuals tend to be recruited via close personal connections, hence the bonds of in-group identity promote radicalisation. The terrorist him- or herself represents only the extremist tip of a pyramid composed of like-minded, though less risk-seeking, activists and radicals.[24]

(b) Counter-Radicalisation

Counter-radicalisation has been described as a stage where individuals or groups are prevented from taking up the social, political and religious principles aimed at undermining the status quo and ideals that are already set in place.[25] The political pyramid's base consists of mass supporters who perceive themselves as people in conflict with an out-group. When this perception of conflict leads to the dehumanisation of the out-group, hatred and polarisation results. The pyramid's middle range contains the

[23] Martha Crenshaw, "Theories of Terrorism: Instrumental and Organizational Approaches" in David C Rapoport (ed), *Inside Terrorist Organizations* (New York: Columbia University Press, 1988) 13-31; See also Martha Crenshaw, *The Image of Terrorism and the Government's Response to Terrorism*, 221.
[24] ibid 220.
[25] C McCauley and S Moskalenko, "Understanding Political Radicalization: The Two-Pyramids Model" (2017) 72(3) *American Psychological Association* 205 at http://dx.doi.org/10.1037/amp0000062 (accessed on July 27, 2021).

radical groups.[26] Counter-radicalisation has also been viewed as a process of instilling the status quo and democratic ideals: it negates adopting an extreme political, social, or religious ideology; and condoning violence geared towards achieving ideological goals.[27]

Counter-radicalisation comprises three ways of preventing members from the non-radicalised population from being radicalised, namely counter-grievance, counter-ideology, and counter-mobilisation.[28] The contemporary wave of counter-radicalisation programmes targeting ideology as a primary cause of terrorism, can be seen in Yemen's internal initiatives following Al-Qaeda's attacks on United States and French interests in the country. Fearing Western intervention after the invasion of Afghanistan in 2001, the Yemeni government adjusted from its failing and unpopular policy of hardline suppression of Al-Qaeda, to include re-education of captured militants. This spawned the Yemeni Committee for Dialogue (YCD).[29]

Non-state actors' role in counter-terrorism in Africa is as significant as elsewhere. Such actors' roles vary across the international, continental, regional and national arenas.

[26] Clark McCauley and Sophia Moskalenko, "Mechanisms of Political Radicalization: Pathways towards Terrorism" (2008) 20 *Terrorism and Political Violence* 415, 416.
[27] Hamisu Salihu, "Is Boko Haram a "Child" of Economic Circumstances?" (August 2018) 45(8) *International Journal of Social Economics* 1174.
[28] Yosua Praditya Suratman, "The Effectiveness of De-Radicalization Program in Southeast Asia: Does it work?; The case of Indonesia, Malaysia, and Singapore" (2017) 5(2) *Journal of ASEAN Studies* 135 at https://nbn-resolving.org/urn:nbn:de:0168-ssoar-63242-8 (accessed on July 27, 2021).
[29] Rohan Gunaratna and Sabariah Hussin, "Introduction" in Rohan Gunaratna and Sabariah Hussin, (eds) *Terrorist Deradicalization in Global Context: Success, Failure and Continuity* (Abingdon, Oxfordshire: Routledge, 2018).

International cooperation is a major counter-terrorism element. Counter-terrorism activities in Africa have received significant attention in line with the United Nations Security Council Resolution 1373, establishing the Counter-Terrorism Committee. Resolution 1373 provides technical assistance to countries to help them comply with the resolution, which involved mitigative strategies to capture terrorism perpetrators.[30] Most African countries have enacted counter-terrorism legislation incorporating the UN's terrorism definition allowing states "to designate (and therefore criminalize) resistance movements on the basis of geopolitical, foreign policy or state diplomatic interests."[31]

In Kenya, most counter-terrorism strategies involve collaboration between the government and non-state actors. Interventions include diplomatic approaches which constitute multilateral and bilateral initiatives aimed at building partnerships with terrorist-threatened victim nations regionally and globally. Further interventions involve intelligence operations and shutting down terror cells through the NSIS.[32] The judicial system contributes through security laws, community outreach projects and interagency collaboration.[33] One should ask: to what extent Kenya's counter-radicalisation laws and

[30] United Nations Security Council, Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting on 28 September 2001 at https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf (accessed on August 18, 2021).
[31] Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights* (European Center for Constitutional and Human Rights, 2010).
at file:///C:/Users/Dr/Downloads/Gavin_Sullivan_and_Ben_Hayes_2010_Blackl.pdf (accessed on July 29, 2021).
[32] Melissa Finn, Bessma Momani, Michael Opatowski and Michael Opondo, "Youth Evaluations of CVE/PVE Programming in Kenya in Context" (2016) 7(1) *Journal of Deradicalization* 34.
[33] O Beckett, "Cyber-Extremism: Isis and the Power of Social Media" (2017) 54 *Social Science and Public Policy* 138.

policies complement customary justice by addressing grossly negligent institutional administrators, as opposed to seeking state criminal punishments of the radicals themselves and what approaches can enhance counter-radicalisation programmes' effectiveness.

C. Collective Coercion of Constituencies with Commonalities

(a) Radicalisation and High Unemployment in Nairobi

Deployment of Kenya's defence forces in the African Union Mission to Somalia (AMISOM) to support the Transitional Federal Government (TFG) of Somalia in flushing out Al-Shabaab militants accompanied a marked increase in the number of youths drawn to extremism. This is evident from rising recruitments and terrorist attacks in different parts of Kenya, including Nairobi. Rising groups such as the Mombasa Republican Council (MRC), Muslim Youth Center (MYC) also known as the Al-Qaeda, along with others with similar agendas promote radicalisation.[34]

Nairobi is among the counties beset by high unemployment and radicalisation. A high number of unemployed youths without national identity numbers or cards have been entrapped by radical groups.[35] While annual GDP growth of over 5% has been regularly

[34] Anderson and McKnight, n 1 above.
[35] Anneli Botha, *Terrorism in Kenya and Uganda: Radicalization from a Political Socialization Perspective* (Lanham, Maryland: Lexington Books, 2016).

recorded, Kenya's youth unemployment rate has shown little to no positive development, standing at a staggering 22%.[36] In assessing their vulnerability to radicalisation, researchers highlight that besides attacks and killings, radical groups (majorly the Al-Shabaab) invest in processes that radicalise youths in the country. [37] This is done by capitalising on long-standing grievances against the central government and religious teachings. Paradoxically, counter-radicalisation measures may unwittingly exacerbate the recruitment of terrorists.

(b) Distinguishing Terrorists from Extremists, Fundamentalists and Radicals

Terrorism "seeks to achieve political goals by spreading panic and fear through the use of the threat of violence"[38] and has been defined as the "application of violence or threatened violence intended to sow panic in a society, to weaken or overthrow the incumbents, and deliver political change."[39] Terrorist organisations usually refer to extremist ideologies, often immersed with ethnonational or religious elements. Ideologies camouflage the terrorists' case, particularly the use of force against determined "hostile" actors. Ideally, the aims, values and aspirations of leaders and followers are unmatched. Terrorists leverage on shared grievances to legitimise any form of rebellion,

[36] Samuel Hall, *Youth Employment in Kenya: Literature Review* (British Council, October 2017) at https://www.britishcouncil.co.ke/sites/default/files/ng_kenya_youth_employment_in_kenya.pdf (accessed on July 30, 2021).
[37] Kennedy Mkutu and Vincent Opondo, "The Complexity of Radicalization and Recruitment in Kwale, Kenya" (2019) 4(9) *Terrorism and Political Violence* 26; Anderson and McKnight, n 1 above.
[38] Giesmann, n 12 above, 518.
[39] ibid 519 quoting Walter Lacquer, "Postmodern Terrorism: New Rules for an Old Game" (September/October1996) 75(5) *Foreign Affairs* 24.

including using threats and violence. Because "of existing ethnic and religious commonalties in combination with shared grievances and ethnic nationalist or religious mobilization within those constituencies" however "(b)oundaries between individual terrorists, their organizations and networks, and larger constituencies are blurred".[40] The problem is that "[c]ounter-terrorism policies utilized entrenched stereotypes and have enhanced simplistic threat perceptions which eventually have entered the political space, thereby diminishing opportunities for thoughtful differentiation between legitimate and illegitimate political resistance."[41] Consequently, they "may contribute to further instability by deepening stereotyped perceptions, for example between (different) ethnic or religious communities."[42] Yet, there is no automatic equation between terrorism and fundamentalism or radicalism.[43] To avoid radicalising relatively marginal group members through indiscriminate state criminal punishment, it is necessary for authorities to tailor counterterror responses by distinguishing radicals from other actors within terrorist organisations, thus administering varying punishments depending on the gravity of extremity.

Extremism implies a deviation from socially-accepted norms. It includes strategies to support aims of extremists to coax the mainstream society to resonate with them.[44]

[40] Giesmann, ibid 520.
[41] ibid
[42] ibid 518.
[43] ibid 521-22.
[44] ibid 524.

Extremists consider mainstream norms as illegitimate and therefore justify using force to defend shared values of their constituency.[45] Pioneering work on fundamentalism has not only pointed mainly to religious resistance against any kind of modernity but also argued that it embraced inherent social and ethnic grievances as root causes for fundamentalist thinking.[46] However, there is no empirical evidence that orthodoxy would be more prone to the use of threats or violence than liberalism. "'Fundamentalism' itself is a construct whose relationship to violence is extremely problematic. . . [Indeed] it is always possible to find non-violent groups that are, for example, led by charismatic leaders, physically isolated and doctrinally rigid."[47]

"[A 'radical'] does not make compromises but tries to resolve problems entirely by tackling them at their roots…questions the status quo of the socio-political order with a view to replace it with another . . . [and] will often act in the name of an absolute truth, be it an ideology or a religion, which does not admit concessions or restrictions."[48] According to social movement theory, radicalisation emanates primarily from socio-economic strains, and is driven by the mobilisation of resources and social framing.[49] These approaches assume that if social and political subgroups (as rational actors) deviate

[45] ibid 525.
[46] ibid 522, citing Martin E Marty and R Scott Appleby, *Fundamentalisms Observed (The Fundamentalism Project)* (Chicago and London: University of Chicago Press, 1991).
[47] Michael Barkun, "Religious Violence and the Myth of Fundamentalism" in Leonard Weinberg and Ami Pedahzur, (eds) *Religious Fundamentalism and Political Extremism* (London; Portland, Oregon: Frank Cass Publishers, 2004) 56, 57.
[48] Giesmann, n 12 above, 523, quoting PK Walderman "Radicalisation in the Diaspora: Why Muslims in the West Attack their Host Countries" *Working Paper 9*, at http://realinstitutoelcano.org (accessed on July 30, 2021).
[49] ibid

from the mainstream thinking in society or become distinct within their constituency by starting to drive their own particular political agendas, radicalisation takes place. Yet, they do not draw a direct causal line from "radicalisation" to the use of violence, let alone to terrorism.

C. Radicalisation through "*Jihad*"

Under Kenyan law: "A person who adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change commits an offence and is liable on conviction, to imprisonment for a term not exceeding thirty years."[50] Similarly, for the Dutch National Coordinator for Security and Counterterrorism, radicalization connotes "the (active) pursuit and/or support of radical changes in society, which may endanger (the existence of) the democratic order (target), possibly with the use of undemocratic methods (means) which may prejudice the functioning of the democratic order (effect)."[51] Most likely, processes of radicalisation and recruitment are interlinked. Recruitment processes are regarded to be a form of directing individuals towards radicalisation, with the aim of developing this radicalisation in a violent direction.[52] However, radicalisation should always be assessed interdependently. While people who radicalise do not necessarily engage in violence, also

[50] Section 12D, "radicalisation" in Prevention of Terrorism Act No 30 of 2012, introduced by section 62, Security Law (Amendment) Act No 19 of 2014.
[51] Joris van Wijk and Maarten P Bolhuis, "Awareness Trainings and Detecting Jihadists among Asylum Seekers: A Case Study from the Netherlands" (August 2017) 11(4) *Perspectives on Terrorism* 39, 40.
[52] ibid

those who "flirt" with radicalisation do not irrevocably radicalize. A Netherlands study discusses how (non-)government actors in their normal line of duties can assist in preventing terrorism.[53] It distinguishes "active detection," which occurs "by law enforcement or intelligence services during ongoing criminal or intelligence investigations," from "passive detection" that "is done by (non-)government actors in their normal line of duties."[54] "Jihadism" in this understanding is "an ideological movement within political Islam based on a specific interpretation of the Salafist doctrine and on the ideas of Sayyid Qutb striving, by means of armed struggle (jihad), to gain global domination of Islam and the re-establishment of the Islamic state (caliphate)."[55] The Netherlands study found it is extremely complex and therefore controversial to identify terrorists or jihadists on the basis of expressions, appearance, and/or behaviour including other ethical and societal challenges like racial stereotyping[56] because "[s]omeone may have a beard or wear a *djellabah*, but it doesn't mean anything."[57]

D. Comparative Methods and Processes in Counter-Radicalisation Programmes by Non-State Actors

A study of de-radicalisation and the prevention of radicalisation in the United Kingdom, Germany and Denmark discerned that, by providing vulnerable individuals with tools

[53] ibid 39.
[54] ibid 41.
[55] ibid 40.
[56] ibid 41.
[57] ibid 43.

to deconstruct harmful propaganda while strengthening their self-identities, the preventive measures can serve as de-radicalising measures.[58] For already-radicalised individuals, the invalidation of propaganda can help to guide the individual to question the harmful propoganda. De-radicalisation of those already radicalised can also prevent radicalisation by sowing the seeds of doubt among audiences who are at risk and are potentially being exposed to or seeking out the content of radical and extremist groups.[59]

Counter-radicalisation by non-state actors may be especially useful, if the messenger has religious authority in the target community.[60] Tactical counter-radicalisation emphasises that violence in the long run is often less effective when compared to more peaceful methods, and not useful to an organizations' overall reputation and objectives. Other counter-radicalisation programmes include peace, inter-faith and interethnic approaches, teaching Islam as peaceful and non-violent, factual and emotional and psychological counter-radicalisation.[61] Such interventions include using mental health and rehabilitation, law enforcement, intelligence and counter narratives.

[58] Asiem El Difraoui and Milena Uhlmann, "De-Radicalization and the Prevention of Radicalization in Germany, Great Britain and Denmark" (2015) 4 *Politique Étrangère* 171.
[59] ibid
[60] J-J van Eerten, B Doosje, E Konijn, B de Graaf and M de Goede, *Developing a Social Media Response to Radicalization* (University of Amsterdam-Department of Psychology/Department of Political Science, 2017).
[61] ibid

Following the launch of the global war on terror, Western nations have commissioned multiple community-focused projects aimed at preventing terrorism and countering violent extremism.[62] With an understanding that a comprehensive approach entails both proactive counter-radicalisation measures and rehabilitation initiatives, these community-based projects typically aim to build resilience and enhance prevention capacity within specific communities. We believe that similar efforts can be used to counter-radicalisation in Kenya.

Tackling violent extremism as a part of education interventions is reflective of a broader international shift toward prevention of terrorism, and toward efforts to address the environment conducive for extremists to spread their ideologies and recruit supporters.[63] Education can both radicalise and de-radicalise the youth. Increasingly, governments in conflict-affected countries are interested in financing measures that counter violent extremism through educational programmes. Such programmes can be effective interventions in Kenya.

An emergent concept adopts a case-management approach that is concerned with secondary and tertiary prevention by targeting individuals vulnerable to radicalisation

[62] Kawser Ahmed, Patrick Belanger, and Susan Szmania, *Community-Focused Counter-Radicalization and Counter-Terrorism Projects: Experiences and Lessons Learned* (Lanham, Maryland: Rowman & Littlefield, 2018).
[63] Samantha de Silva, "Role of Education in the Prevention of Violent Extremism" at https://documents1.worldbank.org/curated/en/448221510079762554/120997-WP-revised-PUBLIC-Role-of-Education-in-Prevention-of-Violence-Extremism-Final.pdf (accessed on July 24, 2021).

or terrorism perpetrators.[64] These counter-radicalisation approaches have been adopted in Australia which uses state-based diversion initiatives implemented by the police. The UK relies on Channel programmes, while the Netherlands adopts exit intervention. Unlike approaches targeting mass populations by tackling social cohesion and a sense of belonging among ethnic or religious minorities, case-managed programmes entail referring individuals to assessment teams and the development of individually-tailored intervention plans, which are used to counter radicalisation.[65]

In African countries such as Nigeria, the public and individual communities are stakeholders and partners in countering terrorism, rather than passive objects of law enforcement activities. [66] Some participating states are developing community-oriented approaches to countering terrorism that emphasise public support and participation to increase accountability and effectiveness. These approaches consist of locally-driven initiatives that attract wide partnerships transcending traditional security practitioners, to include public authorities, civil society organisations, businesses and/or the media.

Counter-radicalisation programmes by non-state actors in East African countries include building grassroots Muslim responses which challenge the Jihadi storyline with simple

[64] Adrian Cherney and Emma Belton "Evaluating Case-Managed Approaches to Counter Radicalization and Violent Extremism: An Example of the Proactive Integrated Support Model (PRISM) Intervention" (2021) 44(8) *Studies in Conflict & Terrorism* 625.
[65] ibid
[66] J Wood, "Unintended Consequences: DAC Governments and Shrinking Civil Society Space in Kenya" (2016) 26(5) *Development in Practice* 532.

competing and clear messages which are equally forthright and scripturally-based.[67] Consequently, the appeal of violent extremism among "vulnerable" groups and individuals will decrease, and fewer people will be radicalised into violent extremism or terrorism.

Kenya implemented Counter-Insurgency (CI) and Counter-Terrorism (CT) tactics to counter radicalisation. The strategies involve military/police actions against radical and extremist groups.[68] As the Kenyan experience exemplifies, CI and CT methods become counterproductive for multiple reasons. This has led to increased recognition for nuanced and holistic conflict-sensitive security strategies that address the root causes of radicalisation, and balance security and developmental challenges.

3. CUSTOMARY JUSTICE, ITS LIMITS AND A PROPOSED LAW PUNISHING CRIMINAL OMISSIONS

A. Customary Law and the Evolution of Community Policing in Kenya

[67] Andrew Glazzard, Sasha Jesperson, Thomas Maguire and Emily Winterbotham, *Conflict, Violent Extremism and Development: New Challenges, New Responses* (Cham, Switzerland: Palgrave MacMillan, 2018).
[68] Charles Villa-Vicencio, Stephen Buchanan-Clarke and Alex Humphrey, "Community Perceptions of Violent Extremism in Kenya" Occasional Paper no. 21, *Justice and Reconciliation in Africa* (Institute for Justice and Reconciliation in consultation with the Life & Peace Institute, 2016) at https://media.africaportal.org/documents/IJR-Violent-Extremism-in-Kenya-final-web-.pdf (accessed on July 24, 2021).

(a) Deploying Customary Justice Mechanisms to Reintegrate Ex-Combatants in Somalia

In Somalia, elders accepted returning combatants back into the communities without any process for reintegration or reconciliation. While elders reported that safety concerns prompted them to take a hands-off approach, respondents noted that the unregulated return of ex-combatants results in various problems. First, Al-Shabaab has been successful in hunting down some defectors so ex-combatants fear retribution from them. Second, having committed specific crimes or participated in Al-Shabaab operations, ex-combatants are afraid of community members with grudges against them. Many Al-Shabaab combatants "while their choices were severely restricted by a variety of push and pull factors, were not forcibly conscripted."[69] Third, returnees also fear government security agencies who may target them or their local community for accommodating them.[70] Finally, they "also feared 'fake returnees' who come to the locality on Al-Shabaab terror missions."[71] Unlike forgiving ordinary crimes, under customary law case-specific crimes against individuals can only be forgiven by appeased victims.[72]

Like Somalia, Kenya has international law obligations to prosecute and punish terrorism as a crime against humanity. Although screening of returnees may offer an opportunity to transfer the high-risk cases to the police from the community, by facilitating social reintegration, cooperation from local leaders may appear as encouraging a suspect's

[69] ibid 292.
[70] Ubink and Rea, n 16 above, 290.
[71] ibid 290-1.
[72] ibid 291.

impunity. Equally, "the return of ex-combatants might be hampered if locals divert them to the criminal justice system and end up in prison."[73] Altogether, ethnojustice may not be feasible in situations where cultural values contributed to conflicts as involvement of customary dispute settlement actors may instead reinforce repressive values, such as patriarchy, which may have caused or contributed to the initial resort to radicalisation. This article maintains that for non-state actors to restore social harmony by rehabilitating and reintegrating radicals, they should develop an enabling environment through a re-education curriculum which counters the hitherto alienating factors such as unemployment, which promotes radicalisation. Given that returnees should neither be punished nor pushed by elders to re-join extremist groups, Kenya's proposed legislative reforms instead seek to have school and university managers report student radicalisation. Thus, it is useful to trace the historical origins of community policing in Africa.

(b) Customary Criminal Law, Colonial Policing and Post-Independence NeoPatrimonial Politics

It is contended that justice, under African traditions such as the Acholi, prefers to restore social harmony using rituals such as *mato oput* ("to drink a bitter potion made from the leaves of the 'oput' tree") to resolve the ethnic conflicts in northern Uganda through

[73] ibid 294.

compensation, instead of pursuing retributive justice.[74] However, the Lord's Resistance Army's victims rejected customary justice and opted for retributive justice at the International Criminal Court. In 2021, Ongwen was convicted[75] and sentenced to 25 years' imprisonment on 61 counts of crimes against humanity and war crimes. Clearly, customary justice may not readily redress mass atrocities.

Pre-colonial African societies, such as the Akan in Ghana, had rudimentary traditional policing services. African customary criminal justice theory cherishes co-operative, sharing values which promote conciliatory and consensual approaches to dispute resolution.[76] Wrongdoing in pre-colonial Africa was predominantly an act for which a group familiar with an offender's behavioural traits should bear collective responsibility. The "objective is restoration of equilibrium," guided by a social harmony principle requiring co-operation to achieve group welfare.[77] However, upon British colonialism's advent in Kenya, written statutes ousted African customary criminal law.[78] Colonialism thus reoriented the nature and type of policing in Africa, shaping the roles, functions, structure and accountability of the police after independence. Unsurprisingly, the police

[74] Steven C Roach, "Multilayered Justice in Northern Uganda: The ICC and Local Procedures of Accountability" (2013) 13(1) *International Criminal Law Review* 249.
[75] *Situation in Uganda in the case of the Prosecutor* v. *Dominic Ongwen*, ICC-02/04-01/15, 6 May 2021, "Sentence" https://www.icc-cpi.int/CourtRecords/CR2021_04230.PDF (accessed on September 2, 2021).
[76] Eugene Cotran, "The Position of Customary Criminal Law in African Countries" in GFA Sawyerr (ed) *East African Law and Social Change* (Nairobi: East African Publishing House, 1967) 14, 16.
[77] ibid 17.
[78] Judicature Ordinance, 12 August, 1897.

agencies were centralised and served the coercive functions of colonial rule.[79] Moreover, given the militarised nature of colonial conquest, repression and control invariably served as the blueprint for the military concept and practice of policing in post-colonial Africa. The post-independence context of neopatrimonial politics led to policing based on repression and regime protection.[80] Consequently, in African post-colonial states, elites had complete control over the police force as an agency of the state. Can "citizens be police" in modern democratising countries who provide information and intelligence for crime prevention, and law and order maintenance? Can formal criminal law substitute ethno-justice under Kenya's new Constitution by incorporating other non-state actors in de-radicalisation programmes?

(c) Community Policing under Kenya's New Constitution

In the late 20th century, one observer of the introduction of a formal legal system noted "[t]he cake of custom has been crumbling and continues to crumble rapidly."[81] Conversely, Kenya's 2010 Constitution and emerging legislation recognise alternative justice systems comprising non-state police and regulate the private security sector.[82] The judiciary is constitutionally-mandated to mainstream Alternative Justice Systems (AJS)

[79] David Anderson and David Killingray, *Policing the Empire: Government, Authority and Control 1830-1940* (Manchester, UK: University of Manchester Press, 1991).
[80] Francis, n 16 above.
[81] JB Ojwang, *Laying a Basis for Rights: Towards a Jurisprudence of Development* (Inaugural Lecture) (Nairobi University Press, 1992) 20 quoting JB Ojwang, "Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa" in Peter Sack and Elizabeth Minchin, (eds) *Legal Pluralism* (Canberra: Australian National University Proceedings of the Canberra Law Workshop (Canberra: Pink Panther, 1986) 99, 112-113.
[82] The Private Security Regulation Act, No 13 of 2016.

to enhance access to, and expeditious delivery of, justice.[83] Thus, terrorism trials permit plea-bargaining.[84] Nowadays courts are permitted to recommend reconciliation not only to settle assault charges or misdemeanors, but also to resolve serious crimes, including murder.[85] Yet despite enacting the 2012 PTA, terrorist attacks escalated. In response to public outcry, in 2014 the state widened the definition of terrorist acts to encompass incitement.[86] Moral panics among the middle class and elites pressured the government to revamp punitive measures.[87] In 2015, the Constitutional Court upheld the radicalisation offence's validity.[88] The government now seeks more powers to criminalise failure by school and university managers to detect and report radicalisation.

B. Mandating Institution Administrators to Prevent Radicalisation and Violent Extremism

(a) The Prevention of Terrorism (Amendment) Bill, 2018

A further amendment to the PTA proposes liability for institution administrators who fail to report radicalisation. This article maintains that there is need for the criminal justice

[83] Article 159(2), Constitution of Kenya (Nairobi: Government Printer, 2010).
[84] Kahawa Law Courts' Court Users Committee (CUC) *Guidelines for Operations at Kahawa Law Courts* (May 2021) 8, para 3.14.
[85] Daniel Pascoe, "Is Diya a Form of Clemency?" (2016) *Boston University International Law Journal*, Vol 34(1) 149-179.
[86] Security Sector (Amendment) Act, No 19 of 2014.
[87] Khamala n 10.
[88] *Coalition for Reform and Democracy (CORD) & another* v. *Republic of Kenya & another* [2015] eKLR.

system (rather than County Boards) to design actuarial risk assessment indicators regarding which pre-inchoate acts are preparatory for radicalisation. Such checklists may guide institution administrators about the characteristics that may reasonably be considered as amounting to radical behaviour. It is imperative for developing the elements of the crime, to enable institution administrators to distinguish radicals or extremists from mere fundamentalists. Such indicators would also safeguard suspected persons against generalised surveillance, particularly by non-state actors lacking specialist expertise. The counter-radicalisation techniques should be subject to oversight to ensure they are efficient and effective, while respecting privacy rights of suspects, who comprise school and university managers. If *nyumba kumi* or counter-radicalisation programmes are deployed by non-state actors for surveillance, should they be countrywide or at terror hotspots? It identifies school managers to monitor counter-radicalisation education programmes. Does criminalising omissions of such non-state actors lead to violation of privacy rights? How are radical students to be screened for reasonable suspicion?

