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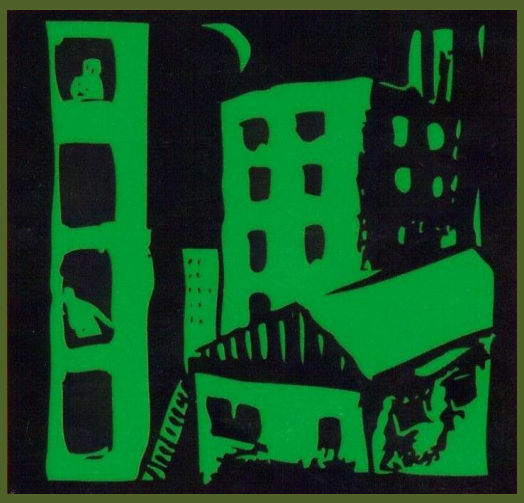

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Integrating the Traditional with the Contemporary in Dispute Resolution in Africa

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1 INTRODUCTION

Across Africa, traditional justice systems have survived in various forms, serving large populations located mainly in rural communities. A number of accounts of how these systems were used, neglected or reshaped have been written.[1] Importantly, the norms and practices, which make up the fabric of customary law in African societies, are

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[1] See generally, Elias TO *The nature of African customary law* (Manchester: Manchester University Press, 1956); Allott A *New essays in African law* (London: Butterworths 1970); Bennett TW & Peart NS *A sourcebook of African customary law for southern Africa* (Cape Town: Juta 1991).

neither homogenous nor static. For these and other reasons, changes in traditional perceptions of justice and in the way justice is administered have over time informed the articulation of concepts, such as, the restatement of customary law and the ascertainment of living customary law.[2]

Having restated or ascertained customary law, there remains the task of integrating traditional and contemporary dispute resolution methods on the continent, to promote better access to justice for litigants. As such, this article revisits earlier studies on traditional justice processes in Africa, following a trajectory that starts off with an overview of the colonial influence on the development of legal systems in Africa, which resulted in dual, and sometimes multiple, normative orders existing side by side. It moves on to show how the plural legal landscape is configured, using examples from a number of communities in Africa. The discourse highlights key features of this dualism, including the superior position accorded to the received legal system as well as the difficulty and expense of accessing the formal justice system. Similarities and differences between proceedings in traditional justice systems and formal courts are identified as a starting point for any process of integration.

An article such as this, which raises a spectrum of issues in an attempt to address the question - what features facilitate the integration of traditional justice systems with formal State systems - can only be generic at best. This is so because various factors at national and sub-national levels, such as, financing as well as the scoping and validation of customary law, affect the positioning, operation and influence of traditional justice systems. Specific illustrations mentioned, while not necessarily applicable across cultural or jurisdictional boundaries, are nonetheless indicative of the features of traditional justice systems and processes that have to be considered in any engagement with more formal justice systems.

2 COLONIAL INFLUENCE AND THE MUTATION OF LEGAL SYSTEMS IN AFRICA

Africa's remarkable diversity of people and cultures, was grouped by Western scholarship into three kinds of societies: the centralised and decentralised polities of the sub-Sahara, and the Islamic system of the Sahel.[3] The discussion of dispute resolution systems that follows in this section is focused on the first two divisions.

[2] Bennett TW *Customary law in South Africa* (Cape Town: Juta 2004) 44–9. Bennett TW "Official vs living customary law: dilemmas of description and recognition" in Claassens A & Cousins B *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act* (Cape Town: Juta 2008) 138. See Himonga C & Bosch C "The application of the African customary law under the Constitution of South Africa: problems solved or just beginning?" (2000) 117 *SALJ* 306 330–1. See also Pieterse M "It's a Black thing: upholding culture and customary law in a society founded on non-racialism" (2001) 17 *SAJHR* 364 377.

[3] See Allott (1970) 3 & 13.

In precolonial times, some parts of Africa offered centralised systems of government similar to the Western system, with kings and monarchs as the sole custodians of power.[4] The centralised communities of Africa were predominantly heterogeneous or multicultural, with a paramount chief or a king-in-council at the head, such as, the Yorubas in Nigeria, Zulus of South Africa, and the Bemba of Zambia.[5] To guard against abuse of power in centralised societies, even though ultimate power was vested in one individual or a group of individuals, the leaders appointed subordinates. These assistants had certain powers to maintain the practice of fairness by the head. In Yorubaland, for instance, if the king misused his office, his chiefs could ask him to go into exile or "open the calabash", a euphemism for suicide.[6] Moreover, if the chiefs acted against the interest of the people, the sovereign with the support of the other subordinates could remove such chief.[7] This provided for checks and balances in the system of governance and ensured that public opinion fed into the governance of the community.[8]