The 2018 Bill seeks to build the resilience of learners through sensitisation, creating strong support and care networks for students, and working with key institutions to counter ideological challenges associated with terrorism. The school administrators will be required to keep and update records of all their students and ensure teachers are sensitised to detect extremism behaviour in students and collaborate with key

stakeholders in countering radicalisation.[89] By establishing a "County Education Board," the Bill seeks to charge non-state actors concerned with the day-to-day management of an early childhood education institution, a school of basic education, college or university with tasks of "institution administrators."[90] Their duties includes collaborating with the relevant State agencies, including police, to formulate and oversee the implementation of county-specific programs to counter radicalisation, ensure the standardisation of curriculums taught in all learning institutions and carry out necessary background checks on learners.[91] Additionally, by ensuring that publicly-available information technology equipment uses web-filtering solutions, they shall limit access to terrorist extremist material. Furthermore, they should ensure that publicly-owned venues and resources should not provide platforms for dissemination of extremist views. Importantly, institution administrators are required to collaborate with the Internal Security Cabinet Secretary, the Inspector General of Police and other stakeholders, including non-state actors, to design appropriate amnesty programs and regulations, to cater for students who turn back from radicalisation.[92]

The Bill claims to neither "delegate legislative powers" nor limit fundamental rights and freedoms. Yet these school administrators will be required to keep and update records of all their students and ensure teachers are sensitised to detect extremism behaviour in

[89] PTAB, n 7 above, "Memorandum of Objects and Reasons".
[90] ibid Preamble.
[91] ibid 12E (1)(a)-(c).
[92] ibid

students, while collaborating with key stakeholders in countering radicalisation. The institution administrator's duties are enforceable on the pain of punishment.[93] Outside school hours and on weekends, parents and guardians of students have a responsibility to monitor the students' activities. Where there is reason to believe that a student is likely to be involved in terrorist acts or to have been radicalised, they must immediately report this to the authorities, including a case of a missing student.[94] Where a child who is reported missing is found and determined to have undergone radicalisation, collaboration with these authorities is mandatory. The programmes aim to rehabilitate the child, carry out an investigation to determine if any other student has been subjected to radicalisation or extremist material or information and "where necessary put in place measures to curb access to extremist material or information within the respective school."[95] Coercively, "the institution administrator will be held liable for radicalization of learners under their care."[96]

(b) Omissions Liability for Failure to Report Radicalisation

The proposed amendment to Kenya's PTA criminalises omissions by institution administrators, namely the failure to report pre-inchoate acts by students who may be radicalised. Emerging evidence from Europe suggests that there is a nexus between crime

[93] ibid section 12F (a)-(e).
[94] ibid 12G (a), (b).
[95] ibid 12H (3)(a)-(c).
[96] ibid

and terrorism.[97] Hence, joining organised gangs may be a precursor to joining terror cells. If this assumption is valid, then failure to report that a student has joined a street gang may impose liability on institution administrator. Currently, the PTA only imposes a general duty to report actual terror acts.[98] Additionally, it proposes to require school and university managers to report pre-inchoate acts, such as students associating with criminal groups. In the past, the presumption was that terrorists pursue ideological goals, unlike criminals who are motivated by profit.[99] Crucially, new evidence suggests that there appears to be no distinction between criminals and terrorists. "The overwhelming majority of perpetrators of recent jihadi terrorist attacks who had a criminal history were involved in low-level criminality."[100] The International Centre for the Study of Radicalisation (ICSR) found that "criminal and terrorist groups have come to recruit from the same pool of people, creating (often unintended) synergies and overlaps that have consequences for how individuals radicalize and operate."[101] The crime-terror confluence that develops in convergence settings has three dimensions: functional confluences (skills exchange, social learning and provision of services), financial confluence (funding for terrorism derived from criminal activity) and ideological confluence (criminals turned violent extremists who follow an ideology that justifies political violence along religious lines).[102] Correspondingly, there are attempts by Kenyan

97 ibid
98 Khamala, n 10 above.
99 Alexander Kupataze and Javier Agromaniz, "Introduction to Special Issue – Understanding and Conceptualizing European Jihadists: Criminals Jihadists or Both?" (May 2019) 16(3) *European Journal of Criminology* 261, 268.
100 ibid 262.
101 ibid 263.
102 ibid

Parliamentarians to impose duties on officials to report students who join criminal gangs as being serious criminals and thus prone to radicalisation.

4. AN EXPLORATORY APPROACH TO DATA COLLECTION AND ANALYSIS OF NON-STATE ACTORS' ROLE IN COUNTER-RADICALISATION IN NAIROBI

A. Methodology

This article adopts an exploratory research design, taken where there is negligible information about a topic. Extensive preliminary work needed to be done to assess the magnitude of the problem, understand its occurrence and gain familiarity with the phenomena in question.[103] Exploratory studies are also necessary when some facts are known, but more information is needed for developing a viable theoretical framework. For this study, information on different parameters affecting counter-radicalisation programmes, success of counter-radicalisation programmes, efficacy of existing policies in counter-radicalisation and challenges in countering radicalisation programmes was collected. These have not been extensively explored in the past. Quota and purposive sampling was used. This type of sampling reduces sampling error by grouping populations into strata. The study stratified the population into three strata based on the wards in Kamukunji sub-county, Nairobi.

[103] JA Maxwell, "The Validity and Reliability of Research: A Realist Perspective" (2017) 1 *The BERA/SAGE Handbook of Educational Research* 116.

B. Findings and Discussions

This section explains the results on the effectiveness of non-state actors' counter-radicalisation programmes in the fight against terrorism in Kamukunji sub-county, Nairobi County. The presentation of this section is guided by specific study objectives. Finally, the article presents discussions on how the findings relate to existing studies and findings from empirical studies.

Sixty-seven respondents answered all questions correctly and were analysed giving a response rate of 88%. Most respondents were male. The findings are consistent with Ahmed et al's study[104] in which more males are employed in community programmes than females. However, this is inconsistent with the KNBS census in which women comprise 51% of the national population.[105] Additionally, we established that most respondents are NGO and CSO representatives, consistent with a study by De Silva where NGOs and CSOs are major parties in the fight against terrorism.[106]

[104] Ahmed et al, n 62 above.
[105] Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census Volume I: Population by County and Sub-County* (Nairobi: Government Printer, 2019).
[106] De Silva, n 63 above.

The research found that a majority of the respondents were educated to secondary level, which is consistent with a study by Umeanolue and Nwadialor.[107] The respondents are in the 18-34 years age category, which is consistent with a study by Finn et al,[108] where age 18-35 dominated the responses. Forty-nine% of our respondents are married, consistent with a study by Suratman where married people were the majority respondents.[109] Seventy two% of the respondents are of Christian religious background, which is inconsistent with a study by Nyokwoyo.[110]

C. Methods and Processes of the Counter-Radicalisation Programmes

Fifty six and five tenths percent of the respondents indicated that skills and vocational training in countering radicalisation were the most used education and re-education strategy. Our findings are consistent with a study by De Silva in which education functions to both radicalise and de-radicalise young people.[111] The findings indicated that skills and vocational training were the most used counte- radicalisation strategies. Consisten with our findings, De Silva also found that education purposed to both radicalise and to de-radicalise young people.[112] In addition, Nyokwoyo recognised that

[107] Ikenna L Umeanolue and Kanayo L Nwadialor, "Religious Extremism as a Challenge to Tertiary Education in Nigeria" (2016) 6 *Mgbakoigba: Journal of African Studies* 1 (unpaginated) at file:///C:/Users/Dr/Downloads/142373-Article%20Text-378631-1-10-20160817.pdf (accessed on November 27, 2020).
[108] Finn et al, n 32 above.
[109] Suratman, n 28 above.
[110] Z Nyokwoyo, "The Religious Radicalisation of the Youth in Eastleigh and its Implication for Christian-Muslim Relations in Kenya from 1992-2015" (Ph.D. dissertation, St. Paul's University, 2016).
[111] De Silva, n 63 above.
[112] ibid.

there was a need for non-state actors to use, what Althusser calls, the ideological state apparatuses,[113] mobilised through educational institutions in Kenya.[114] The key informants agreed that re-education strategies through career guidance initiatives and mentorship was the most preferred strategy. It uses previously radicalised individuals who have been guided through successful careers to mentor the radicalised individuals.

Forty three and three tenths percent of the respondents identified global partnerships for education and re-education methods in countering radicalisation, 38.8% identified career guidance initiatives, 29.9% identified demobilisation and reintegration programmes, while 23.9% identified counter-terrorism studies in schools. In support of our study findings, KNBS found similar results, where awareness that the public and individual communities are stakeholders in countering terrorism was important.[115] Organisations are developing community-oriented approaches in countering terrorism that emphasise public support and participation to increase accountability and effectiveness. These approaches consist of tailored local driven initiatives attracting partnerships widely, beyond traditional security practitioners, to include public authorities, civil society organisations and education centers.[116] Key informants agreed that through stakeholder collaboration, radicalisation can be countered in affected areas.

[113] Louis Althusser, *For Marx* (London: Allen Lane, 1969).
[114] Nyokwoyo, n 110 above.
[115] KNBS, n 105 above.
[116] ibid

Eighty three and six tenths percent of the respondents said there existed rehabilitation centres in the sub-county, with Bahati area hosting most of the rehabilitation centres with 46.4% of the responses. In support of the study findings, Ahmed et al found that a comprehensive approach entails both proactive counter-radicalisation measures and rehabilitation initiatives. These community-based projects aim to build resilience and enhance prevention capacity within specific communities.[117] The key informants agreed that mental (psychosocial) rehabilitation methods such as trauma-informed resilience, trauma healing and religious education were functional in Kamukunji sub-county.

Eighty five and one tenth percent of the respondents identified use of mentors in counter-radicalisation in Kamukunji sub-county. In support of the findings, Eerten and his colleagues found that counter-radicalisation by non-state actors may be useful, if the messenger has religious authority and mentees look up to him/her in the target community.[118] Other counter-radicalisation programmes identified by Eerten et al include peace, factual counter-radicalisation and psychological counter-radicalisation.[119] The key informants agreed that reversing of myths and misinterpretations, religious education, civic educators, community facilitators and trainers of trainees can be used. In addition, youth mentors are used to mentor other youths to desist from joining radicalised groups.

[117] Ahmed et al, n 62 above.
[118] Eerten et al, n 60 above.
[119] ibid

Our study determined how the organisations ensured intelligence collection in countering radicalisation in the sub-county. Clearly, that information was given to the authorities, transparency and community meetings with the security officers were used. Granor similarly found that communication and information-sharing were important tools in tackling radicalisation and extremism.[120] Abubakar also established that strategic communication and information-sharing in counter terrorism was a key feature in the fight against violent extremism and radicalisation.[121] Information-sharing between relevant stakeholders could provide information necessary to fight terrorism.

The research examined the type of actors/partners the respondents had worked with in the fight against terrorism in the sub-county. Our findings indicated that local partners comprised 71.6%, regional partners formed 46.3%, while international partners formed 22.4% of the responses. In support of the findings, Beutel et al[122] asserted that many potential partners were locally-based, and actively participate in counter-radicalisation initiatives.

[120] Boaz Granor, *The Counter-Terrorism Puzzle: A Guide for Decision Makers* (New Brunswick and London: Transaction Publishers, 2005).
[121] Irfan Abubakar, "Effective Strategic Communication in Countering Radicalism in Indonesia" cited in Daniel K Inouye (2016) *Asia-Pacific Center for Security Studies* at https://apcss.org/alumni-perspectives-effective-strategic-communication-in-countering-radicalism-in-indonesia/ (accessed on December 11, 2020).
[122] Alejandro Beutel, Stevan M Weine, Aliya Saeed, Aida Spahic Mihajlovic, Andrew Stone, John Oakley Beahrs and Stephen B Shanfield, "Guiding Principles for Countering and Displacing Extremist Narratives" (2016) 7(3) *Contemporary Voices: St Andrews Journal of International Relations* 35.

Eighty nine and six tenths percent of the respondents identified the existence of community-focused counter-radicalisation and counter-terrorism projects in Nairobi. Glazzard and his colleagues agree that building grassroots Muslim responses which challenge the Jihadi storyline with clear messages is needed for countering radicalisation.[123] Eventually, the appeal of violent extremism among vulnerable groups and individuals will decrease, and fewer people will be radicalised. The main projects identified by key informants were in form of public seminars and rallies, community policing, the Jiongoze Project (JP) and Operation Usalama Watch. (OUW)

[124]

Forty four and eight tenths percent of the respondents involved multiple actors in countering radicalisation in the area. The study found a number of actors in countering radicalisation such as Community Development Initiative (CODI), Japan Centre for conflict Prevention (JCCP), Kamkunji Community Peace Network (KACPEN), Life and Peace Institute (LPI), Royal United States Institute (RUSI), National Counter Terrorism Centre (NCTC), and Social welfare development (SOWED) among others. Cherney and Belton discovered that case-managed programmes by non-state actors involve the referral of individuals to assessment teams and the development of individually-tailored intervention plans, which are used in counter-radicalisation.[125] Brown noted that de-

[123] Glazzard et al, n 67 above.
[124] These are two non state actors working on deradicalisation.
[125] Cherney and Belton, n 64 above.

radicalisation programmes have two important goals. First, to obtain intelligence on extremist organisations. Second, to discredit the extremist ideology.[126] An important indicator of success is convincing rehabilitated militants to speak out against extremist groups and ideology. Hemmingsen and Castro however disagreed that there was lack of variety of countermeasures involving multiple actors which are required to successfully counter the message of radical groups.[127]

D. Non-State Actors' Perception of the Performance of Counter-Radicalisation Programmes

Most respondents (70%) agreed that radicalised groups had decreased in Nairobi while others (30%) felt the numbers increased. In support of the findings. Mirahmadi noted that the number of radicalised individuals had decreased due to use of community forums and education to detect the signs of radicalisation to violent extremism, and due to developing cooperation among community. Second, law and social service organisations were important in countering radicalisation.[128] In addition, Ahmed et al, agreed that following the launch of the global war on terror, most nations have commissioned multiple community focused projects aimed at preventing terrorism and

[126] Katherine E Brown, *Gender, Religion, Extremism: Finding Women in Anti-Radicalization* (New York, NY: Oxford University Press, 2020).
[127] Ann-Sophie Hemmingsen and Karin Ingrid Castro, "The Trouble with Counter-Narratives" (2017) *DIIS, Danish Institute for International Studies Report*, No. 01.
[128] Hedieh Mirahmadi, "Building Resilience against Violent Extremism: A Community-Based Approach" (2016) 668 (1) *The Annals of the American Academy of Political and Social Science* 129.

countering violent extremism.[129] With an understanding that a comprehensive approach entails both proactive counter-radicalisation measures and rehabilitation initiatives, these community-based projects typically aim to build resilience and enhance prevention capacity within specific communities. The key informants agreed that more awareness, sensitisation programmes, community forums, collaboration with the police, and anti-radicalisation programmes helped reduce the number of radicalised individuals.

Seventy seven and six tenths percent of the respondents said there is reduced enrollment of radicalised individuals into de-radicalisation centres. Factors such as poverty, unemployment and lack of support from close relatives and authorities contributed to an increase in the number of radicalised individuals. Nyokwoyo agrees that the high number of unemployed youths without ID cards had fallen into the trap of radical groups.[130] In addition, Kenya's youth unemployment rate has shown little to no positive development, contributing to numerous cases of radicalisation. The key informants agreed that factors such as poverty, lack of support from parents and other relatives, unemployment and peer pressure have all contributed to an increase in the causes of radicalisation in the sub-county.

[129] Ahmed et al, n 62 above.
[130] Nyokwoyo, n 110 above.

Fifty seven percent of the respondents said there existed public-private partnerships in the sub-county aimed at countering radicalisation. Such partnerships were found to be successful. In support of the findings, Nyokwoyo highlighted the importance of promoting partnerships through open dialogue and economic integration.[131] Inter-organisational forums for open deliberation between leaders of different security offices and religious communities as well as civil society actors were needed to strengthen mutual respect and address negative stereotypes/attitudes that led to stigmatisation and marginalisation. The key informants indicated such partnerships included community-security relation programmes such as the Nyumba Kumi Initiative and NGOs partnering with government agencies such as the National Cohesion Integration Commission (NCIC). There were also partnerships such as UNICEF engaging schools, the county government and SOWED Kenya. Furthermore, SOWED Kenya partnered with the Ministry of Interior, private schools and community, along with USAID, JCCP, Kenya Ni Wajibu Wetu, and KACPEN.

Sixty one percent of the respondents said there was improved inter-agency collaboration in the sub-county. El Difraoui and Uhlmann support these findings, namely that early detection measures can serve as de-radicalising measures. For example, by providing vulnerable individuals with tools to deconstruct harmful propaganda while

[131] ibid

strengthening their self-identities.[132] The invalidation of such propaganda can assist already-radicalised individuals, to question it.

The key informants indicated that partnerships worked through sharing early warning information, trainings and education. Commitment and personal involvement were also cited. Cherney and Belton agreed on the emergent case management approach, which typically is concerned with individuals identified as at risk of radicalisation.[133] These case management approaches to counter-radicalisation target wide groups by tackling social cohesion and a sense of belonging among ethnic or religious minorities.

The key informants further indicated that prevention and engagement approaches had been used in the sub-county. The approaches included youth empowerment, using sports and fashion shows, early education, enlightenment, and talking to individuals when they show unusual signs. Badurdeen and Goldsmith support our findings that early detection of radicalisation may be possible, through empowering those who are at risk of the process of radicalisation.[134]

[132] El Difraoui and Uhlmann, n 58 above.
[133] Cherney and Belton, n 64 above.
[134] Fathima Azmiya Badurdeen and Paul Goldsmith, "Initiatives and Perceptions to Counter Violent Extremism in the Coastal Region of Kenya" (2018) 16 *Journal for Deradicalization* 70.

Fifty one percent of the respondents said use of fear appeals to radicalised individuals. The use of fear appeals had not been as effective as the use of hard approaches (61.2%) which caused rebellion by the youth. Horgan et al disagree that appeals to fear by non-state actors proved to be an effective strategy for certain counter-radicalisation purposes by concerned actors.[135] They argue that raising fear may deter those that want to engage in suicide attacks. However, Villa-Vicencio, Buchanan-Clarke and Humphrey assert that the approach of fear appeals might not be a very effective strategy for designing counter-radicalisation in the context of violent radicalisation.[136] The key informants also agreed that hard approaches have not been effective because their use by security agencies tend to make the youth rebel against the state and join radicalised groups.

E. Efficacy of Existing Government Policies in Countering Radicalisation

Our study examined anti-terror laws and policies that had proven important towards countering radicalisation. We determined that the Constitution was the most commonly known law for countering radicalisation in the sub-county as given by 71% of the respondents, followed by the PTA[137] and Cyber Security and Protection Bill.[138] As Rieker argues, apart from the Constitution, the anti-terror law helps give citizens the tools to

[135] John Horgan, Mary Beth Altier, Neil Shortland and Max Taylor, "Walking Away: The Disengagement and De-Radicalization of a Violent Right-Wing Extremist" (2017) 9(2) *Behavioral Sciences of Terrorism and Political Aggression* 63.
[136] Villa-Vicencio, et al, n 68 above.
[137] PTA, n 50 above.
[138] Cyber Security and Protection Bill, 5 July, 2016; subsequently enacted as the Computer Misuse and Cyber Crimes Act No 5 of 2018.

spot and prevent radicalisation.[139] Wijk and Bolhuis opine that non-state actors engaged in passive detection "can be provided with a list of characteristics of terrorists – appearance, nationality, character – for easier assessment of relevant cases to tip Security Services."[140] The institution administrators, through the PTAB, can also help parents spot and prevent jihadism.

In addition, this study found that 58.2% of respondents did not know of existence of media laws. Laws on media reporting and use of technological and social platforms, such as social media and laws on privacy to information, however, were reported. Similarly, Granor found that with increased access to social media and the global problem of misinformation, there needed to be a concerted effort and policy to promote and disseminate actual information.[141] This was essential to counter those that encouraged division, exclusion or demonisation of the "other," to the point where violence was somehow justified and pursued. Lack of objectivity in reporting, be it through fake news, mendacious, and/or non-lying half-truth news, was a crucial issue for journalism to address if the devastating processes that led to radicalisation and terrorism were to be countered.

[139] Pernille Rieker, "Fighting International Terrorism the French Way" in *French Foreign Policy in a Changing World: Practising Grandeur* (Oslo, Norway: Palgrave MacMillan, 2017) chapter 7.
[140] Wijk and Bolhuis, n 51 above, 41.
[141] Granor, n 120 above.

The study found that 58% of the respondents knew of existence of such counter-jihadism measures for countering radicalisation. Rieker agrees that the Stop Jihadism campaign has been used to counter the threat of Islamic extremism throughout the society. As the campaign's government-run website boasts, countries such as France have instituted counter-jihadism measures to their education and prison systems and allocated additional resources to its counter-terrorism agencies.[142] The key informants agreed that counter-jihadism measures for countering radicalisation such as education on jihadism, teamwork in counter-jihadism processes, teachings through madrassas, community education and religious leaders were used.

Sixty nine percent of the respondents knew of public-involvement measures used for countering radicalisation. In corroboration, Kim underscored the importance of elevating the voices of regular citizens aiming to address grievances through peaceful and constructive means.[143] Additionally, the study emphasised that security agencies could work with the citizens and the media to advance widely-held dialogue that encouraged association and empathy. The key informants were also in general agreement that public involvement was achieved through public *barazas* (gatherings), community dialogues, *nyumba kumi* (neighbourhood watch) meetings, making of local laws, information sharing concerning youths in the area, self-help groups meetings,

[142] Rieker, n 139 above.
[143] Jaeshin Kim, "The Effects of Collective Anger and Fear on Policy Support in Response to Terrorist Attacks" (2016) 156(5) *The Journal of Social Psychology* 455.

networking, and during women *chamas* (self-help groups). The key informants posited that community policing was practiced in Kamukunji sub-county using the *nyumba kumi* initiative, peace committees, clustering areas, through platforms such as t-shirts, *barazas*, and chief meetings. Supporting these findings, Granor highlighted that cooperation between non-state actors and the government, through introducing community-oriented policing, had successfully countered radicalisation.[144] McCauley and Moskalenko mentioned that community outreach programmes aimed at preventing radicalisation had proven effective in motivating the police as well as other representatives of Muslim societies in detecting persons who were susceptible to radicalisation.[145]

We found that the UN global counter-terrorism strategy and the UN Action to Counter-Terrorism were the major international laws adopted locally in the fight against terrorism, both forming 50.7% of the responses. International humanitarian law accounted for 31.3% of the responses. Similarly, Villa-Vicencio, et al observed that counter-terrorism policies and tactics have been used to respond to radicalisation in Kenya.[146] Such strategies mostly involve military/police actions against groups identified as radical or even violent extremists, as outlined in most international counter-terrorism doctrines.

[144] Granor, n 120 above.
[145] McCauley and Moskalenko, n 26 above.
[146] Villa-Vicencio, et al, n 68 above.

We agree that "to prevent imposing an imaginary customary system, the participation and decision-making power of the local population at all stages of the (de-radicalisation) process, from conception and design to implementation, is indispensable."[147] This is because radicals seeking reintegration are prone to rejection by terror victims in local communities or even to attacks from overzealous executive agents bent upon extrajudicial killings. They may also attract retaliatory attacks from Al-Shabaab snipers. Radical ideologies "attribute all or at least the great majority of extant social and economic problems to the dominance of the prevailing power."[148] Hence, counter-radicalisation measures should deny an enabling environment that will give rise to would-be terrorists. In 2015, Kenya criminalised radicalisation. However in 2016, evidence emerged "that international terrorist perpetrators have changed course from being ideological to luring and attracting petty criminals and the socioeconomically marginalized."[149] This inspired the publication of a law seeking to impose positive obligations upon non-state actors to report radicalisation. We have thus evaluated the impact of the 2018 PTAB's attempt to enhance non-state counter-radicalisation programs. It is trite law that in a democracy, all pending bills are considered lapsed upon dissolution of Parliament. Any revival, debate or enactment of the PTAB is therefore contingent on successive legislators. In 2022, Al Shabaab's direct attacks against Kenyan civilians reportedly killed 40 civilians, twice the 2021 fatalities.[150] While President William Ruto's new administration is bound to

[147] Ubink and Rea, n 16 above, 295.
[148] Koomen and Pligt, n 19 above, 247.
[149] ibid
[150] ACLED "Context Assessment Increasing Security Challenges in Kenya" March 2, 2023.

continue previous counter-terrorism efforts domestically, in 2024 Kenya shall cease contributing troops to AMISOM's successor, the African Union Transition Mission in Somalia (ATMIS). ATMIS, a multidimensional military, police and civilian mission authorised by the African Union and mandated by the United Nations Security Council, shall hand over its responsibilities to Somali security forces.[151]

CONCLUSION

The PTAB proposed to enforce effective implementation of counter-radicalisation programmes by mandating surveillance by County Education Boards administered through educational institutions as well as parents and guardians. By punishing failure of non-state actors to monitor or report suspected radicalised students, it sought to enhance preventive justice. This study evaluates the provision seeking to impose omissions liability not only on school and university managers, but also on parents and guardians. Our claim is that for such surveillance duties to be legitimate, the citizenry should be motivated to participate in them. This requires the mobilisation of non-state actors to educate parents and guardians to report suspicious activities by their children

https://acleddata.com/2023/03/02/kenya-context-assessment-increasing-security-challenges-in-kenya/ (accessed on June 6, 2021).

[151] Martine Zeuthen, "A New Phase in the Fight against al-Shabaab in the Horn of Africa," *International Centre for Counter-Terrorism*, September 21, 2022 https://www.icct.nl/publication/new-phase-fight-against-al-shabaab-horn-africa (accessed on June 6, 2021).; AFP, "UN Security Council approves African Union Transition Mission in Somalia" *Daily Nation*, April 1, 2022 https://nation.africa/africa/news/un-security-council-approves-african-union-transition-mission-in-somalia-3767800 (accessed on June 6, 2021).

which in turn warrant targeted surveillance, rather than generalized victimisation. If supported by non-state actors, customary justice offers a more sustainable counter-radicalisation variety of a crime control, as opposed to a military model or ethnojustice alone. Our conclusion makes two theoretical assumptions. First, we believe that it is possible for customary governance structures to produce peaceful outcomes through community policing. In this regard legislative reforms are contemplated to punish institution administrators who fail to supervise the passive detection of radicals by parents and guardians. We are wary that formally incorporating non-state actors into counter-radicalisation programmes may inspire returnees' confidence to defect. Thus we tested the programs against empirical evidence. Second, although disenchanted groups breed radicalisation, their constituents should not be subjected to collective punishment. Rather, responses should selectively seek and target opportunists or "Jihadists" who exploit common political grievances by inciting marginalised individuals to use threats or violence as a solution to socioeconomic or socio-psychological problems. In this regard, it was necessary to examine the methods and processes deployed by various non-state actors in the counter-radicalisation fight.

In evaluating perceptions of non-state actors of the performance of relevant programs we empirically demonstrate that vocational training, education, career guidance and counter-radicalisation studies in schools were used to counter terrorism in Kamkunji subcounty, Nairobi County. Other methods and strategies used included trauma-

informed resilience, trauma-healing, peer-to-peer mentorship, self-awareness education, reversing of myths and misinterpretations and guidance and counselling using youth mentors, religious leaders, peer educators, civic educators, community facilitators and trainer of trainees. We conclude first, that non-state actors perceived counter-radicalisation strategies to be successful, which was accomplished through awareness, sensitisation programmes, community forums, collaboration with the police, public-private partnership programmes such as the Nyumba Kumi Initiative and sharing of early-warning information. Second, regarding the efficacy of existing government policies in countering radicalisation, given the potential of customary justice to backfire, we recommend increased awareness creation on existing laws concerning de-radicalisation. Without sufficient public participation, the punishing of school and university managers for failing to report student's joining criminal gangs to "County Education Boards" may fuel intrusion into the domestic domain, triggering defensive parenting. The article demonstrates that the role of non-state actors in counter-radicalisation strategies has to be multi-faceted both in theory and practice. Furthermore, that the approach has to be holistic, so that it incorporates the non-state actors. Incorporating them into counter-radicalisation measures fills some of the gaps in ethno-justice. The starting point for preventing a terrorist mission from succeeding is to fight the enabling circumstances. Beyond ideology, it includes neutralising the conditions that lead to poverty, diseases, ignorance, injustices and marginalisation. Institutions should counter strains that cause anomie. However, existing government policies in countering radicalisation reveal that there are privacy laws limiting media reporting and the use of

technological and social platforms, for carrying out necessary background checks on learners. We recommend further research to inquire into whether criminalizing omissions of institution administrators requires them to engage in intrusive interceptions, searches and seizures of students, thus violating the latter's fair trial and privacy rights. This is because the perceived legitimacy of non-state actors, both from the viewpoint of potential fundamentalists as well as returning violent extremists, seems crucial in sustaining the actors' potential for countering radicalisation and deradicalising the mind.

CONTEXTUAL JUSTICE: AFRICAN TRADITIONAL JUSTICE SYSTEMS AS AN ENABLER OF ACCESS TO JUSTICE

P.L.O. Lumumba† and Evans Ogada†

ABSTRACT

This paper seeks to examine the role of traditional justice mechanisms would have in broadening access to justice in Africa, with the focus being on the Kenyan legal system and laws, the Kenyan legal system which is under scrutiny, being the quintessential paradigm of colonial influence and impact on traditional legal systems. Generally, the essence of any administration of justice system is the possibility for an individual and groups of individuals to bring a claim before a Court for adjudication. At its core, access

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to justice is premised on the ability of court users to participate in and to understand the process in which they participate. Alongside ordinary Court process, there is the emerging question as to the role of traditional dispute resolution mechanisms in enhancing access to justice, as fundamental aspect of daily lived reality. Access to justice in the narrowest sense may mean a guarantee to remedial mechanisms such as access to Court or alternative dispute resolution bodies; however, this position is anomalous since the prerequisite for the so-called alternative dispute resolution presupposes a pretentious superficial substitute.

Access to justice understood as a right that enables the enforcement of rights in the context of social and cultural milieu. Conversely, access to justice in the broader sense, denotes an engagement with the wider social context of the indigenous governance systems. African traditional justice mechanisms enjoy widespread resilience despite years of official ambivalence to their bonafide credentials as reflections of lived realities of Kenyans and Africans in general. Enduring evidence demonstrates that access to justice is undermined or is impeded by lack of legal literacy and in most cases indigence. The lived reality in Kenya and in many countries in Africa also point to the fact that formal justice mechanisms have been unable to effectively and timeously deal with the ever-growing number of suits filed in courts.

The paper will explore the place of African traditional dispzute mechanisms in promoting access to justice in all judicial and quasi-judicial fora and other fora afforded by traditional systems in an effort to offer succor to the indubitable challenges that face

access to justice in contemporary Kenya and in Africa generally. The paper will be calling for a re-think of the contemporary legal system in Kenya not for the simple reason that it is an offshoot of colonialism but rather to be conversant with its impact to the society, and to make suggestions aimed at redressing its shortcomings and its failures.

Key Words: Access to Justice; African Traditional Dispute Mechanisms; African Customary Laws

1. INTRODUCTION

Access to justice as a concept in social science, lends itself to a variety of meanings.[1] Generally, however, it has been argued to denote the possibility for the individual and groups of individuals to bring a claim before a court and have a court adjudicate it.[2] Access to justice can be gauged by the extent to which people can seek and obtain remedies against grievances through state and non-state mechanisms.[3]

Access to justice however continues to suffer restrictions owing to its dispensation being organized predominantly around formal institutional structures, largely inherited from the colonial state. The eradication of traditional justice mechanisms was perpetuated

[1] Francesco Francioni, The Development of Access to Justice in Customary Law in Francioni F(ed.), *Access to Justice as a Human Right*, (OUP 2007) 64
[2] ibid
[3] Ineke Van de Meene and Benjamin van Rooij, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation,* (Leiden University Press 2008) 15

further after independence where African countries, such as it was the case with Ghana, positivist laws were enacted to take away the authority of traditional chiefs to settle disputes.[4] The colonial experience disrupted the way of life in Africa, leading to a binary system in so far as public governance is concerned, bringing about what has been termed the ethnic and the civic.[5] The civic legitimacy space is not governed by traditional moral imperatives (civic public), while the ethnic or primordial legitimacy space is governed by traditional moral edicts.[6] This division in terms of legitimacy of authority and claim for authority reflects in every aspect of life with regards to post-colonial African states.

The division in the public sphere molds into what has been termed as the two publics, distinguishable in the sense that there is a public realm associated with the colonial administration and which has come to be identified with popular politics (civic public life).[7] The civic public life is based on civil structures such as the military, the police and the civil service. The primordial public incorporates the moral imperatives of traditional African cultures, imperatives that would otherwise be classified as belonging to the private realm in Western societies.[8] The bifurcation of public life into civic public life and primordial public has meant that the latter is deemed to be merely a private concern. The existence of the cleavage in the contemporary African state, that is the civic public and the primordial public presents a unique challenge in terms of authority and loyalty for

[4] George Ayitteh, *Indigenous African Institutions* (Transnational Publishers 2006) 495
[5] Redie Bereketeab, The Ethnic and Civic Foundations of Citizenship and Identity in the Horn of Africa. (2011) 11 (1) Studies in Ethnicity and Nationalism 63
[6] Peter Ekeh, Colonialism and the Two Publics in Africa: A Theoretical Statement: (1975) 17 (1) Journal of Comparative Studies in Society and History 91-112
[7] ibid 92
[8] Ekeh (n5) 92

the individual African. The primordial public in Africa undergirded by nationalism, however, remains a dominant and compelling force and cannot be wished away when it comes to access to justice and formal justice systems in Africa.

The colonial experience imposed transplanted western prototypes and mono-legal regulation systems that were thought conducive to justice and these transplants cannot be thought of uniquely as the conduits for justice.[9] The British imposed their common law tradition in countries England colonized. The French, the Germans and the Portuguese brought with them their civil law traditions that they incorporated into the administration of colonies under their charge. The concept of justice in and of itself does not lend itself to singular definition, and it is generally understood as a concept imbued with morality. Justice in traditional African societies for example, denoted the will to respect the order of the human world and to recognize in word and action what belongs to another.[10] Justice was also broadly understood as fair rules in the way they distribute benefits and burdens between a set of claimants. [11] Justice in the African context placed emphasis on restoring harmonious social relations rather than the pursuit of abstract notions of justice, far removed from the lived reality of communal life as a collective socio-political phenomenon.[12] Questions of justice and good governance arose in any societal setting whenever social institutions and practices affected the distribution of societal values. Thus, justice in this context is the standard/principle by which weight

[9] Werner Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (CUP 2006) 61
[10] Ayitteh, (no.4), 68
[11] Steve Nwosu, 'The Ethics of Justice and Good Governance in African Traditional Society', (2002) 8 (3) Journal of Democracy and Nature 469
[12] Ayitteh, (no. 4), 34

was assigned to other values. It was an organizing concept for good governance.[13] The basic appreciation of justice in the African traditional setting does not materially differ with any major contemporary formulation of justice. For example, justice according to classical western premises as articulated by John Rawls, is underpinned by two principles; that 'each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all (liberty principle) and that social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (Fair Equality of Opportunity and Difference Principle).'[14] The Arabic term for justice *adalah* is said to etymologically lie at the intersection of several signifiers such as equality, equal treatment, parity or straightforwardness.[15] Reference to the Arabic understanding of justice is aimed to demonstrate that justice is a value laden ideal with a universal appeal. The logical compatibility between justice as understood in the African traditional context and notions of justice such as has been theorized elsewhere is not difficult to identify. These understandings of justice espouse notions fairness, morality, sameness and equity.

[13] Nwosu, (no. 11)
[14] John Rawls, Justice as Fairness; A Restatement (HUP 2001) 41
[15] Azmi Bishara, 'On Justice in the Current Arab Context', Arab Center for Research & Policy Studies Research Paper Tabayyun, No. 5 (2013)1.

2. A PROLEGOMENON TO AFRICAN CUSTOMARY LAW AND JUSTICE SYSTEMS

Law and justice in the African customary setting have ingrained restorative justice features that have seen African traditional justice systems being used in criminal law matters.[16] Overall however, African laws and African traditional jurisprudence have always faced a barely hidden undercurrent of denial of their potential contribution to jurisprudence.[17] The positivist nature of sedimented western law and the mindset it has bred over the years has been responsible for claims that there was never proper law in Africa and that science of mind has bred deficiency in plurality-consciousness which repudiates the existence of law in social contexts.[18] The unchangeable fact is that traditionally, many African communities did have laws and legal systems that promoted justice as the premier virtue of social institutions. African societies had vibrant legal cultures, legal culture in this sense denoting relatively stable patterns of legally oriented social behaviour and attitudes.[19]

Customary laws in traditional African societies were conventions and enforceable rules that materialized and were respected spontaneously without formal agreement, as

[16] Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems in Kenya' 2009 10 (1) Tribal Law Journal, 1. http://tlj.unm.edu/volumes/vol10/Kinyanjui.pdf (accessed on September 3,2021).
[17] Menski (n8) 385
[18] Menski (n8) 383. It must be pointed however that reference to western law should not suggest that the conceptual western world was governed by a uniform legal systems and set of laws. Reference to western law in this context is generic. It is used not to specifically denote a specific legal system but to refer to a class of colonial laws that emanated from the colonial powers.
[19] David Nelken 'Legal Culture' in JM Smits, *Elgar Encyclopedia of Comparative Law*, (Edward Elgar Publishing Limited, 2006) 374

people went about their daily business and in an effort to solve a myriad problems that emerged without upsetting the patterns of cooperation on which they heavily depended.[20] It must be noted however that, whenever we talk of African justice systems or laws, we do not by any means suggest that there is homogeneity in these systems and laws that emanate from them. To the contrary, African societies are heterogeneous in nature. Africa in appearance is a mixture of diverse cultures and languages as well as varied socio-political systems. These diverse systems nonetheless possess shared values and principles.

Generally, the maintenance of peace within most African communities observed four principles; first, settlement of disputes was through deliberation and discussion rather than force; second, the correction of wrongdoing was by means of compensation rather than punishment except in serious offences such as murder; third ,dispute settlement was conducted by means of adjudication and assessment by elders who were considered to be impartial and fourth, dispute settlement was expected to be fair.[21] African societies, it must be noted, had a hierarchy of courts that dealt with disputes, with emphasis being that issues were to be resolved peacefully. Courts in the various African traditional societies included the moot, the family, the ward, the chief's and the king's court and important to note is that such that disputes involving siblings were to be resolved in a family court, while disputes involving members of different clans were to be dealt with

[20] Ayitteh (n4)68
[21] ibid 72

in the chief's court.[22] African traditional societies exhibited constitutional traits with certain societies recognizing a duality in constitutional legitimization. This duality, for example, is illustrated by Benin's political culture, whose central principle was that while the king had an intrinsic right to rule, the kingship had come into being by the will of the subjects and therefore the king was essentially subject to popular will.[23] Therefore, contrary to popular fad, law and legal systems did exist in traditional African societies. African laws (indigenous or chthonic law) applied to a particular community, tribe or ethnic groups because the ethical basis of the principles of their law is indigenous to that particular group. Africans treated chthonic laws as an extension of morality and in that sense, morality and law are fully complementary. Law was inter-linked with the socio-cultural environment.

African laws bore a similarity in elements with other legal systems around the world, by possessing innards similar to those of every legal system in the world; all legal systems have procedures, principles, institutions and techniques. [24] Customary laws share similarities in principles of the various laws of the indigenous communities at a general level and these similarities depend on whether the communities share matrilineal or patrilineal forms of social organization. [25] In summary, African societies had laws that

[22] ibid
[23] Ayitteh (n4)185-186
[24] Menski (n8), 83
[25] Michael Musgrave. 'African Customary Law in South Africa. Post-Apartheid and Living Law Perspectives'Chuma Himonga and Thandabantu Nhlapo, T., (eds.) (Cape Town: OUP 2015) 64

worked for them and these laws were just as vibrant as any other in the world and these laws continue to have influence in many African societies.

With regard to the constellation of norms collectively known as customary laws, it has been argued that it is not fruitful to employ the understanding of law in its western connotations.[26] Against the backdrop of the schema of diverse legal cultures and ambits and linguistic challenges, it would be important to note however that certain culture-specific behaviour regulating norms and postulates have been recognized in traditional African settings as serving the purposes of law as would in any society.[27]

African legal systems have been trisected on the basis of the identification of elementary elements that should be possessed by any legal system: the pre-colonial phase, the colonial period and the post-colonial stage.[28] Pre-colonial law in Africa operated in a community setting, which must be understood from the standpoint that government and the processes of law and dispute-settlement were mostly confined within a community of limited area and population lent a distinctive character to African law. The judge was not a remote member of an official order, but the man in the next hut, rendering justice according to the conventions or mores of the community.[29] Laws were significantly integrated in the society, flexible and dynamic.[30] Rules of law were seldom visible to the

[26] Anna Friederike Busch, *Protection of Traditional Cultural Expressions in Latin America: A Legal and Anthropological Study* (Springer Publishing 2015) 145
[27] Menski (n8) 381-382
[28] ibid
[29]Menski (n8) 437
[30] ibid *405*

casual observer as they were not codified but nonetheless formed part and parcel of the fabric of local tradition.[31]

During the colonial period, legal systems were characterized by legal pluralism, where the native legal system had to grapple with imported, largely positivist legal systems of the colonial powers. The colonial interference caused a bifurcation of law into what was termed as customary laws (law associated with the various tribes, communities or ethnic groups) and state law (law associated with the colonial administration). The law applicable in colonial Africa modelled on western systems and very obviously reflected the legal ideas of the colonizing nation in question.[32] In the colonial period, there were, generally speaking, two types of courts: those applying customary laws exclusively and those applying only the "modern" law.[33]

In Kenya, the entry of colonial systems and its laws was through ordinances that applied English law by reference. the East Africa Order in Council 1897 the principal ordinance in so far as incorporation of English law (later repeated in the 1921 Order and applied to the Protectorate), stated that the jurisdiction of the Supreme Court and subordinate courts of Kenya was to be exercised "*So far as circumstances admit . . . in conformity with the Civil Procedure and Penal Codes of India and the other Indian Acts which are in force in the Colony . . . and subject thereto and so far as the same shall not extend or apply shall be exercised*

[31] ibid 406
[32] ibid 448
[33] ibid 453

in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th day of August 1897,"[34]

The ordinance bore an important proviso, that "*Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the colony so far only as the circumstances of the colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary.*"[35]

To administer the introduced English law, the colonialists established a Supreme Court and subordinate courts of various classes.[36] Professional lawyers were brought in from the United Kingdom to be judges of the Supreme Court. [37]Several professional lawyers were made Resident Magistrates, manning the first-class subordinate courts and the majority of other magistrates manning the subordinate courts were, however, administrative officers like Provincial Commissioners, District Commissioners and District Officers who were magistrates *ex officio.*[38]

The result of the introduction of the colonial laws and systems was that the system of law and courts in Kenya in the colonial period became typically dual, for with the setting up of English-type courts to administer the English law, there was established a parallel system of courts to administer justice to the indigenous people, the so called 'natives'[39]

[34] Eugene Cotran, *The Development and Reform of the Law in Kenya, (*Journal of African Law / Volume 27 / Issue 01 / March 1983) 42
[35] Ibid
[36] Ibid
[37] Ibid
[38] Ibid
[39] Ibid, 42-43

Indeed, there was introduced the Natives Tribunal which was to deal with matters concerning 'natives in their specific jurisdictional area and advocates were not allowed to appear before these tribunals. [40]The jurisdiction of the Natives Tribunal was anchored under the Natives Tribunal Ordinance, which stated that, '"*the native law and custom prevailing in the area of the jurisdiction of the tribunal, so far as it is not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony*."[41] To reflect the supremacy of the imported colonial law, the 1921 Order in Council provided thus, "*In all cases civil and criminal to which natives are parties, every court. . . shall be guided by native law and custom so far as it is applicable and is not repugnant to justice or morality or inconsistent with any Order in Council or Ordinance in force.*"[42] Though the Supreme Court and subordinate courts had power to administer native law, they were not bound to apply it; they could only be *guided* by it.[43]

The post-colonial period saw Kenya, just like the other African states stare at cross-roads, whereby the colonial legal system had to exist side by side with traditional legal dispute settlement regimes that had remained resilient. The post-colonial period witnessed the dominance of eurocentric transplants of law dominate African (autochthonous law) and that domination continued the trend of marginalization of everything African.[44] The resultant legal system is marked by pluralism, albeit a system in which traditional African laws are deemed inferior to sedimented legal transplants. In these plural legal systems,

[40] Ibid, 43
[41]Ibid, citing section 13(a) of the Natives Tribunal Ordinance
[42] Ibid, citing section 4(2) Kenya Colony Order in Council 1921
[43] Ibid
[44] Menski (n8), *453*

customary laws coexist with the introduced "modern" laws; the expectations within the two different legal spheres often create conflicting situations where justice is interpreted in accordance with different and often conflicting conceptions of values.[45]

The attitude of the colonial judges to the administration of English law and customary law reflected the statutory positions in their condescending tone, namely that English law was supreme and customary law, though applicable in certain contexts, was a lesser system. An example of colonial judicial attitude with regards to African customs and laws is demonstrated by Chief Justice Robert Hamilton in the case of *Rex v. Amkeyo,*[46] where the judge said this:

"*In my opinion, the use of the word 'marriage' to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to considerable confusion of ideas. I know of no word that correctly describes/ it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilised peoples.*"

To justice Hamilton, marriage in the African context amounted merely to 'wife purchase' and more disturbingly, that Africans were not part of 'civilized peoples' for purposes of construing what marriage was.

The Kenyan legal system reflects the plural co-existence of many an African legal system, which systems have subordinated African customary laws and systems through which

[45]Kofi Quashigah, 'Justice in the Traditional African Society within the Modern Constitutional Set-up' (2016) 7 (1) Jurisprudence 96.
[46] Rex v. Amkeyo 7 E.A.L.R. (1917) 14

they operated to 'modern laws' that are effectively colonial transplants. The subordination has taken the form of conceptual tools such as the repugnancy clause. The repugnancy clauses are to be found in the Constitution[47] and statutory law made in parliament. [48]

3. IMPACT OF COLONIALISM ON AFRICAN LAW AND LEGAL SYSTEMS

Colonialism has been argued to be an exercise that entailed the exploitation and direct control over other people. [49] The terms colonialism and colonization trace their etymological roots to the Latin word *colére*, which means to cultivate or to design, and in all practicality , the colonists (those settling a region), as well as the colonialists (those exploiting a territory by dominating a local majority) sought to organize and transform non-European areas into fundamentally European constructs.[50] As with all aspects of traditional African societal life, the law and legal systems were not spared the pernicious influence of colonialism. The colonial impact on African law and traditional legal systems must be examined in the context of the entire colonial period, which is largely blamed for under developing Africa.[51] Africa was drained of her resources as colonialism was largely an extractive adventure.[52] African indigenous institutions that included customary legal systems were significantly changed as a result of the colonial

[47] Article 159 (3) b, Constitution of Kenya
[48] Section 3(2), Judicature Act, Chapter 8 Laws of Kenya
[49] FRELIMO, 'The Anatomy of Colonialism' in Aquino de Braganca and Immanuel Wallerstein (eds.), (1982) The African Liberation Reader (Zed Press) 4
[50]Valentin-Yves Mudimbe, *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge*, (Indiana University Press 1988) 14
[51] See Walter Rodney, *How Europe Underdeveloped Africa*, (Bogle-L'Ouverture Publications, London and Tanzanian Publishing House 1973)
[52] Ayitteh (n9) 459

experience.[53] Colonialism claimed to have a civilization intendment, civilization being the rule of law in the context of legal order.[54] The colonial courts were intended neither just as sites where disputes would be settled nor simply as testimony to effective imperial control; rather, they were to shine as beacons of Western civilization.[55] The intention with western legal transplants assuming hegemonic supremacy over traditional laws and systems must be seen from the prism of state centralization in the colonial era. Law in the atmosphere of statecraft assumes a constitutive dimension.[56] The constitutive dimensions of the state include a cascade of legally-dispensed authorizations; this is what gives the state its empirical and conceptual unity. [57] Therefore, the superimposition of western laws over African laws and legal systems was a power and control dynamic that fit within the whole colonial scheme of pillage and subjugation.

The destructive effects of the colonial adventure on African traditional law and legal systems are well documented. The locus of judicial authority shifted and there emerged multiple centres of authority seeking to wrest overall control over African customary laws. There were at least three focal points of authority that strove for supremacy over the definition of the normative content of customary laws: the central state, the officials of the local state (the chiefs), and a range of non-state interests.[58] The claims of the central

[53] The Judiciary of Kenya, 'Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya: Alternative Justice Systems' (Judiciary of Kenya 2020) xiv
[54] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, (Princeton University Press 1996) 109
[55] ibid
[56]Guillermo O'Donnell, *Democracy, Agency, and the State* (OUP 2010) 119
[57] ibid
[58] Mamdani (n37) 115

state always carried the day as it (the central state) delineated the scope of customary law through the use of the so called 'repugnancy clause'.[59] The repugnancy doctrine as a tool for legocentralization was used to fashion African Customary laws in the desired image of the colonial power, with the requirement that African customary laws not be enforced if they were deemed 'repugnant to justice and morality.'[60]

The repugnancy test was in part intended to elevate African societies closer to the level of British civilization,[61] a scheme that was aimed at social engineering. The colonial administrators were clear eyed in their understanding that customary law was highly embedded in the traditional African society and that it could be employed as a way to shape society and that changes in society and in law were intimately interconnected.[62] The implication of the repugnancy clauses was that customary practices that could be enforced under customary laws itself came to be denied recognition as customary laws and as a result, the repugnancy clauses subjected customary practices to foreign standards that often failed to accord with the idea of justice within the traditional set-up.[63]

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[59] ibid

[60] The Judiciary of Kenya, (n36)2. See Also Judicature Act, Chapter 8 Laws of Kenya 1967, S3(2) The said section states that,' *The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay*.'

[61]Brett Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60,' (1999) 40 (3) Journal of African History 415

[62]ibid

[63] Quashigah, n (31) 99

The repugnancy clause continues to be used to suppress the normative flourishing of African customary laws. The use of the repugnancy tool was employed in the Ghanaian case of *Abangana v Akologo*[64], where the judge in the case, Justice Edward Wiredu pronounced himself thus with regards to customary laws of the Frafra community who are from Northern Ghana:

'*The question as to the existence or content of any rule of customary laws is one of law, the court becomes the final arbiter and is not bound to follow the expert opinion if in the court's considered view, the particular custom is unreasonable, obsolete or is repugnant to principles of equity, good conscience and natural justice, or is contrary to decisions of superior courts or not in step with modern notions.'*

The hegemonic strife for control over the courts and the conceptual tools spawned in the vicious struggle to seize control over the law, with the repugnancy doctrine for example, was an exercise by the colonial administrators at fending off any perceived threats to their power and ultimately control over law generally and over the bodies that applied the law.[65] In the Kenyan context, the sources of law are set out in Section 3 of the Judicature Act, which lists these sources, in descending order of importance, as: the Constitution, all other written laws (including named Acts of the U.K. Parliament), the substance of English common law, doctrines of equity and statutes of general application.[66] The hierarchical identification of sources of law writ large speaks of the deliberateness to

[64] [1977] 1 GLR 382. in Quashigah (n31) 102
[65]Shadle, (n44) 416
[66] Section 3(1), Judicature Act Chapter 8 Laws of Kenya.

expressly deny African customary law of any meaningful significance as a bonafide source of law.

Customary law is mentioned en passant within the statutory repugnancy clause. The repugnancy clause it must be noted, is captured in the Constitution and in statutory instruments.[67] Section 3(2) of the Kenyan Judicature Act states being the statutory repugnancy clause version, states that;

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

This provision finds resonance with article 159 (3) b of the Constitution of Kenya, 2010 which decrees that, '*traditional dispute resolution mechanisms shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality*.' The cumulative effect of the constitutional and statutory repugnancy clauses is that formal notions of justice as decided by a judicial officer will always prevail over traditional African laws. Dispute resolution in such circumstances is therefore to be conducted under abstract notions of morality and justice, thereby granting the judicial

[67] Above, n.34 and 35

officer wide discretionary leeway in terms of choosing what amounts to acceptable justice or morality.

The inevitable consequence of state centralization with regards to judicial power and the use of control conceptual tools such as the repugnancy doctrine, means that Kenyans, just like many other Africans have been effectively subjugated to formal, positivist laws and consequently denied the meaningful usage of their traditional cultural heritage, contrary to their accustomed way of life in which traditional Africans perceived themselves as tied in with everything around them, applying culture-specific holistic, chthonic perspectives as a fertile conceptual base for the production of innumerable legal systems.[68] Africans have faced a vigorous denial of their culture specific legal norms and postulates and with the advent of human rights; African cultural laws have witnessed considerable drowning in the sea of denial and non-recognition.[69]

The repugnancy clause continues to have the proverbial cat's nine lives and in its declaration that traditional dispute resolution mechanisms should not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, the repugnancy clause continues to stifle the normative organic character of African customary laws and systems, never mind the fact that the

[68] Menski (n8) 381
[69] ibid

repugnancy proviso has been rightly been stated to be an item of colonial legacy and a clear reflection of ethno-centric bias.[70]

The repugnancy clauses have come in for criticisms, amongst which is that its scope of application is vague, for there is uncertainty whether customary rules should be considered in abstract or in the context of particular facts or whether the clause should be used as a choice of law rule to avoid hard cases.[71]

The inescapable reality is that African states are legally plural and formal legal systems cannot be deemed as the only forms of social control. Indeed, legal pluralism connotes two distinct ideas: legal pluralism seen from the social science prism is regarded as an empirical state of affairs in society, an argument of accommodation and tolerance, where it is recognized that there are diverse groups which do not ascribe to a single system.[72] The second notion that draws from the concept of legal plurality is that legal plurality has a juristic sense, meaning that there are different bodies of law for different groups of the population varying in terms of ethnicity, religion, nationality or even geography.[73]

The unyielding resilience of African customary dispute resolution systems tests the tensile strength of the formal justice mechanisms as was evidenced in the Kenyan High Court case of *Republic v. Ishad Abdi Abdullahi*[74]where the accused person was charged with

[70] South African Law Commission Report 'Harmonization of the Common Law and the Indigenous Law (The application of customary law: conflict of personal laws(1999) 4 (8) https://www.justice.gov.za/salrc/reports/r_prj90_conflict_1999sep.pdf (accessed on September 3,2021).
[71] South African Law Commission Report (n52)8
[72] Sally Engle Merry, Legal Pluralism, (1988) 22 (5) Journal of Law & Society Review 871
[73] ibid
[74] [2016] eKLR

the offence of murder of another man, Hassan Dahir Barre. Upon the families of the accused and victim entering an agreement on the basis of the Somali maslah dispute resolution system, the state withdrew the charges against the accused. The pragmatic reasoning that informed the decision was that it would have been difficult after such an agreement for the State to be able to procure witnesses in the trial against the accused person. It must be noted that the influence of the maslah system in the Northern part of Kenya is quite strong owing to the fact that the formal justice system is often incapable and incompatible with local socio-cultural norms and as such, the formal justice system is incapable of penetrating the entire communities in Northern Kenya.[75] It is worth noting that the Somali customary system and laws have features similar to those of any other comparatively effective system in the world. The rule of law being a value of widespread application in many a legal system is to be found in the Somali legal system in this sense; customary law holds political leaders to the same laws as everyone else, with even higher penalties for the politicians in case of misconduct.[76] The leader who steals, it was expected, 'must pay his victim not only compensation for what was stolen, but an additional amount because he flaunted the very rules he was supposed to uphold.'[77] The Somali legal system(*the xeer*) consists of several building blocks that constitute it into a system; six major(undergirding) principles, rules of conduct in society, organizations that adjudicate and enforce the rules, procedural rules, verdicts of the law courts and

[75] Tanja Chopra, 'Justice versus Peace in Northern Kenya, (2009) 2 (1) World Bank Justice and Development Working Paper Series, 8
[76] Ayitteh (n.4) 522
[77] Ibid

doctrines developed by learned men.[78] The undergirding principles that animate the Somali legal system are first, the law is separate from politics and religion, secondly, the law has a built-in method for its own development, thirdly, there is a plurality of jurisdictions and norms, fourthly, those who govern must themselves abide by the law, fifthly, the law originates in the reason and conscience of everyone in the community and finally, judges are specialists with their own methods for analyzing the law.[79]

The separation of law and religion among the Somali is strictly adhered to and this principle of law's neutrality, the equivalent of the French constitutional principle of *laicite* (secularism), is captured in two maxims; "*Diinta waa la baddali karaa, xeerka la ma baddali karo*" ("One can change one's religion; one cannot change the law") and the second is, "Between religion and tradition, choose tradition"[80] The *xeer* possesses a distinctly accomplished set of institutions for adjudicating and enforcing the law. The xeer also contains rules of procedure that guarantee a fair trial.[81] The Somali legal system also assures that Insurance guarantees be made and these obligations assure compensation for victims.[82] Substantively, the *xeer* recognizes, in principle, every person's right to life, liberty, and property.[83] The *xeer* therefore remains a formidable legal system whose influence remains in today's contemporary state system. The tenacity with which the Somali have clung on to the *xeer* system is manifested in the helpless situation the formal

[78] Ibid, 77
[79] Ibid
[80] Ibid, 78
[81] Ibid
[82] Ibid
[83] Ibid

judicial system found itself in in the face of clan settlement in the case of *Republic v Ishad Abdi_Abdullahi*,[84] where the court had to reckon with the finality of the settlement reached between the clans as to compensation for the death of the victim through the hands of the accused person. The influence and sheer force of the finality of the traditional dispute *xeer* system could not have been ignored in this matter and cannot be wished away generally in the Northern part of Kenya. The socio-political and moral force of traditional law and legal systems cannot be casually wished away. It therefore becomes necessary to establish grounds for harmonious co-existence between the formal justice system and the traditional dispute resolution mechanisms in recognition that traditional dispute resolution systems are sites for competition in determining the law and that law should not be seen only as a product of formal, institutionalized systems.

4. THE FUTURE OF STIFLED CUSTOMARY AFRICAN LAWS AND DISPUTE RESOLUTION MECHANISMS IN ENHANCING ACCESS TO JUSTICE

The contemporary legal systems in Africa are largely a reflection of the colonial influence. The manner in which the legal system is structured and operates today, steeped in adversarial and procedural rigours, as well as being costly is a reflection of the colonial legacy. Access to justice therefore remains a mirage for a considerable majority of Kenyans and Africans generally, owing to the historical (structural) nature of the formal judicial process. The formal judicial process in Kenya for example, is characterized by a

[84] Above n.61

uniform and nationally funded structure that has resulted in among other challenges, case backlog,[85] with some cases taking years before they are resolved. Other concerns that have been identified as characteristic of the formal dispute resolution system include negative perceptions about the formal justice system, with the resultant effect being that few people resolve their disputes through the formal court system.[86] The first point to note is the resilience of African laws in the face of authoritative modernity in the form of state laws.[87] African laws have a unique feature to them and that informs the reason why they have withstood relentless subversion and undermining over time. To restrict ourselves to state laws therefore would be akin to severely limiting the vision of full legal reality.[88]

Customary laws structures most social life not only in Kenya but in Africa as a whole.[89] Secondly, even though it is acknowledged that the conception of justice in the modern African society cannot be determined only by considerations of tradition, it cannot plausibly be said that justice can be dispensed without appeal to the values of traditions which citizens of pluralistic states in fact live by.[90] There is need to mediate a co-existence between traditional customary laws and dispute settlement methods and state laws. A significant change in attitude must characterize the relationship between African customary laws and dispute resolution systems and state law in Africa. It must be noted

[85] See generally Judiciary of Kenya, 'State of The Judiciary and The Administration of Justice Annual Report 2018 - 2019, Judiciary of Kenya' 2019
[86] The Judiciary of Kenya (n43) 9
[87] Menski (n8) 391
[88] ibid 393
[89] ibid 400
[90] Quashigah (n31) 96

that whereas a number of African countries have departed from the statutory version of repugnancy clauses, the repugnancy doctrine finds itself in a dissonance within contemporary constitutional schemes in Africa. For example, whereas the Kenyan Constitution accords culture and aspects of traditional African lifestyle, including law and traditional dispute mechanisms their pride of place in the Constitution[91], the same Constitution subjects traditional laws and dispute resolution mechanisms to unspecified notions of justice and morality and in any case, subject to the Bill of Rights, the Constitution and written law.[92] The subordination of African traditional laws and dispute systems to formalist state law as in the Kenyan case stifles politico-legal pluralism that is the lived reality in many African states.

An interesting comparative approach that can be of useful input to Africa is the perspective taken by the Pacific Ocean territories known as the Federated States of Micronesia whose Constitution favours a synchronized consistency between customs and traditions and the constitution.[93] Article XI, section 11 of the Micronesian Constitution, dubbed the 'judicial guidance clause' reads as follows: "*court decisions shall be consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia*." [94] This provision of the Micronesian Constitution has been argued to provide a striking example of a system of recognition of cultural practices that impact significantly on the expectations in the justice system of a country,

[91] Constitution of Kenya 2010, Art 11, 44
[92] ibid Article 159(3)
[93] Quashigah (n31) 101
[94] ibid

where customary laws is not necessarily placed under the directive of constitutional law.[95] The rationale for judicial guidance clause has been explained as being the need to build up a body of Micronesian common law, through court decisions based on Micronesian customs and traditions and the total social and physical configuration of Micronesian life.[96] The Micronesian example notwithstanding, there is denying that the relationship between constitutional and customary laws is uneasy and is yet to be resolved. Constitutional law emphasizes the ideology of legal centralism, whereas customary law is rationalized on the basis of legal pluralism, which draws its normative authority on the basis of being able to direct people's behaviour and generate feelings about what ought to be done.[97]

The accommodation of customary laws along a separate track, without being subjugated under western law is also a feature of the legal system in the Royal Kingdom of Eswatini (formerly, Swaziland). Eswatini operates a dual legal system, common law which is based on Roman Dutch law and customary law that is based on Swazi law and the kingdom has two distinct court systems, traditional courts (known as Swazi National courts) and common law courts. Unwritten Swazi customary law administered by the Swazi courts [98] The kingdom of Lesotho also has a dual legal system 'consisting of customary and general laws operating side by side. Customary law is made up of the

[95] Quashigah, (n31) 101,102
[96] Brian Tamanaha, 'A Battle Between Law and Society in Micronesia: An Example of Originalism Gone Awry' (2012) 21 (2) Pacific Rim Law & Policy Journal 301
[97] Janine Ubink, 'The Complexity of Legal Pluralist Settings' in David Zenker and Markus Hoehne (eds.), 'The State and the Paradox of Customary Law in Africa' (Routledge Publishing 2018) 213
[98] https://investeswatini.org.sz/legal-and-regulatory-framework/ (accessed on January 10,2022).

customs of the Basotho, written and codified in the Laws of Lerotholi whereas general law consists of Roman Dutch Law imported from the Cape and the Lesotho statutes.'[99]

The recognition of customary law and dispute mechanisms in the constitution but expressly subordinated to the constitutional law, like in the Kenyan scenario[100], presents a gordian knot in the sense that there is a jurispathic effect of constitutional law despite the desire to recognize and preserve living customary law.[101] The net effect is that as state-building is an ongoing process in general, and the pluri-legal configurations are constantly in flux and the relationships between state and non-state institutions are continually evolving.[102] The key to resolving the clash between state and customary law lies in finding a formula for accommodation and integration. Recognition of customary justice systems in contemporary settings will inevitably signify a reordering of authority and power.[103] The accommodation and integration can take the approach of exploring plurality-conscious avenues in indigenous reinterpretation of public interest litigation in an effort to ingrain a holistic and plurality-conscious reconstruction of the entire legal system.[104]

5. CONCLUSION AND RECOMMENDATIONS

[99] https://www.nyulawglobal.org/globalex/Lesotho.html#:~:text=on%20all%20states.-,Customary%20Law,Cape%20and%20the%20Lesotho%20statutes (accessed on January 10,2022).
[100] ibid (n57) See also ibid (n58)
[101] Ubink (n70) 214
[102] ibid 215
[103] ibid (n70) 218
[104] Menski (n8) 488, 489

Access to justice objectives is noble but it must be recognized that it will be a struggle to achieve access to justice ideals if they are pursued through purely formalist means, a bequeathed heritage of colonial legal transplants. African laws and dispute resolution mechanisms can offer respite to the challenges facing access to justice through formal judicial processes generally, such as prohibitive costs and case backlog. Understanding how African dispute resolution mechanisms operate is key to incorporation of traditional dispute methods as meaningful contributors to access to justice. Understanding law as an intricate societal concern must be appreciated in light of our unique anthropological placing as a civilization. Unless one is intimately familiar with the ontological commitments of a culture, it is often difficult to appreciate or otherwise understand those commitments. Perhaps through comparing salient aspects of Western and traditional African conceptions of personhood, we can realize a more informed perspective on the foundations for the associated ontological commitments within traditional African culture.[105] What appears from a number of African post-colonial states, Kenya included, is that we appear to be imprisoned by the thought that African justice systems and laws can only be administered with regards to certain matters. The inevitable consequence of such a mindset is that African laws and justice systems remain unavailable in such areas as commercial and human rights law. The Kenyan Constitution for example exemplifies this subordinating attitude towards traditional African laws when it says that, 'Traditional dispute resolution mechanisms shall not be used in a way that contravenes

[105] Lee Brown, 'Understanding and Ontology in Traditional African Thought', in Lee Brown(ed), *African Philosophy New and Traditional Perspectives* (OUP 2004) 160

the Bill of Rights or is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.'[106]

In the Kenyan context it must be noted, access to justice objectives is stated to be an intention to cater for the interests of all and that should any fees be levied, the amount charged should not impede the access to justice.[107] The notion of justice being referred to within the Constitution remains largely justice as defined by laws which are hegemonic and which remain essentially Anglo centric in many respects. The consequence is that traditional African dispute resolution mechanisms are delimited, to the extent that their impact remains minimal. Their denial hinges on the fact that African laws are not written. It is our recommendation therefore that orality needs not to be seen as necessarily fatal as it must not be taken to be axiomatic that African laws and systems must simply assimilate into a global North- dominated agenda of legal uniformization.[108] The Eswatini / Lesotho dual model can be pursued where specialist courts that deal with traditional laws exist alongside the formal courts, such as to provide meaningful dualism as a reflection of real socio-legal reality.

There is need also for modernizing legal reforms such as extended legal education, judicial training and legal writing, areas that have totally disregarded African orality as a bonafide source of law.[109] Equally, it is important to think of the possibility of

[106] Article 159(3), Constitution of Kenya, 2010
[107] Article 48, Constitution of Kenya,2010
[108] Menski (n. 8) 485
[109] Ibid, 491

formulating a plurality conscious African legal theory, which will effectively explain the general nature of African traditional law as ' humancentred, participatory, bottom-up approach in African laws, based on trial and error, not on prescribed blueprints imported from abroad.'[110]

[110] Ibid, 492. See generally, Menski (n.8)

THE IMPACT OF COVID-19 AND GOVERNMENT MITIGATION REGULATIONS ON ATTENDING CUSTOMARY INITIATION SCHOOLS IN SOUTH AFRICA

Lerato Rudolph Ngwenyama †

ABSTRACT

Initiations in South Africa ordinarily take place in June and December every year. However, initiations were suspended in March 2020 when South Africa went on national lockdown necessitated by the Covid-19 pandemic. The ban on initiations was only applicable at alert level two and five. At alert level one, the Department of Co-operative Governance and Traditional Affairs ("COGTA") issued a statement stating that initiations would remain suspended in an attempt to prevent the spread of Covid-19 and to save the lives of initiates. However, the Eastern Cape Province was an exception because initiation conductors made submissions to COGTA that they would comply with all health protocol measures. This paper evaluates the South African government's

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legislative and regulatory response to the Covid-19 pandemic – especially in the context of customary practices such as initiation. In order to undertake an evaluation of the government's legislative and regulatory response to the pandemic, the paper considers the following aspects: (1) which measures were put in place to regulate initiation schools; (2) were the measures due to governmental regulation or did initiation school conductors simply recognise the need to prevent the spread of Covid-19 by shutting down initiation schools; and (3) more importantly, what are the constitutional implications (if any) of the government's legislative and regulatory response to the Covid-19 pandemic in terms of prohibiting initiation. The paper concludes that the government adopted far-reaching measures to prevent the spread of the Covid-19. These measures involved a restriction on the right to participate in cultural initiation. However, in a national state of disaster such as has been the case with the Covid-19, these measures are justifiable limitations of the right to enjoy cultural initiation.

Key words: Initiation, Government mitigation regulations, Constitutional implications

1 INTRODUCTION

Every year in South Africa, young men and women are excited to undergo initiation. In South Africa, initiation refers to any customary, cultural rituals or ceremonial practices that take place at an initiation school in line with the customs and traditions of a particular

community.[1] The customary practice of initiation further includes teachings that relate to ideals, values, aspirations and respect.[2] Many communities in South Africa undergo initiation as a sacred and respected customary practice that marks the passage of young men and women into adulthood.[3] Initiation practices therefore aim to prepare initiates to become responsible adult men and women in society.[4] Male initiates are taught important aspects of life such as providing for their families and becoming leaders in their respective families.[5] Female initiates are taught how to take care for their families and taught about the role that women generally play in the household.[6]

In relation to young men, initiation generally entails circumcision.[7] Circumcision refers to the surgical removal of the foreskin (either wholly or partially) as part of the customary initiation practice.[8] In relation to young women, initiation refers to the removal of the clitoris.[9] Sadly, during 2020–2021 all young men and women did not get an opportunity to undergo the customary practice of initiation because of the national lockdown necessitated by the Covid-19 pandemic.[10] In this regard, the South African government was compelled to promulgate regulations that could, among other things, ensure that

[1] Section 1 of the Customary Initiation Bill. See, also, DK Mabena *The Role of Initiation Schools in the Identity Formation of Southern Ndebele Adolescent Boys* Masters dissertation, University of South Africa (1999) 12.
[2] Section 1 of the Customary Initiation Bill. See, also, Mabena (n 1) 12.
[3] Preamble of the Customary Initiation Bill. See, further, C Chikunda and P Shoko 'Exploring the Relevance and Quality of the VaRemba Initiation School Curriculum and its Impact on Formal Schooling in a Rural District in Zimbabwe' (2009) 26 Southern African Journal of Environmental Education 193 199; see, also, Mabena (n 1) 12.
[4] Preamble of the Customary Initiation Bill. See, further, Chikunda and Shoko (n 3) 193 199.
[5] Chikunda and Shoko (n 3) 193 199.
[6] ibid.
[7] Mabena (n 1) 12.
[8] Section 1 of the Customary Initiation Bill. See, also, Chikunda and Shoko (n 3) 193 199.
[9] ibid.
[10] Regulation 38(1)(a) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002.

young men and women did not undergo the customary practice of initiation – in order to keep them safe and sufficiently protected from Covid-19 while in their respective homes.[11] It is certain, however, that many of the regulations and directives issued by the government have limited fundamental rights such as the cultural right to initiation.

The aim of this paper is to evaluate the government's response to the Covid-19 pandemic, particularly in the context of initiation. The research problem is whether the regulations that prohibited the attendance of initiation were unreasonable and unjustifiable infringements of the fundamental right to initiation. In order to evaluate the government's response to the Covid-19 pandemic, the paper considers the following aspects: (1) the measures put in place to regulate initiation schools; (2) were the measures due to governmental regulation or did initiation school conductors recognise the need to prevent the spread of Covid-19 by shutting down initiation schools; and (3) more importantly, what are the constitutional implications of the government's legislative and regulatory response to the Covid-19 pandemic in terms of prohibiting initiation.

The article first evaluates the government's response to the Covid-19 pandemic.

2 SOUTH AFRICA'S RESPONSE TO ATTENDING INITIATION SCHOOL DURING THE COVID-19 PANDEMIC

[11] ibid.

In response to the Covid-19 pandemic, the South African government implemented various measures. These measures includes a nationwide lockdown during which time everyone was required to stay at home, observe social distancing and ensure regular handwashing or sanitising.[12] However, these measures are extremely difficult to implement in initiation schools, where initiates are closely packed and where, in order to wash their hands regularly, they only have access to running water in rivers.

The government promulgated Regulation 38 relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 ("DMA"). Regulation 38(1)(a)-(e) provides that:

"(1) For the duration of the national state of disaster -

(a) male and female initiation practices are prohibited;

(b) a person may not arrange or hold an initiation school or conduct an initiation practice;

(c) a prospective initiate may not attend an initiation school;

(d) an owner of land may not provide consent for the use of his or her land for the holding of an initiation school; and

(e) a traditional surgeon or medical practitioner may not perform circumcision as part of an initiation practice.

[12] Regulation 11B relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN R398 in *GG* 43148 25-03-2020.

(2) The National House of Traditional Leaders and provincial houses of traditional leaders must take steps to ensure that traditional leaders are aware of the content of this regulation."

Regulation 38 compelled the government to ban arranging or holding initiation schools or conducting initiation practices. In this regard, the government implemented further measures, especially in the context of customary practices, to regulate initiation schools. These measures included: (a) a person could not arrange or hold an initiation school or conduct an initiation practice; (b) a prospective initiate could not attend an initiation school; (c) an owner of land could not provide consent for the use of his or her land for the purpose of holding an initiation school; and (d) a traditional surgeon or medical practitioner could not perform circumcision as part of an initiation practice.[13] These measure were only applicable at alert levels five to two.

At level one of the lockdown, the government developed Regulation 73 relating to Covid-19, issued in terms of section 27(2) of the DMA. Regulation 73(1)-(6) provides that:

"(1) Initiation practices are prohibited nationally, except that initiation practices will be allowed in the Eastern Cape Province, excluding Nelson Mandela Bay, with effect from 17 December 2020.

[13] Regulation 38(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN R480 in *GG* 43258 of 29-04-2020; Regulation 38(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 608 in *GG* 43364 of 28-05-2020; Regulation 57(1)(b)-(e) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 891 in *GG* 43620 of 17-08-2020.

(2) Where initiation practices are prohibited -

(a) a person may not arrange or hold an initiation school or conduct an initiation practice;

(b) a prospective initiate may not attend an initiation school;

(c) an owner of land may not provide consent for the use of his or her land for the holding of an initiation school; and

(d) a traditional surgeon or medical practitioner may not perform circumcision as part of an initiation practice.

(3) Where initiation practices are allowed there must be strict adherence to all health protocols and social distancing measures as provided for in directions issued by the relevant Cabinet member after consultation with the Cabinet member responsible for health.

(4) All post-initiation celebrations ("imigidi") are prohibited.

(5) The National House of Traditional Leaders and provincial houses of traditional leaders must take steps to ensure that traditional leaders are aware of the content of this regulation.

(6) Failure to adhere to these regulations and any directions that are issued in respect of initiation schools, will result in the closure of initiation schools by the relevant authorities."

In terms of regulation 73, initiation schools or practices were still prohibited nationally, except in the Eastern Cape Province.[14] The Eastern Cape was treated as an exception because initiation conductors made submissions to the Department of Co-operative Governance and Traditional Affairs ("COGTA") that they would comply with all health protocols. The holding of initiation schools or conducting initiation practices in the Eastern Cape was subject to strict adherence to all health protocols and social distancing measures.[15] Though initiations were allowed in the province, all post-initiation celebrations were prohibited.[16] This is because celebrations of this kind were identified as being potential super-spreader events of Covid-19. A super-spreader event is an event during which an infectious virus could be transmitted more rapidly during a pandemic. Consequently, the National House of Traditional Leaders and the provincial houses of traditional leaders were tasked to take steps to ensure that traditional leaders were aware of the content of the Covid-19 regulations relating to initiations.[17] It should be mentioned that failure to adhere to the Covid-19 regulations and any directions relating to initiation schools, could result in the closure of the initiation school concerned by the relevant authorities.[18]

[14] Regulation 73(1) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(1) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.
[15] ibid.
[16] Regulation 73(4) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.
[17] Regulation 73(4) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(5) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.
[18] Regulation 73(5) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1290 in *GG* 43964 of 03-12-2020; Regulation 73(6) relating to Covid-19, issued in terms of section 27(2) of the Disaster Management Act 57 of 2002 GN 1346 in *GG* 43997 of 15-12-2020.

It is clear that the measures put in place to regulate initiation schools flowed from the government's response to Covid-19. In this regard, the government recognised the need to save the lives of initiates and to prevent the spread of the Covid-19 pandemic by shutting down initiation schools – except in the Eastern Cape (as mentioned above). It became important to understand what the regulations prescribed in relation to initiations, especially given that initiates are closely packed and there may not be access to running water to wash hands regularly.

The next step in the analysis includes an investigation into the implications of the Constitution in relation to the prohibition of initiation practices during the Covid-19 pandemic.

3 IMPACT OF THE CONSTITUTION ON THE PROHIBITION OF INITIATION SCHOOLS

The purpose of this section is to consider whether the government's legislative and regulatory measures in prohibiting initiation schools because of the Covid-19 pandemic are justifiable under the Constitution of the Republic of South Africa, 1996. According to the courts, the limitation of rights involves a two-stage inquiry.[19] First, a court must

[19] *S v Zuma* 1995 (2) SA 642 (CC) para 21; *S v Makwanyame* 1995 (3) SA 391 (CC) paras 100 and 208; *S v Williams* 1995 (3) SA 632 (CC) para 54; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 (22 September 1995) para 9; *Moise v Greater Germiston Transitional Local Council* (CCT 54/00) [2001] ZACC 21 (4 July 2001) para 7; *Johncom Media Investments Limited v M* (CCT 08/08) [2009] ZACC 5 (17 March 2009) para 22; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8 (1 April 2009) para 141; *AB v Minister of Social Development* (CCT155/15) [2016] ZACC (29 November 2016); *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* (CCT108/17) [2018] ZACC 30 (18 September 2018) paras 59-82; *Centre for Child Law v Media 24 Limited* (CCT261/18) [2019] ZACC 46 (4 December 2019) paras 52-60; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para

inquire whether the government's legislative and regulatory measures restrict or infringe fundamental rights. Secondly, if the court has established that the regulatory measures restrict or infringe fundamental rights, a court must inquire whether the restriction or infringement is justifiable under section 36 of the Constitution.[20] Section 36 of the Constitution provides that:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

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108. See, further, P De Vos, W Freedman, Z Boggenpoel, L Draga, C Gevers, K Govender, P Lenaghan, SM Weeks, CS Namakula, N Ntlama, D Mailula, K Moyo, S Sibanda & L Stone "Limitation" in P de Vos & W Freedman (eds) *South African Constitutional Law in Context* (Oxford University Press Southern Africa 2021) 431.

[20] *S v Zuma* 1995 (2) SA 642 (CC) para 21; *S v Makwanyame* 1995 (3) SA 391 (CC) paras 100 and 208; *S v Williams* 1995 (3) SA 632 (CC) para 54; *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison* (CCT19/94, CCT22/94) [1995] ZACC 7 (22 September 1995) para 9; *Moise v Greater Germiston Transitional Local Council* (CCT 54/00) [2001] ZACC 21 (4 July 2001) para 7; *Johncom Media Investments Limited v M* (CCT 08/08) [2009] ZACC 5 (17 March 2009) para 22; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* (CCT 36/08) [2009] ZACC 8 (1 April 2009) para 141; *AB v Minister of Social Development* (CCT155/15) [2016] ZACC (29 November 2016); *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* (CCT108/17) [2018] ZACC 30 (18 September 2018) paras 59-82; *Centre for Child Law v Media 24 Limited* (CCT261/18) [2019] ZACC 46 (4 December 2019) paras 52-60; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 108. See, further, De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda & Stone (n 19) 431-432.

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The impugned regulatory measures to be considered concerned the prohibition of initiation practices at levels five to two, as quoted above.[21] In the context of the question of whether the government's legislative and regulatory measures are justifiable under section 36 of the Constitution, the assessment of the regulatory measures becomes relevant in the following case. Everybody has the right, in terms of section 30 of the Constitution, to participate in the cultural life of their choice. This section signals that everybody has the freedom to practise a culture of their own choice.[22] Section 31(1)(a)-(b) further states that persons belonging to a cultural community may not be denied the right, with other members of that community, to enjoy their culture and to form, join and maintain cultural associations. However, no one may exercise the right to culture in a manner that is inconsistent with any provision of the Bill of Rights.[23] This would mean that the customary practice of initiation is subject to constitutional control and regulation. Initiation must be practised in a manner that complies with the constitutional rights

[21] See, Part 2 above.
[22] TW Bennett *Customary Law in South Africa* (Juta 2010) 86.
[23] Sections 30 and 31(2) of the Constitution.

contained in the Bill of Rights.[24] These rights include the right to human dignity,[25] the right to life,[26] and the right to sufficient water.[27] Clearly regulation 38 restricts or infringes the right to participate in one's cultural initiation by prohibiting the arrangement or holding of initiation schools or conducting an initiation practice. In light of this finding, it becomes important to consider whether the restriction on participating in cultural initiations is reasonable and justifiable under section 36 of the Constitution.

The restriction or infringement on the right to culture is brought about by regulation 38, issued in terms of section 27(2) of the DMA. By its very nature, regulation 38 qualifies as a law of general application.[28] This means that it is a provision of law that can be used to limit fundamental rights.[29] The right to participate in cultural initiation schools is important in our society. This is because the initiation is regarded as a rite of passage to adulthood and is practised as a transfer of teachings on culture, tradition and respect for women and the elderly in society.[30] However, looking at the surrounding circumstances of certain initiation schools, where the only source of water is a river or pond, the lives of

[24] Section 3 of the Customary Initiation Bill states that "The customary practice of initiation is subject to the Constitution and must be transformed and adapted so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by —

(a) protecting the lives and dignity of initiates as referred to in sections 10 and 11 of the Constitution;
(b) providing initiates with access to sufficient food and water, health care services and, where necessary, emergency medical treatment as referred to in section 27 of the Constitution; and
(c) protecting and promoting the rights of children as referred to in section 28 of the Constitution".

[25] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".
[26] Section 11 of the Constitution states that "[e]veryone has the right to life".
[27] Section 27(1)(b) of the Constitution provides that "[e]veryone has the right to have access to … sufficient … water".
[28] *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 119.
[29] ibid.
[30] Preamble of the Customary Initiation Bill.

initiates could be endangered during the Covid-19 pandemic. Initiates might not be able to regularly wash their hands because of a lack of running water. It could be difficult for initiates to source and use personal protective equipment such as face masks and to observe health protocols such as hand sanitising – because of a lack of funding in certain initiation schools. It could also be difficult for initiates to maintain social distancing because they are usually closely packed at the schools.

Regulation 38, in prohibiting initiation practices, is arguably justifiable in an open and democratic society based on human dignity, equality and freedom. This is because the government – in promulgating regulation 38 – acted in a manner that fulfils its obligation in terms of section 7(2) of the Constitution. In this regard, the government had an obligation towards initiates to respect, protect, promote and fulfil their fundamental rights to life (in terms of section 11 of the Constitution) and to security of their person (in terms of section 12 of the Constitution).[31] This is because the initiates' fundamental rights to life and security of their person are threatened by the Covid-19 pandemic. Thus it was necessary for the government to prohibit the practice of initiation in order to reduce the risk of transmission of Covid-19, so preserving the lives of initiates.[32]

The importance of the purpose of the limitation of the fundamental right to participate in cultural initiation is clear. The government prohibited initiation practices in terms of the stringent regulations to slow and prevent the spread of Covid-19.[33] More importantly,

[31] *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 112.
[32] ibid.
[33] ibid paras 130-131.

the purpose of the limitation of the right to participate in cultural initiation is to protect the right to life and health of initiates, who could have died if preventative measures had not been taken against Covid-19.[34] It was important for the government to take drastic and far reaching measures that invade the right to cultural initiation, in order to deal with the destructive and other effects of the Covid-19 pandemic.[35] Therefore, the prohibition on attending initiation schools should not be seen by young men and women as an unreasonable limitation to the exercise of their cultural right to initiation.

Considering the nature and extent of the limitation of the right to participate in cultural initiation, the impact of regulation 38 must be considered as a whole. Regulation 38 restricted both male and female initiation practices. This regulation did not allow any person to arrange or hold an initiation school or conduct an initiation practice, and a prospective initiate could not attend an initiation school. Under the same regulation, an owner of land could not provide consent for the use of his or her land for the holding of an initiation school. In the final instance, regulation 38 prohibited a traditional surgeon or medical practitioner from performing circumcision as part of an initiation practice. Regulation 38 offered no exceptions regarding the practice of initiation. However, the restriction or infringement on the right to cultural initiation is qualified against the

[34] *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56 para 9; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 132.
[35] Section 27(2) and (3) of the Disaster Management Act 57 of 2002. See, further, *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 131.

backdrop of ensuring that initiation schools do not become infection sites and super spreaders of Covid-19.[36]

Despite a number of factors mentioned in section 36, in practice, for a limitation to be justifiable the court ordinarily applies the proportionality test, which involves a balancing of rights and interests.[37] In this regard, the right to participate in cultural initiation is weighed against the regulatory measures that restrict or infringe that right. This is in order to assess whether the regulatory measures are permissible in an open and democratic society based on human dignity, equality and freedom.[38] In other words, the last two factors listed in section 36 of the Constitution relate to reasonableness and questions as to whether there is a relationship between the restriction and its purpose, and whether the means taken were proportionate.[39] The seriousness that Covid-19 has posed (and continues to pose) in relation to prospective initiates' right to life and security of their person cannot be over-emphasised. Covid-19 has (and continues to have) the potential to destroy the lives of prospective initiates on a large scale. Thus, the government had to response drastically by prohibiting initiation practices, while cautiously protecting the lives of initiates from the severe consequences of Covid-19.

Therefore the limitation of the initiates' right to participate in cultural initiation by prohibiting initiation practices, and the means chosen, are objectively rational. This is

[36] *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 138.
[37] Bennett (n 21) 95. See, further, De Vos, Freedman, Boggenpoel, Draga, Gevers, Govender, Lenaghan, Weeks, Namakula, Ntlama, Mailula, Moyo, Sibanda & Stone (n 19) 432.
[38] ibid.
[39] *S v Manmela* 2000 (3) SA 1 (CC) para 66; *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) para 139.

because in 2020 there was still limited knowledge about Covid-19 (including in the specialised field of epidemiology), there was little scientific information about how Covid-19 is transmitted and prevented, and the finding of a vaccine for Covid-19 was still work in progress.[40] The means chosen by the government to restrict prospective initiates from participating in cultural initiation is also proportional in that the chosen means are necessary to deal with the harsh consequences of Covid-19 and to decrease the potential for large numbers of deaths at initiation schools. In this regard, the government struck an appropriate balance between minimising the adverse effects of Covid-19 and saving the lives of initiates.

4 CONCLUSION

The South African government adopted far-reaching measures to prevent the spread of the Covid-19 pandemic. These measures involved a restriction on the right to participate in cultural initiation, as discussed above. However, in a national state of disaster such as has been the case with the Covid-19 pandemic, these measures are justifiable limitations of the right to enjoy cultural initiation in terms of section 36 of the Constitution. This is because these measures have the legitimate purpose of protecting public health in terms of section 27 (2) and (3) of the DMA. Moreover, these measures are justifiable because they fall within the terms of law and meet the requirements of reasonableness and

[40] *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* (611/2020) [2021] ZASCA 9 (28 January 2021) paras 140-141.

proportionality in terms of section 36 of the Constitution. Furthermore, these measures are justifiable because they were aimed at protecting the lives of initiates in line with constitutional rights such as the right to life and security of the person.

REMODELLING THE INTERFACE BETWEEN AFRICAN STATES AND COMMUNITIES: A FOCUS ON CULTURAL RIGHTS

George Fordam Otieno Wara[†]

ABSTRACT

This article considers African communities' struggles for survival and continuity as community systems. It uses systems theory to model the communities as systems whose cultural rights were disrupted by states due to colonialism. States in sub-Saharan Africa are addressing the disruption by entrenching cultural rights in constitutional texts so that rights that are based on cultural practices have equal footing in law as rights granted formally under the states' constitutional and statutory frameworks. The article reviews these state efforts to recognise cultural rights through the prism of neo-colonial constitutions, relying on notions of transformative constitutions and constitutionalism (the art of providing effective restraints on the exercise of state power) to examine how constitutions can be instrumentalised to change the interaction between states and communities. The key to constitutional change lies in legitimacy and widespread acceptance of the transformative constitutions by communities and a commitment to

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their implementation by the states. Such legitimacy and widespread acceptance of the new constitutional frameworks can be achieved through integration of more cultural aspects within the revised constitutions and implementation of partnership-based models that track the communities' cultural practices.

Keywords: Colonialism, Systems Theory, Cultural Rights, Constitutionalism, Interface

I. INTRODUCTION

This article argues for using transformative constitutions to change the interactive frameworks between states and communities in sub-Saharan Africa. African communities continue to struggle against suppression and domination by colonial and neo-colonial state systems. Communities rely on their customs and traditions to guide their behaviours, to communicate in their languages, to submit to direction from their traditional leadership institutions and to practice other aspects of their cultures. The colonial state systems pursued policies of reform of these African cultural practices using repugnancy clauses in the colonial state constitutions through which African customary laws were not to be enforced if contrary to justice or morality of the colonial state.[1] The colonial states' domination and suppression of African communities and the resulting resistance by the communities continued post-independence for most African countries

[1] Sylvia Tamale, "The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa," (2008) *Fem Leg Stud*, 16(1), 47–69 at https://doi.org/10.1007/s10691-007-9078-6 (accessed on October 13, 2021).

in the 1960s. These community struggles within asymmetrical interactive frameworks have resulted in unhealthy competitions for resources, instabilities, and conflicts among the communities and between communities and states in sub-Saharan Africa. This article examines whether transformative constitutions that entrench cultural rights and constitutionalism[2] can transform the interaction between states and communities from dominance to mutual recognition, respect, dignity and coexistence between the states and communities that inhabit them.

This article adopts a functional approach to constitutions in which they are viewed as maps dictating how power can be distributed within the state and among its constituent elements.[3] A constitution is thus a power map or blueprint for interaction between state and non-state actors within the state. Almost all sub-Saharan African states have written constitutions that are intended to help tribal, ethnic, or linguistic social groups to participate in the integrated socio-economic systems of the states that they inhabit. However, many of these social groups are still relegated to the periphery of the integrated socio-economic systems of their states. This demonstrates that a constitution, however

[2] Constitutionalism is used here to refer to the art of providing effective restraints on the exercise of state power.
[3] Kenyan Professor Okoth-Ogendo defines a constitution as a "power map upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of 'the covenant', to an authoritative affirmation of the basis of social, moral, political or cultural existence, including the ideals towards which the policy is expected to strive." H.W.O. Okoth-Ogendo, *Constitution Without Constitutionalism: Reflections on an African Political Paradox* (New York: American Council of Learned Societies, 1988) 13; Walter F. Murphy, "Civil Law, Common Law, and Constitutional Democracy (The 19th Tucker Lecture)," (1991) 1 *Louisiana Law Review* 129 (where American political scientist, Walter F. Murphy, insists that "the goal of a constitutional text must ... be not simply to structure a government, but to construct a political system, one that can guide the formation of a larger constitution, a "way of life" that is conducive to constitutional democracy. If constitutional democracy is to flourish, its ideals must reach beyond formal governmental arrangements and help configure, though not necessarily in the same way or to the same extent, most aspects of its people's lives. ")

well written, is not enough, in and of itself, to guarantee an interactive framework in which communities exercise their cultural rights in sub-Saharan Africa.

This raises the challenge of how to instrumentalise constitutions or to use them as tools for changing the interaction between states and communities. This is the concept of "transformative constitutionalism", which, generally, refers to the idea of fundamental societal change through the instrumentality of the constitution.[4] Under practice theory, state and non-state actors are driven to change behavior through practice and habit.[5] The idea of behavioral change through practice is also consistent with the definition of customary law based on custom or usage and the contextual nature of social grouping identity by reference to practices or customs, such as the identification of pastoralists in East Africa based on pastoral practices. Behavioral change requires a commitment to the change program and a culture of promoting change in every aspect of the state's operations. Change is not just about well drafted power maps or blueprints; it is also about winning hearts and minds. The communities' acceptance of the validity and legitimacy of the revised constitutions, in addition to the transformative constitutions themselves, are, therefore, necessary to change the interface of dominance between states and communities. In other words, the communities need to believe that the revised constitutions better serve their needs and interests, are more convenient, just, and fair. The change program must be championed by both state and community leaders and

[4] See K.E. Klare, "Legal Culture and Transformative Constitutionalism", (1998) 14:1 *South African J on Human Rights* 146; Pius Langa, "Transformative Constitutionalism", (2006) 17:3 *Stellenbosch L Rev* 351.
[5] Hargreaves, T., "Practice-ing behaviour change: applying social practice theory to pro-environmental behaviour change," (2011) *Journal of Consumer Culture* 11:79-99 at http://dx.doi.org/10.1177/1469540510390500 (accessed on February 7, 2021).

receive widespread support among community members. This article assesses whether the revised constitutions in sub-Saharan Africa will succeed in winning the hearts and minds of state and community leaders and thus guarantee an interactive framework in which communities exercise their cultural rights.

Culture should be viewed as a historical, fluid, dynamic and contested process of interaction within a community.[6] This analytical approach to culture enables a better grasp of the struggles for continuity and survival by community systems in sub-Saharan Africa and their need for a changed interactive framework with the states. The traditional approach to culture is essentialist in nature and perceives of culture as an integrated and static repertoire of ideas, beliefs, meanings and values held by a discrete, clearly bounded and internally homogenous social grouping.[7] This article adopts the analytical approach to culture and also conceptualises African communities as not just the individuals making up the community, but also their laws, customs, cultures, ancestors, lands, waters, and other elements that the community system as a whole considers essential to its continuity and survival. This article examines the communities' struggles against colonial and neo-colonial ideas, beliefs, meanings and values by focusing on four areas of the communities' cultures - (1) customs and traditions; (2) languages; (3) traditional leadership institutions; and (4) their abilities to self-identify and self-organise – to test

[6] Merry, Sally Engle, "Changing Rights, Changing Culture" in Cowan, Jane K. Marie-Benedicte, Dembour, and Richard A.Wilson (eds.) *Culture and Rights: Anthropological Perspectives* (New York: Cambridge University Press, 2001), 41.

[7] United Nations Educational, Scientific and Cultural Organization (UNESCO): Universal Declaration on Cultural Diversity, Resolution adopted on the Report of Commission IV at the 20th plenary meeting on 2 November 2001 [UNESCO Declaration], 41 ILM 57-62 (January 2002).

whether the new interface models between the states and the communities will be effective in correcting the imbalances created by colonial and neo-colonial disruption.

This article relies on Professor Niklas Luhmann's systems theory to model these communities as systems[8] and to highlight the importance that they attach to their cultural rights. Luhmann describes systems as "bodies or groupings of interactive and interdependent elements that are functionally differentiated or structured to self-produce and self-preserve and that use feedback loop mechanisms to maintain their integrity and stability."[9] The article also relies on social dominance theory or the tendency of human societies to structure themselves as systems of group-based social hierarchies[10] to examine community struggles to assert their cultural rights. These are struggles by these communities for survival and continuity as community systems following the existential threat that they face in their suppression and domination by state systems.

Recent legal developments in sub-Saharan Africa are encouraging for the effort to remodel the interfaces between states and communities in the region. States have passed laws that formally recognise the communities' rights to culture so that rights based on customary practices of a community have equal footing in law as other rights granted

[8] See John Gillespie, "Towards a Discursive Analysis of Legal Transfers into Developing East Asia," (Spring, 2008) 40 *N.Y.U. J. Int'l L. & Pol.* 657 (discussing Professor Niklas Luhmann's ideas).
[9] Hugh Baxter, "Autopoiesis and the Relative Autonomy of Law," (July, 1998) 19 *Cardozo L. Rev.* 1987; David N. Cassuto, "The Law of Words: Standing, Environment, and Other Contested Terms," (2004) 28 *Harv. Envtl. L. Rev.* 79.
[10] See Erika K. Wilson, "Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality," (2017) 26 *Nat'l Black L.J.* 129 (for an explanation of social dominance theory); Felicia Pratto, Jim Sidanius & Shana Levin, "Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward," (2006) 17 *Eur. Rev. Soc. Psychol.* 271; Jim Sidanius et al., "Social Dominance Theory: Its Agenda and Method," (2004) 25 *Pol. Psychol.* 845.

under the states' constitutional and statutory frameworks. These state efforts to recognise cultural rights may be viewed through the prism of neo-colonial constitutions to test whether the new interface models in sub-Saharan Africa will be effective in correcting the imbalances created by colonial disruption. Sub-Saharan African constitutions can be instrumentalised to change the interaction between states and communities. This article concludes with recommendations on how to implement these new recognition-interface models to track the communities' customary laws, languages, traditional leadership institutions and rights of self-determination, to aid them in their struggles to maintain integrity and stability.

This article is divided into four substantive parts. First, it uses the lens of systems theory to describe the African community systems and their cultural practices. Second, it discusses the colonial and neo-colonial disruption of the African community systems through an explanation of the colonial and neo-colonial state interfaces of dominance and suppression. Third, the prism of neo-colonial state constitutions is used to examine ongoing efforts to remodel the colonial interface of dominance and suppression. Fourth, it considers the potential for state systems to use law reform to create an ideal interface of effective recognition of community systems.

II. COMMUNITY SYSTEMS AND THEIR CULTURAL PRACTICES

Part I explores how communities in sub-Saharan Africa use their cultural practices in pursuit of their survival and continuity as communities. To aid in the analysis, these

communities are modelled as systems based on Luhmann's systems theory[11]. These community systems consider that the loss of their essential elements, including culture, would result in their disappearance as a people. As a result, the communities continue to practice their cultures despite colonial and neo-colonial disruption. They continue to rely on their customs and traditions to guide their behaviours, to communicate in their languages, to submit to direction from their traditional leadership institutions and other aspects of their cultures. Systems theory may explain the struggles by African communities against colonial and neo-colonial ideas, beliefs, meanings and values as efforts by these communities to construct and reconstruct themselves, so as to preserve their very existence as systems.[12]

Systems theory is premised upon the basic idea that systems evolve to secure their own continuity and survival.[13] A system is a body or grouping of interactive and interdependent component parts that work together to maintain the system's integrity and stability.[14] Professor H. Patrick Glenn of McGill University's Faculty of Law and Institute of Comparative Law, traces the origin of the notion of "system" to the Greek "*sustema*", as "*assemblage*" or "*ensemble*".[15] He explains that the concept of "system" was brought into the mainstream of western intellectual life with the development of

[11] See Luhmann, N & Baecker, D (ed), "Introduction to Systems Theory," (trans Gilgen, P, 2013) *Polity Press* (containing a collection of Prof. Niklas Luhmann's lectures); Arthur J. Jacobson, "1989 Survey of Books Relating to the Law; VII. Legal Theory and Philosophy: Autopoietic Law: The New Science of Niklas Luhmann. Autopoietic Law: A New Approach to Law and Society," (ed) Gunther Teubner, 1988) 87 *Mich. L. Rev.* 1647. (collectively, 'The New Science of Niklas Luhmann').
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] H. Patrick Glenn, "Special Issue/Numero Special: Navigating the Transsystemic: Tracer le Transsystemique: Doin' the Transsystemic: Legal Systems and Legal Traditions," (2005) 50 *McGill L.J.* 863 - 898.

taxonomic biology in the eighteenth century, using systems as units of analysis.[16] Professor Russell L. Ackoff similarly defines a system as a whole being that contains inter-dependent component parts that can affect the properties or behaviour of the whole.[17] The system is, therefore, different from, and greater than, the sum of its component parts.

Community systems strive to create stable frameworks of interaction with their environments, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits. A stable framework of interaction between a system and its environment is achieved through regeneration and transformation until the system finds a relatively stable equilibrium between its various elements and its environment.[18] Such stable frameworks of interaction and equilibrium are intended to ensure the systems' survival or long-term stability. Where the system is unable to maintain a stable framework of interaction, it remains unstable as a system. Systems are, however, resilient and will continue to resist external disruptions for as long as they exist as community systems.

A system is also self-referential and tends to self-define and self-identify. Luhmann describes the self-replicating or self-referential feature of systems as "autopoiesis", a notion borrowed from biological systems that are essentially units which repeatedly self-produce and thus become independent of their environment.[19] The notion of autopoiesis

[16] Ibid.
[17] See, generally, Russell L. Ackoff & Fred E. Emery, *On Purposeful Systems* (London: Tavistock, 1972).
[18] See Hugh Baxter, "Autopoiesis and the "Relative Autonomy" of Law," (July, 1998) 19 *Cardozo L. Rev.* 1987(using the systems theory notion of autopoiesis to explain a community system's ability to self-generate and self-perpetuate).
[19] See John Paterson & Gunther Teubner, "Changing Maps: Empirical Legal Autopoiesis," (1998) 7 *Soc. & Legal Stud.* 451 (explaining the notion of autopoiesis).

captures the tendency of systems to regenerate and transform their component parts to perpetuate themselves.[20] This self-definition characteristic of systems is the reason why a community system's self-identification should be the first among equals in identifying or defining itself.[21] As the United States Supreme Court stated in *Santa Clara Pueblo v. Martinez*, "a tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[22] The United Nations Declaration on the Rights of Indigenous Peoples recognises the need to safeguard both the individual and the collective rights of indigenous peoples.[23] The International Labour Organization ('the ILO') Convention (No 169) on the Rights of Indigenous Peoples of 1989, also calls for recognition of the rights of ownership and possession of indigenous peoples over their ancestral land.[24] International organisations and instruments such as the United Nations, the World Bank, the Convention on Biological Diversity, the African Charter on Human and Peoples Rights and other international human rights instruments all emphasise the importance of recognising and safeguarding the rights of communities. The state should, therefore, allow community systems to self-define and to self-identify.

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[20] Ibid.
[21] See Robert A. Williams, Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," (1990) *DUKE L.J.* 660, 663 n. 4 (describing the right of "indigenous peoples" to self-define).
[22] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, FN 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106, 1978 U.S. LEXIS 8 (U.S. May 15, 1978).
[23] See "United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)" (2007) U.N.Doc.A/RES/47/1 U.N. General Assembly resolution 61/295 (stating the rights of indigenous peoples, including the "right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired").
[24] See "Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169)" (27 June 1989) 72 ILO Official Bull. Ser. A 59, 60 art. 1, (entered into force September 5, 1991).

In analysing the group or body of interactive and inter-dependent elements that make up the system, certain limitations may impede efforts to identify an immutable, definite, bounded ethnic group or system. Language is one such limitation. The terminology used to identify social groupings may generate uncertainty because many of the key terms used in the identity exercise, such as the labels or identity markers used to define social groups, such as Zulu, Kikuyu, Yoruba, Oromo, Somali, Igbo, and other African ethnic social groupings, lack consensus definitions and do not refer to consistent or coherent social groupings. The task of social grouping identification using language is further complicated by the existence of language barriers as the language of identification may be different from the language used by the community system.

A second limitation that may impede efforts to identify any system is context, because systems are generally defined by contrasting who or what a system is with that which it is not. Communities are themselves globally interconnected, internally contested, fluid and marked with ambiguous boundaries of identity. Galaty gives other examples of the contextual nature of identity in using objects that often exemplify this contrast between self and the other: landscapes (our natural surroundings, theirs), the social order (our institutions, their institutions), and practices or customs (we are what we do, or do not do).[25] In this sense, identity is inherently contextual and dynamic because a system acquires an ethnic label or identity marker as against non-elements of that system. This

[25] John G. Galaty, "Animal spirits and mimetic affinities: The semiotics of intimacy in African human/animal identities," (2014) 34(1) *Critique of Anthropology*, 30-47.

contextual nature of identity dispels any assumption of a unitary or static meaning behind ethnic labels or identity markers.

Despite our linguistic and contextual limitations, social groupings have existed and thrived for generations in sub-Saharan Africa. Galaty's pragmatic approach to social grouping identity focuses on identifying, generally, the body or group of interactive elements that make up the system rather than engaging in an endless quest for an immutable, definite, bounded ethnic group.[26] This approach suggests that our social grouping identification task should be oriented toward accurately describing the social grouping as a whole.[27] It does not require consensus as to which descriptive characteristics precisely constitute a community system's elements or constituent parts. Instead, this approach uses ethnic labels or identity markers or "pegs upon which we hang a description of the community system" to allow a coherent and consistent discussion about it.[28] Such identity markers or ethnic labels are not immutable or unsusceptible to human modification but constitute mythical unities concealing underlying symbolic constituents[29]. Using systems theory and identity markers, therefore, sub-Saharan African communities can be modelled as systems bent on

[26] Ibid.
[27] See also Sol Tax [Professor Emeritus, University of Chicago's Department of Anthropology], "Can World Views Mix?" (1990) 49 *Human Organization* 3 (appears to agree with Professor Galaty's pragmatic approach when he argues that customs and practices of social groupings refer to the deeper values, or structures that are not expressed but remain firmly embedded and relatively unchanging).
[28] Professor Galaty's metaphor of an ethnic label or identity marker as a "peg" upon which to hang a description of the social grouping, is borrowed from John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (1970) 167 – 172.
[29] John G. Galaty, n 27 above.

continuity and survival to explain their struggles against colonial and neo-colonial ideas, beliefs, meanings and values.

The cultural practices of sub-Saharan African communities are useful in understanding the communities as systems. The international human rights instruments that protect cultural rights - the Universal Declaration of Human Rights (UDHR)[30], the International Covenant on Economic, Social and Cultural Rights (ICESCR),[31] the International Covenant on Civil and Political Rights (ICCPR),[32] the African Charter on Human and Peoples' Rights (Banjul Charter)[33] – state, generally, that everyone has the right freely to participate in the cultural life of the community.[34] The Banjul Charter differs slightly from the other Western-inspired human rights instruments because it was inspired by African cultural practices[35]. It acknowledges that people are diverse and that each person has a cultural lens through which they perceive, interpret, and respond to self, others, life, and learning. This lens is shaped by their communities and their environments, broadly defined to include the geography, climate, ecosystem, biodiversity and ontological totality of the territory that a community inhabits.

Community systems use culture as channels for self-perpetuation or to communicate their constituent elements from generation to generation. These cultural practices enable the community system to adapt to its environment by continuously changing to maintain

[30] Universal Declaration of Human Rights, arts. 22, 27 (1948),
[31] International Covenant on Economic, Social and Cultural Rights, art. 15 (1966),
[32] International Covenant on Civil and Political Rights, art. 27 (1966)
[33] African Charter on Human and Peoples' Rights/Banjul Charter, arts. 20, 21, 22 (1981)
[34] See, for e.g., Universal Declaration of Human Rights (UDHR), G.A. Res. 217, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948) art. 27.
[35] Sylvia Tamale, n 2 above, 47-69.

itself while maintaining its core essence. Communities transmit their cultural practices from generation to generation using the family units and, in particular, oral traditions by the older generations. Some examples of cultural practices in sub-Saharan Africa that can be gleaned from court cases, oral traditions, media articles and other contemporary writings include communal land tenure systems, organisation in clans or large family groupings, use of inheritance practices to maintain wealth within families, clans or other family groupings, use of common languages for communication and interaction, military service, hierarchical leadership, belief in supreme beings and dispute settlement by councils of elders.[36] Part III of this article examines state efforts to remodel their interaction or interface with the communities through constitutional recognition of their customs and traditions, languages, traditional leadership institutions and abilities to self-define and self-identify.

[36] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Endorois case) (2003) 276 / 2003; Chris Peers & Raffaele Ruggeri (illustrator), *Warrior Peoples of East Africa 1840-1900* (2005) Osprey Publishing Ltd.; Eugene Cotran, *Casebook on Kenya Customary Law* (1987) Professional Books Limited and Nairobi University Press (summarizing cultural practices in Kenya).

III. COLONIAL DISRUPTION OF AFRICAN CULTURAL PRACTICES

This section focuses on the colonial states' disruption of the cultural practices of communities inhabiting sub-Saharan Africa and their resistance to the disruption. It relies on the conception of "state" as the entity that struggles for and, ultimately, monopolizes the use of legitimate force within a given territory[37]. The colonial state system disrupted African cultural practices as part of their own struggle to consolidate instruments of power and authority over the African communities by dominating and suppressing the power ingredients that the African community systems developed over time to better interact with their environments. These power ingredients include intensive food production systems, high population densities that provided labour, economic specialisation through agriculture or pastoralism, effective leadership institutions and other constellations of power. Colonial disruption resulted in African community systems' isolation, disenfranchisement, disengagement, social withdrawal, and in some countries, armed resistance to colonial rule. Social dominance theory may be used to explain this contestation for power between the colonial states and the African community systems that led to the disruption of African community systems during colonialism.

Social dominance theory posits an integrated theory of intergroup relations, competition among groups and contests for power and resources, to explain the social inequality that

[37] See Karl Dusza, "Max Weber's Conception of the State," (Autumn, 1989) 3 *International Journal of Politics, Culture, and Society*, No. 1, 73-74.

is inherent in multicultural community systems.[38] It is a theory that is inextricably intertwined with the basic assumption of systems theory that systems evolve to secure their own continuity and survival. It begins with the notion that "all human societies tend to be structured as systems of group-based social hierarchies."[39] In other words, human societies, consisting of multicultural community systems, are structured such that some social systems are dominant, and others are subordinate. When communities with different cultures come into contact, therefore, they form group-based social hierarchies to ensure the provision of prestige, social power and privilege for individual members of the hierarchical society. The hierarchical structure creates a stable framework of interaction between them. According to social dominance theory, this group-based hierarchical structure is based on a system's power or ability to defend its interests or to impose its will against other systems.[40] Stability in hierarchical societies is sustained through the normative endorsement of forms and ideologies that preserve, perpetuate and promote the hierarchical structures.[41] These hierarchy-enhancing forms and ideologies dictate how resources and social status ought to be distributed in the hierarchical society. The hierarchical society promotes behaviours in which the dominant group remains on top and the subordinate group at the bottom.

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[38] Michelle Adams, "Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action," (December, 2002) 82 *B.U.L. Rev.* 1089, 1107 (describing social dominance theory as starting with the notion that "all human societies tend to be structured as systems of group-based social hierarchies").
[39] Erika K. Wilson, "Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality," (2017) 26 *Nat'l Black L.J.* 133 - 134.
[40] See Jim Sidanius & Felicia Pratto, "Social Dominance: An Intergroup Theory of Social Hierarchy and Oppression," (1999) *Cambridge University Press*, 2:3 - 30 (analysing various intergroup relations theories).
[41] Ibid.

By applying these asymmetrical behaviours, dominant social systems within the hierarchical society end up hoarding a disproportionate share of power ingredients, such as food production, population densities, economic specialisation, labour, capital, political organisation and other instruments of power and authority. Walter Rodney in his book, *How Europe Underdeveloped Africa*,[42] discusses the maintenance of this group-based hierarchical structure through an analysis of power relations. He defines power as the ability to defend one's interests and, if necessary, to impose one's will by any means necessary. Jared Diamond in his book, *Guns, Germs, and Steel: The Fates of Human Societies*,[43] has also argued that communities with a long history of living in densely populated, economically specialised, politically centralised social systems tend to develop constellations of power factors that enable them to dominate communities that lack the same power ingredients. The communities' cultural practices are based on these power factors. These power ingredients enable the communities that possess them to nourish themselves better, reproduce better and, generally, dominate other communities that inhabit the same area. These power factors also enable the communities to develop legal and institutional structures necessary to persist and thrive as community systems. The subordinate social systems, on the other hand, absorb a disproportionate share of these power ingredients, such as inhabiting areas of low agricultural potential, engaging in low status occupations and other attributes of an inferior social status. The end result is a hierarchical arrangement in which the dominant group is on top and the subordinate

[42] Walter Rodney, *How Europe Underdeveloped Africa* (Pambazuka Press, 2012), 224.
[43] Jared Diamond, *Guns, Germs, and Steel: The Fates of Human Societies* (New York, NY: W. W. Norton & Company, Inc. 1999), 15-16 (describing the power factors that systems use to attain and maintain dominance over others).

group at the bottom. The dominant social systems then use instruments such as education and training to preserve, perpetuate and promote this hierarchical arrangement. Professor Ngugi Wa Thiong'o describes the final triumph of a system of domination as being when the dominated start singing the system's virtues.[44]

The theory that systems tend to hierarchise when they interact is, therefore, helpful in understanding why the colonial state systems disrupted African cultural practices. The colonial state systems were looking to consolidate instruments of power and authority over the African communities. In their economic model, the colonial state systems viewed the communities and their resources as labour and capital that could be injected into the mother country's economy to create sufficient resources to administer the colony. The colonial regimes used various tactics, such as predatory legislation, compulsory acquisition of land, agreements or treaties and forced eviction, to integrate the communities' power factors into Europe's socio-economic system. The result was a thriving European minority in sub-Saharan Africa living in the midst of socially and economically marginalised African communities.

The colonial states' domination and suppression of the African community systems was bound to run into resistance by the African communities based on system theory's basic premise that systems evolve to secure their own continuity and survival. This systemic disruption was a major test of the systemic characteristics of these communities and their

[44] Ngugi wa Thiong'o, *Decolonising the Mind: The Politics of Language in African Literature* (London: James Currey; Nairobi: Heineman Kenya; Portsmouth, N. H.: Heinemann; Harare: Zimbabwe Publishing House, 1986), 20.

abilities to self-preserve as systems. The disruption thus interfered with the stability and integrity of the community systems, forcing them to take corrective measures in search of that stability. Because the community systems are resilient, they organised themselves to resist the disruption in a bid to regain stability. Examples of resistance by African communities to colonial rule include Kenya's Mau Mau uprising of 1952 – 1960, which was the climax of smaller, localised protests against the colonial system[45], the Maji Maji rebellion of 1905-7 in the south and east of German East Africa (present-day Tanzania)[46], the Anglo-Ashanti Wars between 1824 and 1900 pitting the Ashanti Empire in the Gold Coast (modern day Ghana) against the British[47], the Anglo-Zulu War of 1879 between the British Empire and the Zulu Kingdom[48], among other resistance movements against colonial rule.

These resistance movements are examples of the African communities' struggles to persist, recover and thrive in the face of the disruption by colonialism that threatened their very existence as communities.[49] Some colonial states responded to the resistance movements by African communities by seeking to assimilate a critical mass of their

[45] Wunyabari O. Maloba, *Mau Mau and Kenya, An Analysis of a Peasant Revolt* (East African Educational Publishers Ltd., 1993), ch. 1.
[46] See John Iliffe, "The Organization of the Maji Maji Rebellion," (1967) 8 *The Journal of African History* No. 3, *Cambridge University Press*, 495-512 at https://www.jstor.org/stable/179833 (accessed on October 13, 2021).
[47] B. Wasserman, "The Ashanti War of 1900: A Study in Cultural Conflict," (Apr., 1961) 31 *Journal of the International African Institute* No. 2, Cambridge University Press on behalf of the International African Institute, 167-179, at https://www.jstor.org/stable/1158104 (accessed on October 13, 2021).
[48] Michael Lieven, "Heroism, Heroics and the Making of Heroes: The Anglo-Zulu War of 1879," (Autumn, 1998) 30 *Albion: A Quarterly Journal Concerned with British Studies* No. 3, The North American Conference on British Studies, 419-438 at https://www.jstor.org/stable/4053287 (accessed on October 13, 2021).
[49] See B.E. Aguirre "Dialectics of Vulnerability and Resilience," (Winter, 2007) 14 *Geo. J. Poverty Law & Pol'y* 39, 41; B. Ruhl "Adaptation and Resiliency in Legal Systems: General Design Principles for Resilience and Adaptive Capacity in Legal Systems – With Applications to Climate Change Adaptation" (June, 2011) 89 *N.C.L.Rev*. 1373 (discussing resilience).

individual members into the colonial state's socio-economic system.[50] The colonial states that chose assimilation assumed that assimilating a critical mass of Africans in the colonial socio-economic system would create an equilibrium that would ensure the socio-economic system's survival or long-term stability despite the continuing disruption to African cultural practices.

The instability caused to communities' cultural practices during colonialism continued after African countries gained independence. In '*Not Yet Uhuru*', Kenya's first vice-President, Jaramogi Oginga-Odinga, writes about the colonial state's use of African elites to maintain their dominance over African communities after the countries' independence[51]. The strategy used was to encourage a select group of Africans to participate in the colonial state's socio-economic system. The select Africans were provided with resources and encouraged to acquire land, labour and capital from the departing Europeans for their use in building a modern economy for the newly independent state. The result was a thriving African elite, just as the European minority before them, in the midst of socially and economically marginalised African communities.

This state of affairs persists in sub-Saharan Africa to this day. African communities continue to exist and persist at the periphery of the integrated socio-economic systems, often led by elites in most sub-Saharan African countries. The result is a persistent

[50] Jaramogi Oginga-Odinga, *Not Yet Uhuru* (Hill & Wang, January 1967), First edition, chapters 3 & 14 (using the title 'the White Hand of Authority' for chapter 3 and 'Obstacles to Uhuru' for chapter 14, Oginga-Odinga writes about the colonial state's use of African elites to maintain their dominance over African communities post-independence).
[51] Ibid.

competition for resources, instabilities, and conflicts among communities and between communities and states in the region. Unless the root causes of these instabilities and conflicts are addressed, according to systems theory, the African community systems will continue struggling to maintain their integrity and stability. If left with no other options for self-corrective measures, they will naturally resort to their pre-colonial cultural practices, including violence, as part of their struggles against the continuing disruption. A rethinking of existential risk mitigation strategies around a deeper understanding of community resilience is therefore essential and requires fundamental changes to the states' legal and policy processes for addressing instability risks in the sub-Saharan Africa region.

IV. REMODELING THE INTERFACE OF DOMINANCE THROUGH NEOCOLONIAL CONSTITUTIONS

Part III examines state efforts to create and sustain stable interactive frameworks with African community systems by remodelling the dominance interface to minimise the unhealthy competition over resources, instability and conflicts in the region. States have realised that the continued domination of African communities poses existential threats to the states themselves due to the competition over resources and the resistance offered by the African communities. In particular, four areas of the communities' cultural life that were disrupted by the colonial states and that some African states have sought to entrench in post-independence constitutions include: (1) customs and traditions; (2)

languages; (3) traditional leadership institutions; and (4) their abilities to self-identify and self-organize. Recognizing that culture is a historical, fluid, dynamic and contested process of interaction within a community, naturally means that culture encompasses more than the four areas of cultural life chosen for this article. However, a review of the states' efforts to remodel their interfaces with communities through the prism of constitutions reveals at least one of these four areas of cultural life in the post-independence constitutions of states in sub-Saharan Africa. Excerpts of the state constitutions that were reviewed for this article are included herein as Appendix A.

The customs and traditions of African communities represent an area of the communities' culture that has gained widespread acceptance and legitimacy within the communities over a long period of time. These practices are viewed by members of the communities, generally, as serving their needs and interests and being representative of each community's value system, policies, ideologies, ideas of justice, morality and other core elements of the community system. In order to dominate these communities, the colonial state suppressed the communities' customs and traditions and implemented the colonial state's statutory system. In most of these African states, the colonial state system pursued policies geared toward reform of "primitive or uncivilised" African customs and traditions and replaced them with "civilised" European value systems[52]. African customs and traditions were associated with negative qualities of backwardness and underdevelopment.[53] These suppression policies were the basis for the repugnancy

[52] Sylvia Tamale, n 2 above, 47–69.
[53] Ngugi wa Thiong'o, n 46 above, 28.

clauses regarding customary laws where African customary laws were recognised by the colonial state so long as they were not repugnant to the morality of the colonial state.[54]

The colonial state systems also suppressed African languages. Culture is inextricably intertwined with the language of a community that makes possible culture's genesis, growth, articulation and transmission. Language is both a tool of communication and a means of transmitting culture from generation to generation.[55] As Professor Ngugi Wa Thiong'o states in *Decolonising the Mind*, the choice of language and the use to which language is put is central to a people's definition of themselves in relation to their natural and social environment, indeed in relation to the entire universe[56]. From a word, a group of words, a sentence and even a name in a community's language, one can glean the social norms, attitudes and values of that community.[57] Professor Wa Thiong'o describes a harmony between the language of individuals in their games, riddles, proverbs, transpositions of syllables, work in the fields and teachings and the language of the community[58]. He believes that writing in his Gikuyu language is part of the anti-imperialist struggles of Africans and advocates writing of African literature in African languages in order to precipitate Africa's inevitable revolutionary break with neo-colonialism.[59]

[54] See Sylvia Tamale, n 2 above.
[55] Ngugi wa Thiong'o, n 46 above, 13.
[56] Ibid 4.
[57] Ibid 6.
[58] Ibid 11.
[59] Ibid 27-28.

Besides language, African communities also relied on their traditional leadership institutions to guide their behaviours and to resolve disputes among their community members. Some communities traditionally relied on respected spiritual leaders or medicine men for the divination of future events, administering medicine, conducting rites associated with rainmaking or circumcision, directing raids, providing medicine and, generally, practicing witchcraft. Other communities relied on councils of elders to organise collective activities, safeguard the communities' natural resources, settle disputes among their members, investigate anti-social acts among their members and regulate certain agricultural and pastoral activities of the members. These traditional leaders also guided the community in matters involving peace-making, trade, intermarriage and conflict resolution with other communities.

Colonialism disrupted many of these traditional leadership institutions. For example, one of the first acts of the colonial state following the outbreak of the Mau Mau uprising in Kenya in 1952 was the arrest and imprisonment of one hundred eighty (180) alleged Mau Mau leaders.[60] The colonial state removed the traditional leaders because they perceived them as being instrumental in the uprising against colonial rule. The communities' traditional leaders were unable to successfully resist colonial disruption and therefore lost their effectiveness internally within the communities and externally against the colonial state systems. The community leaders lost their power to Europeans even in situations where some of that leadership structure was left intact. The Europeans

[60] Dr. Aoife Duffy, "Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure," (August, 2015) *Law and History Review*, vol. 33, No. 3, 489-542, sections 89-90.

then imposed puppet leaders on African communities as a way of integrating the communities' legal and institutional structures into their European legal and institutional structures. At independence in many countries, the gaps in African community leadership that had been created by colonial disruption were filled by African elites who the Europeans had imposed on the communities to perpetuate their dominance.

Another area of the African communities' cultural life that the colonial state systems disrupted is the communities' capacities for self-determination. The boundaries of this self-identification or self-definition characteristic of community systems tend to stretch only as far as state sovereignty permits.[61] For example, the Kenyan government refused to recognize the results of a referendum in 1962 in which the mostly Somali community living in its then Northern Frontier District (NFD) favoured secession from Kenya.[62] Similarly, liberation struggles by the Oromo community in Ethiopia have met stiff opposition from the Ethiopian government.[63] The Nigerian state showed its sovereign power against all Nigerian communities, including the Igbo community, during the secessionist war for Igbo self-determination between 1967 and 1970.[64] The United States and Canada have exercised their sovereignty to require, generally, (1) blood quantum

[61] See *Love v. Commonwealth of Australia* (11 February 2020) B43/2018; *Thoms v. Commonwealth of Australia* (11 February 2020) B64/2018 (collectively, *Love v. Commonwealth*) (High Court of Australia), 124-125 (discussing the state sovereignty limitations of community self-identification and self-definition).
[62] Mohamed Sheikh Alio, "Kenyan NFD Muslim Communities: The Painful Past and Pending Justice," (15 June 2022) 21 *International Journal of Islamic Thought* 74, 77.
[63] Siegfried Pausewang (ed.), (CMI Report) Exploring new political alternatives for the Oromo in Ethiopia. Report from Oromo workshop and its after-effects (Bergen: Chr. Michelsen Institute (CMI Report R 2009: 6)).
[64] Onuoha, Godwin, "Contemporary Igbo Nationalism and the Crisis of Self-Determination in Nigeria," (April 2012) 71:1 African Studies 29-51.

and (2) acceptance by the community, for an individual to claim Native American or First Nations status.[65] In Australia, an Aboriginal community's determination of the Aboriginal status of an individual is subject to the Australian state's discretion to recognise or not to recognise that status determination.[66] The systemic characteristic of self-definition and self-identification is thus in inherent conflict with the principle of state sovereignty; if a community system is able to assert its right of self-definition and self-identification against the state, that community would be sovereign and hence become a state. If an individual's status determination by a community in exercise of its right of self-definition or self-identification is at variance with the same individual's status determination by a state in exercise of its sovereign power, the community must, therefore, yield out of a sense of self-preservation. This is consistent with Max Weber's conception of "state" as "the entity that struggles for and, ultimately, monopolises the use of legitimate force within a given territory"[67]. A community system's characteristic of self-identification or self-determination, therefore, remains subject to state validation through recognition.

Post-independence constitutions in sub-Saharan Africa offer an important lens through which to analyse the uses of culture by the state and non-state actors in the four areas of a community's cultural life discussed above - (1) customs and traditions; (2) languages; (3) traditional leadership institutions; and (4) their abilities to self-identify and self-define.

[65] Ralph W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians," (July, 1991) 66 *Wash. L. Rev.* 643.
[66] *Love v. Commonwealth*, n 63 above, 124-125.
[67] See Karl Dusza, n 39 above.

The promulgation of a new constitution, and the public review process involved, marks an important new beginning in the life of a nation, and offers citizens the opportunity for public participation in reviewing their community values, identities, sense of belonging and institutions. Reviewing these constitutions allows an in-depth understanding of their approach to culture and the patterns of interface re-modelling that are taking root in Africa. The texts of these constitutions allow engagement in doctrinal and comparative research to discern the ideal interface model that encompasses the primary cultural aspects of a community.[68] However, the findings indicate a trend in sub-Saharan Africa toward change of state interactions with communities from dominance to recognition. Excerpts of the state constitutions that were reviewed for this article are included herein as Appendix A.

[68] This study does not present a complete picture of the states' formal legal frameworks because it is limited to constitutional texts and not legislation and caselaw that also form part of the formal legal framework.

V. RESEARCH FINDINGS

The state's attempts to re-model their disruptive interaction or interface with the communities from dominance to recognition is moving in the right direction. This part considers how states have attempted to correct the imbalances created by colonial disruption in the four areas of cultural life discussed previously: (1) customs and traditions; (2) languages; (3) traditional leadership institutions; and (4) their abilities to self-identify and self-define. This summary classifies each country's effort as strong, weak or no recognition/prohibited. These classifications are based on textualist constitutional interpretation or the view that constitutional text should be the most important factor in constitutional interpretation. The categories "strong" versus "weak" are consistent with this interpretive methodology and follow a careful examination of the constitutional texts. "Strong" constitutional texts are those that are clear and unambiguous about each of the four areas of cultural life, while "weak" constitutional texts are those that will rely on drafting history and context to reconstruct the drafters' intentions regarding the communities' cultural life. Excerpts of the state constitutions that were reviewed for this article are included herein as Appendix A. A summary of the relevant constitutional provisions follows.

Area of a community's cultural life	Strong Recognition	Weak Recognition	No Recognition/ Prohibited
Communities' customs, traditions and values as sources of law	South Africa, South Sudan, Angola, Chad, The Gambia, Ghana, Namibia, Nigeria, Eswatini, Zambia	Kenya, Central African Republic, Cote d'Ivoire, Ethiopia, Mozambique, Sierra Leone, Zimbabwe	
Mechanism for determining, reviewing, advising and educating communities on customary law	Chad, Ethiopia, Ghana, Namibia, Nigeria, Eswatini, Zambia	Somalia, Zimbabwe	Kenya, The Gambia, Mozambique, South Sudan
Communities' languages as official or national languages	South Africa, South Sudan, Angola, Burundi, Central	Kenya, Uganda, Benin, Cameroon, Chad, Equatorial	Cote d'Ivoire, Djibouti, Gabon,

	African Republic, DRC, Ethiopia, Ghana, Niger, Senegal, Somalia, Zimbabwe	Guinea, Eritrea, The Gambia, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, Eswatini, Zambia	Liberia, Mauritius, Sierra Leone
Communities' traditional institutions for leadership and dispute resolution	South Africa, Uganda, South Sudan, Angola, Botswana, Chad, Ethiopia, The Gambia, Ghana, Sierra Leone, Eswatini, Zambia	Kenya, Burkina Faso, Cameroon, DRC, Cote d'Ivoire, Lesotho, Mozambique, Nigeria, Rwanda, Togo	
Communities' right to self-identify, self-determine and to self-organize	Uganda, South Sudan, Burundi, Ethiopia	Central African Republic, Eritrea, Gabon, The Gambia, Lesotho, Liberia, Mauritius, Mozambique, Eswatini, Nigeria,	Kenya, Tanzania, Angola, Burkina Faso, Chad, Congo (Brazzaville), DRC, Cote d'Ivoire, Djibouti, Equatorial Guinea,

		Seychelles, Somalia, Zimbabwe	Ghana, Guinea-Bissau, Madagascar, Niger, Senegal, Sierra Leone, Togo, Zambia

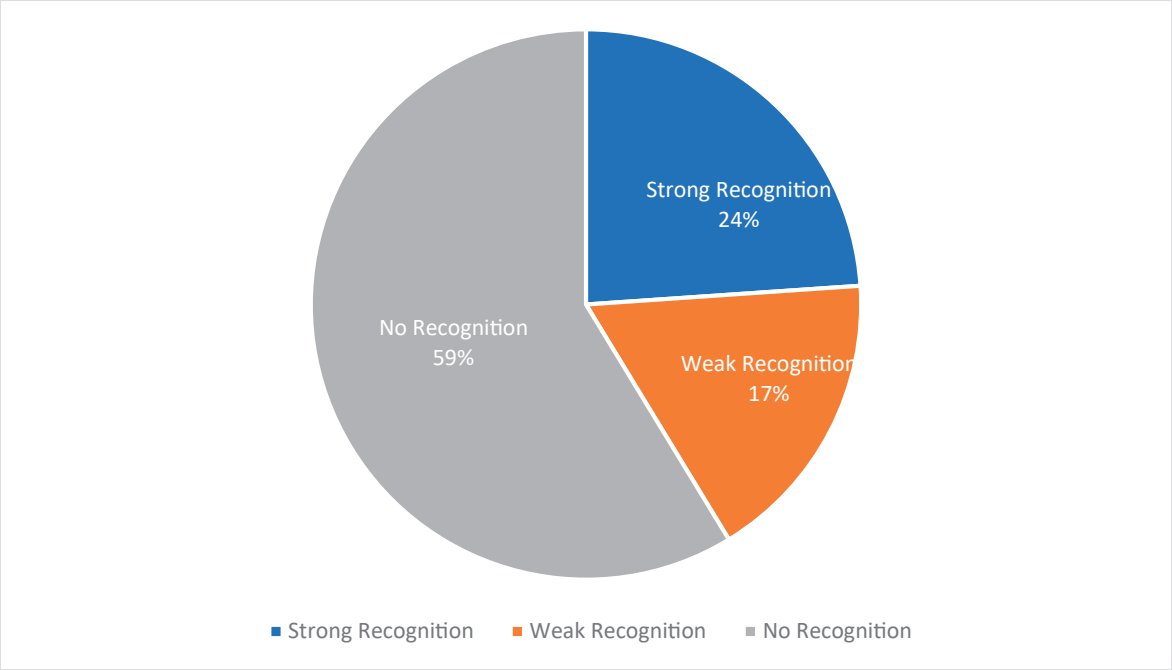
Source: Table created by author based on research on the constitutions of sub-Saharan Africa. Excerpts of the constitutions are contained herein in Appendix A.

I also give a breakdown of findings for each area of cultural life as follows:

A. *Communities' customs, traditions and values as sources of law*. I note ten (10) sub-Saharan African states with constitutions that cite the communities' customary laws as sources of law. For example, article 5 of South Sudan's Constitution of 2011 (rev. through 2013) cites "customs and traditions of the people" as sources of legislation in South Sudan. [69] Another example is article 161 of Chad's Constitution of 2018 that provides that, until codification, the customary and traditional rules are applicable in the communities where they are recognised.[70]

[69] South Sudan's Constitution of 2011, at https://www.constituteproject.org/constitution/South_Sudan_2011.pdf (accessed on October 13, 2021).

[70] The Constitution of the Republic of Chad/Constitution de la République du Tchad), at https://www.constituteproject.org/countries/Africa/Chad?lang=en (accessed on October 13, 2021).

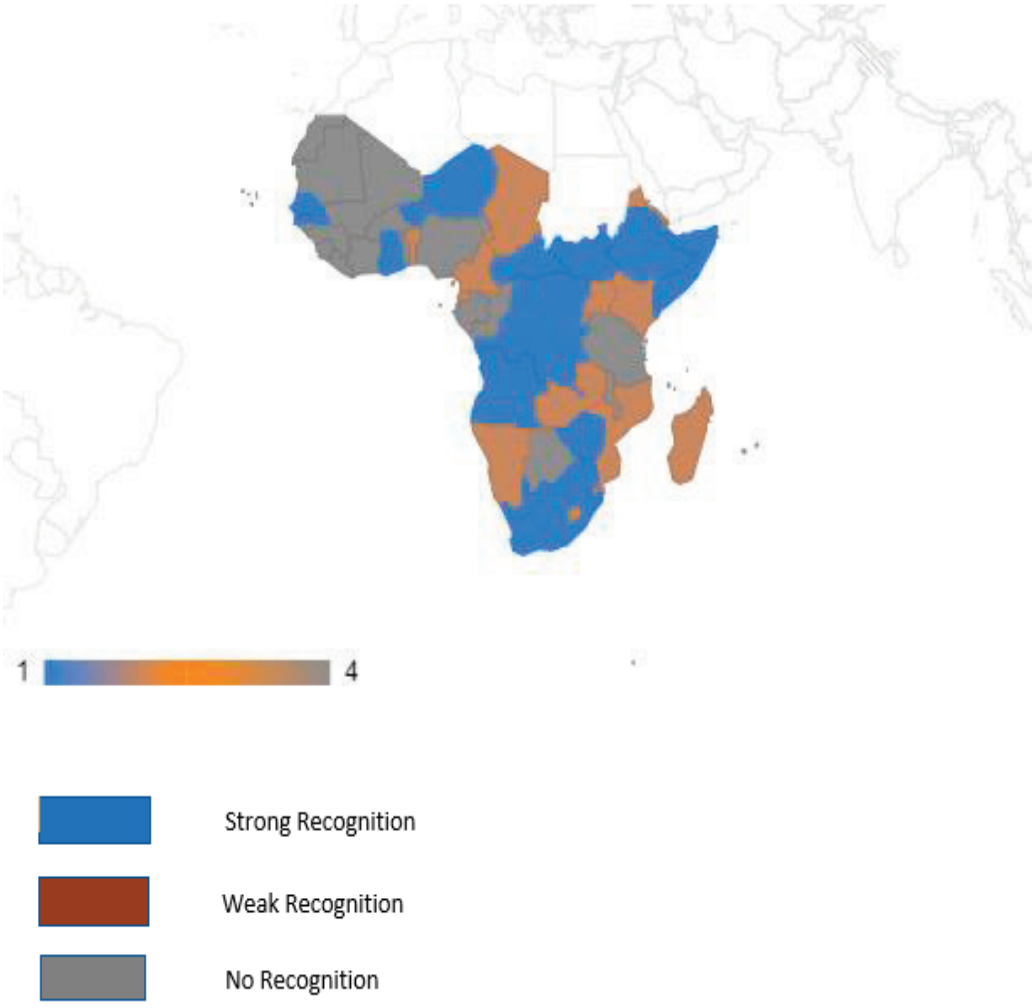


Source: Pie chart on communities' customs and traditions created by author based on research on the constitutions of sub-Saharan Africa.

B. *Communities' languages as official or national languages*. Roughly a quarter of state constitutions in sub-Saharan Africa expressly recognise the languages of their communities as national or official languages. Examples are article 6 of South Sudan's Constitution that provides that "[a]ll indigenous languages of South Sudan are national languages and shall be respected, developed and promoted"[71] and article 6(1) of the South African constitution of 1996 that provides that "[t]he official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English,

[71] South Sudan's Constitution of 2011, at https://www.constituteproject.org/constitution/South_Sudan_2011.pdf (accessed on October 13, 2021).

isiNdebele, isiXhosa and isiZulu"[72]. Another third of the countries make some references to the need to promote and protect the languages of the communities as part of promoting their cultures.

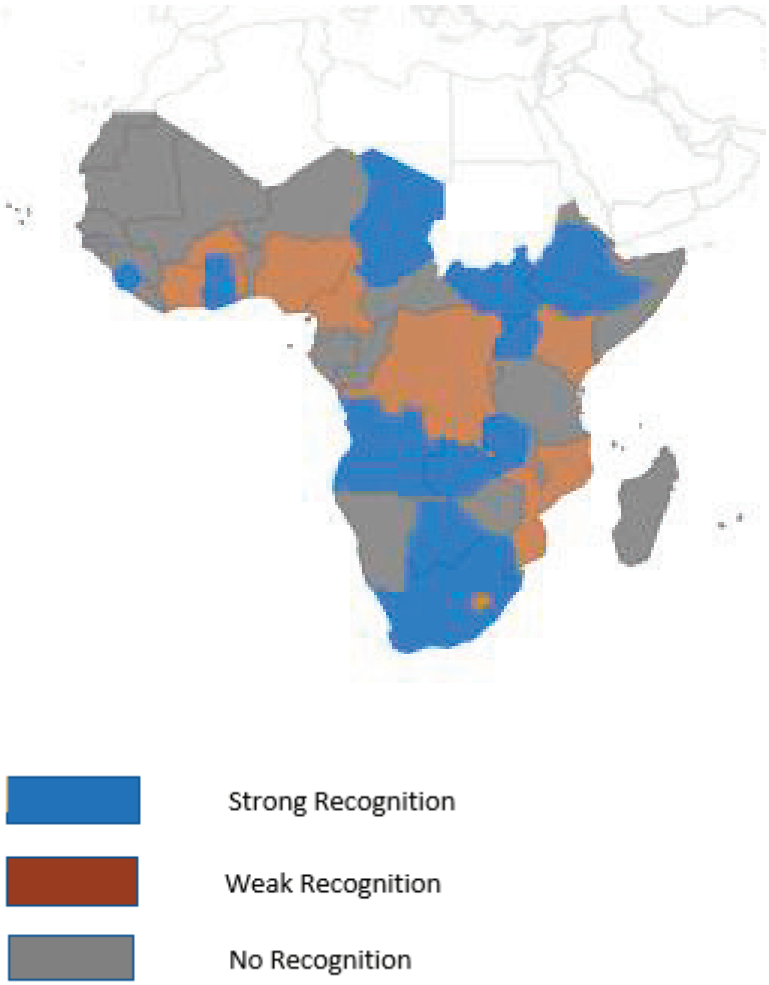


[72] The Constitution of South Africa, at https://www.constituteproject.org/countries/Africa/South_Africa?lang=en (accessed on October 13, 2021).

Source: Map on languages created by author based on research on the constitutions of sub-Saharan Africa.

C. *Communities' traditional institutions for leadership and dispute resolution*. Slightly less than half of sub-Saharan African countries expressly and vaguely recognise the communities' traditional leadership institutions. South Africa's Constitution is an example of express recognition of traditional leaders. Under article 211(1) "[t]he institution, status and role of traditional leadership, according to customary law, are recognised…"[73]. Uganda is another example of a country that expressly recognises the role of traditional leaders. Article 246, Chapter 16 of Uganda's Constitution provides that "the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies"[74].

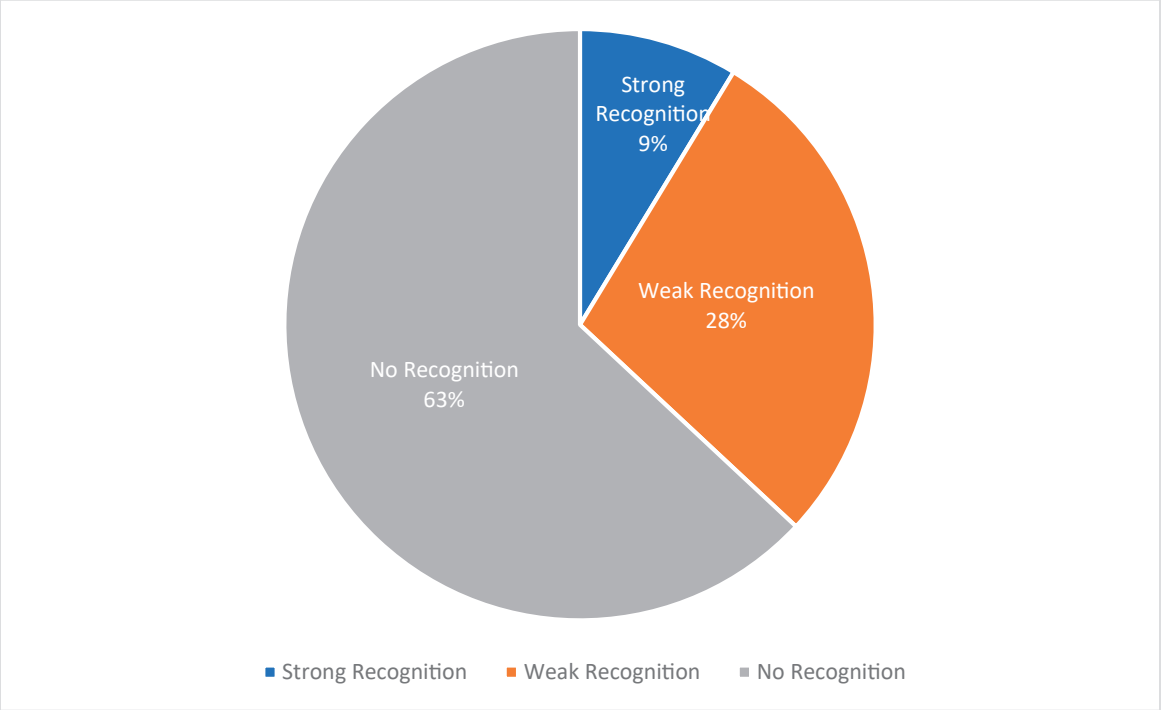
[73] Ibid.
[74] The Constitution of Uganda, at https://www.constituteproject.org/countries/Africa/Uganda?lang=en (accessed on October 13, 2021).



Source: Map on traditional leadership institutions created by author based on research on the constitutions of sub-Saharan Africa.

D. *Communities' right to self-identify, self-determine and to self-organise.* The fourth area of cultural life where states recognize communities' rights to self-determination is not as common in sub-Saharan Africa. I found only four (4) countries that constitutionally allow communities the right to self-determination. Article 39 of Ethiopia's constitution, for

example, recognizes communities' right to self-determination, including secession through a prescribed procedure that includes a referendum.



Source: Pie chart on self-determination created by author based on research on the constitutions of sub-Saharan Africa.

The findings show a trend toward constitutional recognition of African cultural practices even though there is room for more cultural aspects to be brought within the constitutional frameworks. So far, no sub-Saharan African country recognises all four areas of the communities' cultures. Indeed, each area of the communities' cultural life only gains strong recognition in less than a quarter of the sub-Saharan African states.

However, the real test of the remodelling's success will be on whether the remodelled interaction/interface will afford the community systems genuine options to apply self-corrective measures to mitigate the risk of unhealthy competition over resources and instability that resulted from colonial disruption. Success will be achievable when the communities are able to re-gain their power factors that traditionally enabled them to develop legal and institutional structures necessary to persist and thrive as community systems. Such effective institutions can be midwifed by a transformative legal framework.

VI. LAW AS A TRANSFORMATIONAL TOOL

In this section, I return to the fundamental issue in this article; the search for an ideal interface between the formal state systems and the cultural practices of sub-Saharan African communities. Professor Wa Thiongo'o describes the ideal interaction with African languages as one that restores the harmony between all aspects of the individual, his community and the environment, so that the individual understands his community and environment fully and is in a position to change it for his collective good.[75] Sub-Saharan African states have taken steps toward this ideal by recognising some aspects of the communities' cultures in their post-independence constitutions, as described in the research findings. These constitutional reforms are a step in the right direction as they show that African states are starting to view factors of power from the perspective of the communities themselves and not from a colonial lens. However, there remains an urgent need for the states to recognise more aspects of the communities' cultures in their constitutional and legislative frameworks. Once the constitutional and legislative frameworks are enacted, the states should also be willing to subject themselves to independent judicial systems for adjudication of any disputes arising from their interactions with the communities.

This section discusses the partnership-based recognition model[76] as an effective interface between the state systems and the African community systems. The ideal recognition

[75] Ngugi wa Thiong'o, n 46 above, 28.

[76] For examples of partnership-based models of interface between two systems, see The Two Row Wampum of 1613, text at www.peacecouncil.net (accessed 2 April 2020). The term "Wampum" refers to "Wampum belts" that were customarily used by the Iroquois to document a treaty. The Two Row Wampum of 1613 was a treaty of non-

framework for two or more systems should be based on the partnership model. A partnership-based recognition framework ought to be founded on consensus, friendship, mutual respect, mutual dignity and mutual integrity between the states and the African communities.[77] The key to a partnership-based relationship between communities is their intention to create an integrated socio-economic system as co-owners.[78] The constitutional and statutory legal frameworks in such systems are, generally, compatible with the communities' cultural practices. This partnership model is like a ship (state system) and a canoe (community system) sailing down the same river in peace but neither trying to steer each other's vessel.[79]

A partnership-based model would require the state system to reconceptualise its interface with community systems within its borders. The state will need to pivot away from the tendency to dominate and suppress African community systems and, instead, integrate them into the state's socio-economic system, including formally recognising their cultural rights. The post-independence constitutions in sub-Saharan Africa are not the ideal partnership-based models because they do not recognise all four areas of a community's

interference in internal affairs, peace, friendship, mutual respect, mutual dignity and mutual integrity. See also Larry Chartrand "Indigenous Peoples: Caught In a Perpetual Human Rights Prison," (2016) 67 *UNBLJ* 167 - 186 / (2016) 67 R.D. U.N.-B. 167 – 186 at paragraph 38 (describing the interface based on the Two Row Wampum of 1613 as follows: "[I]t is said that the Two-Row Wampum confirms a treaty between the Mohawk and the Dutch, where the two rows of purple represent the ship of the European and the canoe of the Mohawk sailing down the same river in peace but that "neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.")

[77] Larry Chartrand, n 77 above.

[78] Ibid.

[79] Ibid.

cultural life; (1) customs and traditions; (2) languages; (3) traditional leadership institutions; and (4) their abilities to self-identify and self-organise. However, they are steps in the right direction and a departure from the colonial states' domination and suppression models.

The state systems should go further and study and understand key aspects of the cultural life of the communities and the communities' resilience by mapping their key structural attributes, essential dynamics, interdependencies and feedback loop mechanisms in order to create and sustain interventions that will help these communities to achieve stability. The new cultural rights recognition frameworks should also embrace the analytical approach to culture as a historical, fluid, dynamic and contested process of interaction within a community. As Sylvia Tamale states in '*The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa*', "we must invoke the core values of our societies to engender transformation; find those values that resonate from indigenous cultures that will speak to the rights repertoire."[80] The new cultural rights recognition frameworks should, therefore, recognise this dynamism of communities and allow them to practice their cultures or to adopt new cultural practices according to each community system's legal and institutional structures.

African communities should also be able to participate effectively in implementation of the new cultural rights recognition frameworks through direct access to independent judicial systems. Courts can act as arbiters of disputes that arise in the contestation for

[80] Sylvie Tamale, n 2 above, 65.

power between states and community systems and, thereby, provide guardianship for the new interface model. Recall that it was the colonial and neo-colonial state systems that used predatory legislation, compulsory acquisition, unconscionable agreements or treaties, forced eviction and other suppression and domination tactics to push the African communities to the fringes of their socio-economic systems. There is, therefore, a risk of the state systems continuing to use tools of domination and suppression to continue dominating the African community systems. The new cultural rights recognition frameworks' redress mechanisms need to be reformed, to allow the judicial systems to hear and determine claims by communities and thereby create some symmetry in the inherently asymmetrical relationship between the states and the communities. African communities should use the opportunity provided by these transformative constitutions and independent judicial systems to strengthen their legal and institutional structures. In this way, transformative law reform can lead to an interface of recognition where the post-independence state systems recognise the cultural rights of the African communities.

VII. CONCLUSION

This article has explored the ideal interaction between the formal state systems in sub-Saharan Africa and the community systems. It uses systems to model these communities as systems and to highlight the importance that they attach to their cultural rights. These African communities are systems because they are composed of interactive individuals,

their laws and customs, cultures, ancestors, land, waters, and other elements essential to their continuity and survival. The cultural practices of these communities are thus essential elements of the community systems that they have developed with the passage of time to ensure their survival and continuity as communities. The colonial states disrupted these community systems by interfering with their cultural rights. This disruption happened because the colonial state systems viewed the communities and their resources as labour and capital that could be injected into the mother countries' economies to create sufficient resources to administer the colonies. This article also relies on social dominance theory to explain these disruptive actions by the colonial and neo-colonial states against the African communities.[81] The colonial disruption of the community systems interfered with their stability and integrity as communities, thus forcing them to take corrective measures in search of that stability. These instabilities and conflicts continued even after the states gained independence because the post-independence states continued the same domination and suppression of communities that happened during colonial rule. The communities, on their part, remained resilient and continued to resist. Even today, if left with no other options for self-corrective measures, the African communities will naturally resort to their pre-colonial cultural practices, including violence, as a response to the continuing disruption.

The states' failure to correct the African communities' instabilities caused by colonial disruption was a failure in the interface between the formal state systems and the African

[81] See Erika K. Wilson, "Why Diversity Fails: Social Dominance Theory and the Entrenchment of Racial Inequality," (2017) 26 *Nat'l Black L.J.* 129 (for an explanation of social dominance theory).

community systems. Instead of integrating the African communities into the socio-economic system, state policies were hostile to them and sought to integrate individuals or to create African elites that would continue the same policies of domination and suppression against the African communities. African communities resisted these domination and suppression policies and their hostility toward their customs and traditions and other aspects of their cultural life.

Opportunities to define mutually beneficial interactive frameworks or interfaces between the state statutory systems and African communities, have arisen through post-independence constitutional enactments and amendments. These constitutional moments have created opportunities for the states and communities to create ideal partnership-based recognition frameworks founded on consensus, friendship, mutual respect, mutual dignity and mutual coexistence. The sub-Saharan African states have seized these opportunities to recognise some areas of the communities' cultures in their post-independence constitutions. These constitutional reforms are a step in the right direction because they demonstrate that sub-Saharan African states are starting to view factors of power from the perspective of the communities themselves and not from a colonial lens. The communities' acceptance of the validity and legitimacy of the revised constitutions, in addition to the transformative constitutions themselves, are, therefore, necessary to change the interface of dominance between states and communities. There remains an urgent need for the states to recognise more aspects of the communities' cultural life in their constitutional and legislative frameworks and to implement these

recognition frameworks. Other than enactment and implementation of these constitutional and legislative frameworks, the states should also be willing to subject themselves to independent judicial systems for adjudication of any disputes arising from their interactions with the communities. With legal frameworks that recognise the communities' cultural rights and independent judiciaries to address power asymmetries, the new legal frameworks may be effective in creating stable environments where the community systems are able to recover from colonial disruption, co-exist with the states and thrive as systems.

APPENDIX

Sub-Saharan African Country	Recognition of Community Systems	Recognition of traditional dispute resolution mechanisms	Codification of customs and traditions
Kenya	Article 11(1) of the Kenyan Constitution of 2010 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Article 44(1) of the Kenyan Constitution of 2010 provides that "[e]very person has the right to use the language, and to participate in the cultural life, of the person's choice".	Article 159(2)(c) of the Kenyan Constitution of 2010 recognizes traditional dispute resolution mechanisms. Article 169-170 of the Kenya Constitution of 2010 recognizes Kadhi's Courts and specifies	

		their jurisdiction and the qualifications of a Chief Kadhi and other Kadhis. The Kadhis' Courts Act, Chapter 11 of the Laws of Kenya operationalizes the Kadhi's Courts.	
South Africa	Article 6(1) of the South African constitution of 1996 provides that "[t]he official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu". Article 30 provides that "[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights".	Article 211 (3) of the South African Constitution of 1996 provides that "[t]he courts must apply customary law when that law is applicable,	

	Under article 211(1) "[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution". Article 212 allows for national legislation to specify the role of traditional leaders.	subject to the Constitution and any legislation that specifically deals with customary law".	
Uganda	Part XXIV of Uganda's Constitution of 1995, as amended upto 2017, provides that Cultural and customary values ... may be developed and incorporated in aspects of Ugandan life and the State shall promote and preserve those cultural values and encourage the development, preservation and enrichment of all Ugandan languages. Article 37 in Chapter 4 states that "[e]very person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others". Article 246, Chapter 16 provides that the institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the		

	culture, customs and traditions or wishes and aspirations of the people to whom it applies. It also clarifies under subsection 5 that the institution of traditional leader or cultural leader existing immediately before the coming into force of the Constitution shall be taken to exist in accordance with the provisions of this Constitution. The Third Schedule lists Uganda's indigenous communities as at 1st February, 1926.		
Tanzania	Article 20 of the Constitution of 1977 of the United Republic of Tanzania (re. through 2005) allows for freedom of association but makes it unlawful to register any political entity aimed at promoting or furthering the interests of any tribal group, place of origin, race or gender or of only a particular area.		
South Sudan	Article 5 of South Sudan's Constitution of 2011 (rev. through 2013) cites 'customs and traditions of the people' as sources of legislation in South Sudan. Article 6 provides that "[a]ll indigenous languages of South Sudan are national languages and shall be	Under Article 167(3) of the Constitution, the courts of South Sudan shall apply	

	respected, developed and promoted". Under Article 33, "[e]thnic and cultural communities shall have the right to freely enjoy and develop their particular cultures. Members of such communities shall have the right to practice their beliefs, use their languages, observe their religions and raise their children within the context of their respective cultures and customs in accordance with this Constitution and the law". Under Article 38, all levels of government shall recognize cultural diversity, protect, promote and preserve the cultures of the people. The institution, status and role of Traditional Authority, according to customary law, are recognised under article 167(1) of the Constitution. Article 168 provides for the roles of Traditional Authority to be specified by state legislation and establishment through national legislation.	customary law subject to the Constitution and the law.	
Angola	The Preamble to the Angolan Constitution of 2010 refers to "[i]nvoking the memory of our ancestors and calling upon the wisdom of the lessons of		

	our shared history, our centuries-old roots and the cultures that have enriched our unity; [i]nspired by the best lessons in African tradition - the essence of Angolan culture and identity". Under Article 7, "[t]he validity and legal force of custom which does not contradict the Constitution and does not threaten human dignity shall be recognised". Under Article 19(2), "[t]he state shall value and promote the study, teaching and use of other Angolan languages". Under Article 48(4), "[a]ny associations or groupings ... which ... promote tribalism ... shall be prohibited". CHAPTER III, Article 223 provides that (1) "[t]he state shall recognise the status, role and functions of the institutions of the traditional authorities founded in accordance with customary law which do not contradict the Constitution. (2)Recognition of the institutions of the traditional authorities shall oblige public and private entities to respect, in their relations with these institutions, the values and norms of customary law that are		

	observed within traditional political and community organisations and do not conflict with the Constitution or the dignity of the human person". Article 225 provides that "[t]he traditional authorities shall be the entities which personify and exercise power within the respective political and community organisations, in accordance with the values and norms of customary law and respecting the Constitution and the law". Additional attributes, responsibilities and organization of traditional authorities to be regulated by law.		
Benin	Article 10 of the Benin Constitution of 1990 provides that "[e]very person has a right to culture. The State has the duty to safeguard and promote the national values of civilizations, as much material as spiritual, as well as the cultural traditions". Under Article 11, "[a]ll communities comprising the Béninese nation shall enjoy the freedom to use their spoken and written languages and to develop their own culture while respecting those of others. The State must		

	promote the development of national languages of intercommunication".		
Botswana	Part III (sections 77-85) of the Constitution of Botswana 1966 (rev. 2016) creates the Ntlo ya Dikgosi (Tswana for "House of Chiefs") in Botswana as an advisory body to the country's parliament. It consists of not less than 33 nor more than 35 Members composed in part of regional leaders selected by a Regional Electoral College.		
Burkina Faso	The Preamble to Burkina Faso's Constitution of 1991 (rev. through 2015) recognises "the customary and traditional leadership as [a] moral authority [,] depository of the customs and of the traditions in our society". Article 13 states that "tribalist, regionalist, denominational, or racist political parties or formations are not authorised."		
Burundi	The Preamble to Burundi's Constitution of 2018 reaffirms the resolution to conserve their culture, to ensure the safeguarding of their culture and the		

	values of cooperation among the different ethnic groups of their society. Under Article 5, the national language is Kirundi, official languages are Kirundi and others and all legislative texts must have a version of Kirundi. Under Article 128, the Government is open to all ethnic groups and it is composed of at most 60% Hutu ministers and at most 40% Tutsi ministers. Under Article 148, ethnic representation in public enterprises is filled at a rate of 60% or more for the Hutu and 40% or more for the Tutsi. Article 169 provides that the National Assembly is composed of at least 100 deputies in rates of 60% Hutu and 40% Tutsi, of which a minimum of 30% must be women, elected by direct universal suffrage...In the case that the results of an election do not reflect the percentages outlined above, it proceeds to the rectification of corresponding imbalances by means of co-optation provided for in the Electoral Code. Under Article 213, the Magistrature includes at most 60% Hutu and at most 40% Tutsi... Under Article 263, ...the Defence		

	and Security Corps may not include more than 50% of the members belonging to a particular ethnic group...		
Cameroon	The Preamble to Cameroon's Constitution of 1972 (with amendments through 2008) states that the people of Cameroon are proud of their linguistic and cultural diversity, an enriching feature of their national identity. Article 1(3) recognizes English and French as the Official languages and that the State shall endeavour to protect and promote national languages. Article 57(1) of Cameroon's Constitution of 1972 (with Amendments through 2008) provides that the organs of the Region shall be the Regional Council … and in (2) provides that Regional Councillors shall comprise … representatives of traditional rulers elected by their peers. Article 59 allows the President of the Republic to suspend the Regional Council or to dissolve it after consultation with the Constitutional Council and Article 60 allows the President of the Republic to suspend or		

	dismiss the President and the Bureau of the Regional Council.		
Cape Verde	The Preamble to Cape Verde's Constitution of 1980 with amendments through 1992 refers to local authorities whose officeholders shall be elected by the communities to whom they are responsible. Article 38 guarantees the right to personal identity. Article 82 refers to the "national community". Article 51 allows freedom of association except for armed, military or paramilitary associations or those which promote violence, racism, xenophobia, or dictatorship or those whose purposes violate criminal law. Article 77 recognizes the right to culture for everyone.		
Central African Republic	The Preamble of the Central African Republic's Constitution of 2016 states that the Central African People are proud of their national unity, linguistic (unity) and of their ethnic, cultural and religious diversity; reaffirms its adherence to the protection of the rights relative to tribal peoples. Under Article 24,		

	the State recognizes and protects the traditional values in accordance with the law and the Customary Authorities; the national language is Sango and the official languages are Sango and French. Article 31 prohibits political parties or groups from identifying themselves with a race, an ethnicity, a gender, a religion, a sect, a language, a region or an armed group. Article 80 states that the rules concerning the plan of development and of progressive and widespred implantation of the language of Sango and the fundamental principles of culture are the domain of the law.		
Chad	The Preamble to Chad's Constitution of 2018 states that different successive regimes created and maintained regionalism, tribalism, nepotism… of which the consequences were … distrust between the different communities … Thus the Sovereign National Conference ... assembled ... the traditional and religious authorities the representatives of the rural world ...The Preamble also affirms the will of the people to live together with respect for ethnic,	Under Article 163, the customary and traditional remedies may not be made an obstacle to public action. Under Article 165, the	Article 161 of Chad's Constitution of 2018 provides that until codification, the customary and traditional rules are only

	religious and cultural diversity ... consider that political, ethnic and religious tolerance... and cultural dialogues constitute fundamental values... The Preamble further affirms total opposition to any regime of which the policy would be founded on ... nepotism, clanism, tribalism ... Article 5 prohibits any propaganda of ethnic, tribal, regional or religious character... Under Article 9 the law establishes the conditions of promotion of the national languages, also stating that French and Arabic are the official languages. Article 27 prohibits customary and traditional rules concerning collective criminal responsibility. Under Article 36, every Chadian has the right to culture and the state has the duty to safeguard and to promote national cultural values. Under Article 127, the laws establish the rules concerning the procedure according to which customs are declared and harmonized with the principles of the constitution. Under Article 162, the customary and traditional rules governing the matrimonial regimes and inheritance may only be	High Council of the Autonomous Collectivities and of Traditional Leadership participates in the non-jurisdictional settlement of disputes. Under article 218, the traditional and customary authorities participate in the non-jurisdictional regulation of disputes within their territorial jurisdiction.	applicable in the Communities where they are recognized. However, customs contrary to the public order or those that promote inequality between citizens are prohibited.

	applicable with the consent of the concerned Parties. In default of consent, the national law alone is applicable. It is the same in case of conflict between two or more customary rules. Under Article 164, a consultative organ called the High Council of the Autonomous Collectivities and of Traditional Leadership is instituted, under article 165, it is a consultative assembly giving substantiated opinion on the policy of decentralization, on territorial planning, and on questions relative to traditional leadership. Article 166 provides that enabling legislation will specify its institutions. Articles 167-170 establish the Economic, Social and Cultural Council to deal with culture, among other issues. Under Article 217, the traditional and customary authorities are the guarantors of use and custom, in article 218 participating in the valuing of use and customs, the promotion of the ideas of peace, of development and of social cohesion. Under article 220, a law will determine the status and attributions of the traditional and customary authorities.		

Comoros	In the Preamble to Comoros' Constitution of 2018, the people affirm their will to cultivate a national identity based on a sole people, a sole religion and a sole language and the people's will to develop culture as elements of promotion of the national spirit. Under Article 9, the official languages are Shikomor national language, French, and Arabic. The Preamble also opposes regionalism, separatism and other act infringing on the territorial integrity and the national unity. In Article 8, the state has a mission to support the Comorian community and development of Comorian culture. Under article 11, the state commits to reinforcing African identity, unity and integration. Article 29 guarantees the right to culture.		
Congo (Brazzaville)	The Preamble of Congo's Constitution of 2015 recognizes the pressing need to conciliate cultural national realities. Article 16 recognizes rights of the autochthoneous peoples. Article 28 guarantees the right to culture and to the respect for the cultural identity of each citizen though it may not be		

	exercised to cause prejudice to the public order or to others or to the national unity. Article 51 prohibits acts or manifestation of an ethnic.. character. Article 58 prohibits any political party to identify with an urban or rural community,... ethnic group or clan. Article 61 prohibits political parties from ethnicism, sectarianism. Article 230 establishes a consultative council of the wise and of traditional notables to opine on democratic, cultural and social governance though it is to be operationalized by law under article 231.		
Congo (Democratic Republic)	The Preamble to the DRC's Constitution of 2005 (with amendments thru 2011) considers that injustice, impunity, nepotism, regionalism, tribalism, clanism and patronages are the origin of the decline of values and the ruin of the country. The Preamble is also attached to the promotion of mutually advantageous international cooperation and to the rapprochement of the world with respect to their respective identities... Under Article 1, the official language is French and the national		

	languages are Kikongo, Lingala, Swahili and Sshiluba with the state assuring their promotion and the protection of the other languages which are part of the Congolese cultural patrimony. Article 10 states that any person belonging to an ethnic group of which the members and the territory are constituent to that which became the DRC at independence is Congolese. Article 13 prohibits discrimination based on a person belonging to a certain race, ethnicity, tribe, cultural or linguistic minority. Under Article 14, the state guarantees the right to individual or collective property, acquired in conformity to the law or to custom. Article 46 guarantees the right to culture. Under Article 51, the state has the duty to assure and to promote the peaceful and harmonious coexistence of all ethnic groups and of the country. Article 207 recognizes customary authority, which is devolved conforming to local custom subject o conformity with the Constitution, the law, public order and morals. Each customary chief, who desires to exercise a public		

	elective mandate must submit himself to election (with some exceptions). The customary authority has the duty to promote national unity and cohesion and a law establishes the status of the customary chiefs.		
Côte d'Ivoire	The Preamble to the 2016 Constitution of Cote d'Ivoire refers to ethnic, cultural and religious diversity and a determination to build a multi-ethnic and multi-racial Nation. Article 20 guarantees from of association. Article 24 guarantees equal access to culture and states that the State promotes and protects the cultural heritage as well as the habits and customs that do not run counter to public order and the accepted standards of behaviour. Article 25 prohibits political parties and groups organized along regional, religious, tribal, ethnic or racial lines. Article 48 names French as the official language and Articles 163-164 describes the Economic, Social, Environmental and Cultural Council as an advisory entity on laws and that is also subject to enabling legislation. Article 175 states that the Traditional	Article 175 describes one of the functions of the National House of Kings and Traditional Chiefs as the non-judicial settlement of conflicts in villages and between communities.	

	Chieftancy is represented by the National House of Kings and Traditional Chiefs, subject to enabling legislation, groups all Traditional Kings and Chiefs and, among other functions, values habits and customs, promotes peace and social cohesion, participating in administration and conflict resolution.		
Djibouti	The Preamble to Djibouti's Constitution of 1992 (with Amendments thru 2010) affirms a determination to establish a pluralist democracy guaranteeing the full enjoyment of collective rights. Under Article1, the official languages are Arabic and French. Article 6 forbids identity based on race, ethnicity, sex, religion, sects, language or religion.		
Equatorial Guinea	The Preamble to the Equatorial Guinea Constitution of 1991 (with Amendments thru 2012) mentions the desire to uphold the authentic African spirit of the positive tradition of family and communical organization, adapting it to new social and judicial structures consistent with modern life; conscious		

	that the charismatic authority of the traditional family is the foundation of the Equatoguinean Society. Article 1(2) recognizes political pluralism but in Article 9 prohibits political parties based on tribe, ethnicity, region, district, municipality province, gender, religion, social condition nor profession or occupation. Article 4(1) mentions official languages as Spanish, French and others determined by law and also recognizes autochthonous languages as part of the national culture. State encourages and promotes culture under Article 6.		
Eritrea	The Preamble to Eritrea's Constitution of 1997 describes the necessity of inheriting and improving upon the traditional community-based assistance and fraternity, love for family, respect for elders, mutual respect and consideration. Article 4(3) guarantees the equality of all Eritrean languages. Article 9(1) tasks the State with creating and promoting conditions conductive for developing a national culture capable of expressing national		

	identity, unity and progress. Article 21(4) makes it a state responsibility to preserve historical and cultural heritage. Article 14(2) prohibits discrimination based on race, ethnic origin, language, color, gender, religion, disability, age, political view or social or economic status or any other improper factors. Article 19(6) gives every citizen the right to form organizations for political, social, economic and cultural ends.		
Ethiopia	The Preamble of Ethiopia's Constitution of 1994 is against cultural discrimination but appreciates the rich and proud cultural legacies that have built up common interests and contributed to the emergence of a common outlook. Article 25 guarantees right to equality but prohibits discrimination on the grounds of race, nation, nationality, language, etc. Article 5(1) recognizes equality of all Ethiopian languages and identifies Amharic as the working language of the Federal Government; states may determine their own working languages. Article 31 recognizes freedom of association except for illegal activities.	Article 34(5) states that the Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with consent of	

	Article 39 recognizes communities' right to self-determination, including secession through a prescribed procedure that includes a referendum. Article 47 allows communities the right to establish, at any time, their own states and prescribes procedures for that, including a referendum. This right to self-determination includes the right to speak, write, develop its own language, promote its own culture, preserve its history, etc., and, under Article 43, communities' right to development. The same article defines communities/nations, nationalities and peoples as a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory. Article 62 provides that the House of Federation decides on issues relating to communities' right to self-determination, including the right to secession. Under Article 40, land is a common property of	the parties to the dispute, subject to enabling legislation. Under Article 78 and pursuant to Article 34(5), the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts.	

	communities, pastoralists have right to free grazing and cultivation land and right not to be displaced. Article 41, Article 91 puts the responsibility on the state to preserve historical and cultural legacies. Article 88 provides that Government shall promote and support people's self-rule. Government shall respect the identity of communities and strengthen ties of equality, unity and fraternity among them.		
Gabon	Article 1 of Gabon's Constitution of 1991 (with amendments through 2011) recognizes freedom of association but within conditions fixed by law. Any associations contrary to the law, morality or th goodwill of ethnic groups or communities may be prohibited by law. Discrimination based on origins, sex, race or opinions is also prohibited. Indeed, discriminatory acts based on race, ethnicity, or religion, including all regionalist propaganda threatening interior or exterior national security or the integrity of the state is punishable by law. Article 2 recognizes French as the official language and		

	recognizes state responsibility to protect and promote it.		
The Gambia	Section 4 of The Gambia's Draft Constitution of 2019 talks about the state's promotion of ethnic, cultural and language diversity, the development and use of local languages, etc. Section 9 mentions customary law and Shariah as sources of law. Section 11 talks about the state promotion cultural expression. Section 57 states that every person is entitled to enjoy, practice, profess, maintain and promote any culture, language or tradition subject to the terms of the constitution. Section 67 prohibits discrimination based on race, ethnicity, creed, colour, gender, language, religion. Under section 155, English and any other language indigenous to the Gambia are the languages of the National Assembly; translations in English and progressive realization of the use of indigenous languages. Sections 209, 210 and 211 deal with traditional authorities and customary institutions (Seyfo and Alkalo). The Seyfo are elected while the Alkalo are appointed in accordance	Section 185 establishes Shar'iah High Court with jurisdiction over matters relating to adoption, marriage, divorce, burial, inheritance, or endowment (waqf) amongst people who are subject to Shariah in that regard.	

	with traditional linces of inheritance. They are responsible for maintaining social stability and cohesion but are non partisan and non political. They hold office for life but can be removed for ill-health, misconduct or bad behaviour. They can also resign.		
Ghana	Chapter 4 of the Constitution of Ghana of 1992 as amended through 1996 lists customary law as comprising the laws of Ghana. It describes customary law as the rules of law which by custom are applicable to particular communities in Ghana. Article 17 affirms equality of all and prohibits ethnic-based discrimination or differential treatment. Article 26 provides for the right to culture where every person is entitled to enjoy any culture, language, tradition or religion except for customary practices which dehumanize or are injurious to the physical and mental well-being of a person. Article 39 places responsibility on the state to promote customary and cultural values through formal and informal education and to foster the development of	Under article 273, the National House of Chiefs has appellate jurisdiction over matters affecting the chieftaincy.	One of the roles of the National House of Chiefs under article 272 is to undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate

	Ghanaian languages. Article 55(4) prohibits ethnic-based or regional political parties. Article 270(1) guarantees the institution of chieftaincy as established by customary law and usage and shields it from Parliamentary interference except by recognizing it. Under article 276, chiefs are not to participate in party politics. Article 271 creates the National House of Chiefs which is an advisory body on chieftaincy and is made up of elected paramount chiefs from the regions. The National House of Chiefs also undertakes an evolution of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful. Under article 274, each region has a Regional House of Chiefs that deals with chieftaincy matters in each region.		cases a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin. Under article 274, the Regional House of Chiefs also undertakes the compilation of the customary laws and lines of succession applicable to

			each stool or skin in the region.
Guinea-Bissau	Article 4(4) of Guinea-Bissau's Constitution of 1984 with amendments through 1996 prohibits political parties of a regional or local nature, that sponsor racism or tribalism. Article 17(1) makes it a state responsibility to create and promote favourable conditions for the preservation of cultural identity, as support for national conscience and dignity.		
Lesotho	Article 3 names the official languages as Sesotho and English. Article 16 guarantees freedom of association and Article 35 the right to participate in cultural activities with state being responsible to ensure opportunity for free participation. Article 45 states that the College of Chiefs may designate in accordance with customary law succession to the throne when King dies or throne is vacant/ designate a Regent when the holder is a minor/absent/not yet designated. Article 103		

	recognizes 22 offices of Principal Chief based on regions and in Article 104, the 22 principal chiefs make up the College of Chiefs.		
Liberia	Article 5 of the Constitution of 1986 states that the state shall preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted… and that the state shall also take steps to eliminate sectionalism and tribalism. Article 11 states that all are equal. Article 41 states that parliamentary language shall be English or any other language approved by Parliament. Article 78 allows political parties to be organized for any ethnic, social, cultural, occupational or religious objectives but membership must be open to all.		
Madagascar	Madagascar's Constitution of 2010 recognizes the national language as Malagasy and official languages as Malagasy and French. Article 14 recognizes rights of association and to form political		

	parties except for those that advocate totalitarianism, or segregation of ethnic, tribal or religious character. Article 26 recognizes individual's right to participate in the cultural life of the community and the state's responsibility to promote and protect national cultural patrimony. Article 105 establishes an Economic, Social and Cultural Council that may undertake studies and inquiries concerning economic, social and cultural questions.		
Malawi	Article 15 of the Malawi Constitution of 1994 amended through 2017 provides that any person/group of persons have access to courts to protect their rights. Article 20 provides for equality for all and non-discrimination based on language, race, ethnicity etc. Article 26 provides that every person has the right to use the language and to participate in the cultural life of their choice. Article 30 provides that all persons and peoples have a right		

	to development and Article 32 recognizes freedom of association.		
Mauritania	Preamble of the Mauranian Constitution of 1991 as amended through 2012 recognizes the cultural diversity of the Mauritanian peole and their right to be different. Article 1 prohibits particularist propaganda of racial or ethnic character. Article 5 recognizes Islam as the people's and state religion. Article 6 (and the Preamble) mentions national languages - Arabic (also the official language), Poular, Soninke and Wolof. Article 10 recognizes freedo of association and freedom to adhere to any political or syndical organization of choice. Article 94 establishes a High Islamic Council by the President as an advisory council and Article 95 establishes the Economic and Social Council which is also advisory concerning economic and social issues.		
Mauritius	Mauritiu's Constitution of 1968 with Amendments through 2016 in article 13 recognizes freedom of		

	assembly and association with some restrictions allowable for public order, morality, health etc. Article 49 recognizes official language of the Assembly as English but any member my address it in French. Article 75A establishes the Rodrigues Regional Assembly. The National Assembly consists of 70 members, 62 directly elected for five-year terms in multi-member constituencies and 8 additional members, known as "best losers", appointed by the Electoral Supervisory Commission to ensure that ethnic and religious minorities are equitably represented. Under section 3 of the First Schedule to the Constitution, every candidate for appointment to the 8 seats belongs to a community - Hindu, Muslim, Sino-Mauritian or General Population. The candidate self-identifies but if there are disputes the Supreme Court ultimately decides.		
Mozambique	The Preamble to Mozambique's Constitution of 2004 as amended through 2007 and article 3 recognizes that the Constitution is based on pluralism of expression. Article 9 states that the state shall	Article 4 recognizes the different normative and	

	promote the development of national languages and increasing use as they convey Mozambican identity. Official language is Portuguese. Article 115 places the onus on the state to promote the development of national culture and identity and guarantee free expression of the traditions and values of Mozambican society and dissemination of Mozambican culture. Under article 118, the state shall recognize and esteem traditional authority that is legitimate according to the people and to customary law and the state shall define the relationship between traditional authority and other institutions. Article 45 spells out individual duties to the community (i.e. Mozambican community). Article 46 spells out a citizen's duties to the state including defence. Article 52 recognizes freedom of association and in article 74 parties are the expression of political pluralism.	dispute resolution systems in Mozambique.	
Namibia	Namibia's Constitution 1990 with Amendments through 2014 states in article 3 that the official language of Namibia shall be English. Other		

	languages are allowed as a medium of instruction in private schools or schools financed or subsidized by the state. Legislation can also provide for use of other languages for legislative, admin and judicial purposes, where the languages are spoken. Article 10 provides for equality. Article 19 states that every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this constitution. Article 21(e) provides for freedom of association. Under article 66, both the customary law and the common law of Namibia in force of on the date of Independence shall remain valid to the effect to which such customary or common law does not conflict with the Constitution. Subject to the Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament and the application thereof may be confined to particular parts of Namibia or to particular periods.		

Niger	The preamble to Niger's Constitution of 2010 with amendments thru 2017 provides that the people are concerned to safeguard their cultural identity and oppose regionalism, ethnocentrism, etc. Article 4 specifies that sovereignty belongs to the People and no community, party etc., may arrogate its exercise. Article 5 states that all communities may use their languages which are national languages and which the State should promote and develop, including in Article 43 translating the constitution into national languages. French is the official language. Article 9 allows for freedom of association including of political parties but parties should not be ethnic based or regional.		
Nigeria	Article 40 of Nigeria's Constitution of 1999 with Amendments thru 2011 recognizes freedom of association, including forming or belonging to any political party. Article 222 requires that political parties be open to all Nigerians. Names of political	Article 260 et seq establishes the Sharia Court of Appeal of the Federal Capital Territory, Abuja that consists of a	

	parties, symbol or logo must not contain any ethnic or religious or regional connotation.	Grand Kadi and other Kadis as may be prescribed by the National Assembly. It has appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law. Article 275 et seq establishes Sharia Court of Appeal of a State that consists of a Grand Kadi and other Kadis as prescribed by the	

		Assembly. It has appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal law. Article 265 et seq establishes the Customary Court of Appeal of the Federal Territory, Abuja with a President and Judges. It has appellate and supervisory jurisdiction in civil proceedings involving	

		questions of customary law. Article 280 et seq establishes Customary Court of Appeal of a State with a President and Judges as prescribed by the House of Assembly. It has appellate and supervisory jurisdiction in civil proceedings involving questions of customary law.	
Rwanda		Rwanda's Constitution	

		recognizes traditional dispute resolution mechanisms and provides for the enactment of laws to establish different mechanisms for home-grown solutions based on Rwanda's culture and for organic laws that may establish specialised Courts. Rwanda's legislature adopted Organic	

		Law 40/2000 establishing the Gacaca Courts. The Organic Law No. 31/2006 has also been adopted by Rwanda's legislature to specify the jurisdiction, functioning and competence of Abunzi Committees.	
Sao Tome and Principe	Sao Tome and Principe's Constitution of 1975 with amendments thru 2003 aims to forge a national identity and allows for freedom of association.		
Senegal	The Preamble to Senegal's Constitution of 2001 with amendments thru 2016 recognizes the people's		Article 1 recognizes any

	attachment to their fundamental cultural values and respect for cultures of all components of the Nation and also equality for all and non-discrimination. Article 1 states the official language is French and national languages are Diola, Malinke, Pular, Serere, Soninke, Wolof and any other national languages which shall be codified. Article 4 forbids race/ethnic/region/language based political parties. Article 5 forbids race/ethnic/religion/region based discrimination. Article 8 and 1 recognize freedom of association subject to public order limitations. Article 66-1 establishes the High Council of the Territorial Collectivities as a consultative body and Article 87-1 establishes the Economic, Social and Environmental Council, also a consultative body.		other national language which shall be codified
Seychelles	Chapter I of the Seychelles Constitution of 1993 with amendments thru 2017 states that the national languages are Creole, English and French but leaves room for others subject to organic law. Article 23		

	recognizes freedom of association subject to public order, morality, health and safety limitations.		
Sierra Leone	Article 6 and 13 of Sierra Leone's Constitution of 1991, reinstated in 1996 and amended thru 2013 puts the onus on the state to promote national integration and unity and discourage discrimination and also to promote culture such as music, art, dance, etc. Article 27 forbids discrimination based on race, tribe etc., though this does not apply to a law which makes provision for the application in the case of members of a particular race/tribe or customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons. Article 35 forbids registration of political parties with membership/name/symbol/colour/motto/serving interests or welfare of a particular tribe/ethnic/religious group. Article 72 recognizes the office of paramount chief as established by customary law and usage and shields it from laws though the paramount chief can be removed by the		

	President after a judicial process. Article 90 provides that the business of parliament is conducted in English.		
Somalia	Article 2 of Somalia's Constitution of 2012 states that Islam is the state religion and all laws must be Sharia'h compliant. Article 5 names the official language as Somali (Maay and Maxaa-tiri) and the second language is Arabic. Article 16 provides for freedom of association. Article 31 makes the state responsible for promoting positive traditions and cultural practices of the Somali people, whilst striving to eliminate from the community customs and emerging practices which negatively impact the unity, civilization and well-being of society; collecting, protecting and preserving the country's historic objects and sites, whilst developing the know-how and technology that shall enable that and promoting the cultural practices and local dialects of minorities.		

South Sudan	Article 1 of South Sudan's Constitution of 2011 with amendments thru 2013 describes it as a multi-ethnic, multi-cultural, multi-lingal, multi-religious and multi-racial entity where such diversities peacefully coexist. Article 5 names customs and traditions of the people as a source of legislation in South Sudan. Article 6 provides that all indigenoius languages are national languages and shall be respected, developed and promoted with English as the official working language. Article 25 provides for freedom of association but no association shall function as a political party at the national or state level unless it has open membership to all. Article 33 provides for the right of ethnic and cultural communities to freely enjoy and develop their particular cultures and their members to practice their beliefs, use their language, observe their religions and raise their children within the context of their respective cultures and customs in accordance with the Constitution. Article 36 makes government responsible for inculcating tolerance among cultures, protecting culture. Article	Article 167 provides that Courts shall apply customary law subject to the Constitution.	

	167 recognizes the institution, status and role of Traditional Authority according to customary law and their functions in accordance with the constitution and subject to enabling legislation.		
Eswatini	The preamble to Eswatini's Constitution of 2005 recognizes the necessity of blending the good institutions of raditional law and custom with those of an open and democratic society. Under article 3, the official languages are siSwati and English. Traditional institutions tied to the monarchy and succession to the Throne, royal oaths, etc., are governed by Swazi law and custom. Article 227 lists the traditional institutions as iNgwenyama (traditional head of state), iNdlovukazi (queen mother), Ligunga, Liqoqo, Subaya, Tikhulu chiefs, etc. Article 251 establishes the council of chiefs drawn from 4 regions of the Kingdom and appointed by iNgwenyama on a rotational basis whose function is to advise the King on customary issues and chieftaincy matters. Article 252 recognizes Swazi law and custom as part of the law	Article 115 mentions Swazi (customary) courts or chief's courts.	

	of Swaziland and authorizes Parliament to provide for proof and pleading of the rule of custom, regulate its recognition, resolution of conflicts of custom, etc. Article 115 desribes matters regulated by law and custom whose bills have to go to the senate, for example, affecting status of the monarchy, designation , recognition of chief or other traditional authority, the organization, powers or administration of customary courts, law and custom or their ascertainment, cultural activity like the reed dance, etc. Under article 20, all are equal before the law and discrimination on the basis of ethnicity or tribe, etc., is prohibited. Article 25 protects freedom of assembly except for public order restrictions.		
Togo	Article 2 of Togo's Constitution of 1992 with amendments thru 2007 provides for equality of all before the law. Article 3 recognizes French as the official language. Article 7 forbids political parties based on ethnicity, regions or religion. Article 30 recognizes freedom of association. Article 143 recognizes the traditional chiefdoms, guardina of		

	use and customs. The designation and the enthronment of the traditional chiefs obeys the use and customs of locality.		
Zambia	The Preamble to Zambia's Constitution of 1991 with Amendments thru 2016 recognizes and upholds the multi-ethnic, multi-racial, multi-religious and multi-cultural character of Zambia. Under Article 7, the laws of Zambia consist of … Zambian customary law which is consistent with this Constitution. Article 21 protects freedom of assembly and association provided laws can be passed for public order. Article 23 states that there is no discrimination except laws for the application in the case of members of a particuar race or tribe, of cutomary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons. Article 60(3) prohibits political parties founded on ethnic, tribal, etc., basis. Article 165 guarantees the instituton of chieftaincy and traditional institutions and provides that they shall exist in accordance with the culture, customs		House of Chiefs in article 169 also makes proposals on areas in customary law that require codification.

	and traditions of the people to whom they apply. Parliament forbidden from making las which allow a person/authority to recognize/withdraw recognitionof chiefs or laws which derogate from the honor and dignity of chieftaincy. Article 169 establishes the House of chiefs consisting of 5 chiefs from each province, elected by chiefs of a province. The House of Chiefs considers and discusses bills relating to custom or tradition referred by the President, matters relating to customary law and practice, welfare of communities in a local authority, advises the govt on traditional and customary matters, etc. Under article 258, official language is English but other languages may be used for education purposes and the state has the responsibility to promote and protect diversity of languages.		
Zimbabwe	Section 6 of Zimbabwe's Constitution of 2013 with amendments through 2017 officially recognizes Chewa, Chiabarwe, English, Kalangu, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, Sotho,	Article 282(e) gives traditional leaders the role of resolving	

	Tswana, Venda and Xhosa as official languages together with sign language., Others may be added by Parliament and state to promote and advance use of all langauges. Article 16 makes it state responsibility to promote and preserve culture and article 33 indigenous knowledge systems. Article 56 provides equality for all and non discrimination based on ethnic, social origin, language, custom, culture etc. Article 63 creates the right to use language of choie and participate in culture life of choice. Article 58 provides for freedom of assembly and association. Article 67 provides for political rights. Article 280 recognizes traditional leaders under customary law to perform cultural, customary and traditional functions. Article 281 traditional leaders observe customs. Article 282 traditional leaders promote and uphold cultural values. Article 285 establishes a National Council of Chiefs which is also subject to an Act of Parliament. It promotes culture and traditions, hears complaints by traditional leaders, defines and enforces ethical	disputes in accordance with customary law	

	conduct and handles dispute settlement concerning traditional leaders.		

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