Decentralised precolonial political systems were premised on consensual decision making, with judgments derived through a process of compromise, and the most popular opinion upheld. As a result, amongst the Kikuyu in Kenya and the Oromon in Ethiopia for instance, decision making was quite slow.[9] These communities were usually homogeneous or of a similar culture, and led by a group of elderly men of the community who shared power, such as the Igbos of Eastern Nigeria.[10] The third type comprised theocratic systems practised in the northern territories of the Gold Coast (now Ghana), Northern Nigeria, most of the Gambia, some areas of Sierra Leone, the Sudan, Uganda, Zanzibar and some other communities of East Africa.[11] In non-centralised communities, the people were as critical to the administration of justice, as the members of the ruling family. The latter could not impose their will on the people, but had to adhere to the wishes of the masses.[12]

The judicial functions of the king, in the case of organised communities, or elders, in unorganised ones, were queried by European colonialists, as they considered the indigenous African laws contrary to theirs, and thus not sophisticated enough to be reckoned with.[13] The former Chief Justice of the Gold Coast and Nigeria, however, attested to the fact that the laws and customs in precolonial Africa were essential to the types of indigenous systems practised by the people.[14] Similarly, the Privy Council pronounced in the case of Re Southern Rhodesia that "there are indigenous peoples

[4] See Economic Commission for Africa (ECA) Development Policy and Management Division (DPMD) "Relevance of African traditional institutions of governance" (2004). Concept Paper discussed at the ECA's Fourth African Development Forum (ADF-IV) (2004) and at an Experts' Workshop in Addis Ababa (June 2006) 3-4.

[5] See Lloyd PC "The integration of the new economic classes into local government in western Nigeria" (1953) 52(209) *African Affairs* 327 329–30, cited in Elias (1956)18.

[6] See Elias (1956) 18.

[7] See Elias (1956) 18-19.

[8] See Elias (1956) 18–19.

[9] See ECA DPMD (2004).

[10] Elias (1956) 20.

[11] See Elias (1956) 11 & 13.

[12] See Elias (1956) 22–3.

[13] Elias (1956) 5.

[14] See Elias (1956) 34–5.

whose legal conceptions, though differently developed, are hardly less precise than our own …; they are no less enforceable than rights arising under English law".[15]

Fundamentally, Africans relied on the wisdom and judicial skills of their local leaders to resolve disputes.[16] Disputes were presented to members of the community, with the traditional leader as the head or a council of elders or other similar panel presiding.[17] The traditional leader asked questions, sought advice from the audience and then gave judgment to reconcile the disputants, after the parties to the dispute had given a detailed account of the conflict.[18] Masina describes the African notion of ubuntu in the justice system as a communal value as follows:

> Ubuntu at the philosophical level seeks to find a balance between self and other, the destructive and creative, good and bad. It moves away from the thinking of social relations in dualistic oppositions, that is, an either/or situation, good versus bad, black versus white, self versus other, in seeking to resolve conflict. The purpose of ubuntu is to work toward a situation that acknowledges a mutually beneficial condition. Its emphasis is on cooperation with one another for the common good as opposed to competition that could lead to grave instability within any community. It describes the feeling of the worth of the community and a shared fellowship of men and women.[19]

Mandova asserts that the concept of ubuntu is similar to that of unhu in Shona culture (an indigenous group in Zimbabwe). He contrasts unhu, which he describes as a communal idea, with the individualistic nature of European culture. He extends this discussion to include dispute resolution, which requires communal decision making, by the chief and his councillors or advisors – thus encouraging collective participation and a fair hearing.[20]

Roberts describes precolonial African societies as units.[21] The loose translation of a unit is a single item, which is a subdivision of a whole. Therefore, when a conflict arose between members of a unit, the entire community would become involved in

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[15] [1919] AC 211 233–4.

[16] See Cappelletti M & Garth B "Access to justice: the worldwide movement to make rights effective, a general report" in Cappelletti M & Garth B (eds) *Access to justice: a world survey* vol 1 (Milan: Giuffre Editore1978) 268 & 270:

"Justice was popular. The people could understand the machinery … and in many places participated directly in judicial proceedings. Justice was local and speedy … [T]he [regular] courts [on the other hand] required proof of facts that would have been well known without special proof to a traditional African tribunal … Justice was simple and flexible. There were no elaborate codes of procedure or evidence."

[17] Cappelletti v Garth (1978) 268 & 270.

[18] See Allott (1970) 6 & 21.

[19] Masina N "Xhosa Practices of ubuntu for South Africa" in Zartman IW (ed) *Traditional cures for modern conflicts: African conflict "medicine"* (London: Lynne Rienner Publishers 2000) 181.

[20] Mandova E "The Shona Proverb as an expression of unhu/Ubuntu" (2013) 2(1) *International Journal of Academic Research in Progressive Education and Development* 100–108. See also Sansom B "Traditional rulers and their realms" in Hammond-Tooke WD (ed) *The Bantu- speaking peoples of southern Africa* (London: Routledge & Kegan Paul 1974) 267. See also Mabovula NN "The erosion of African communal values: a reappraisal of the African ubuntu philosophy" (2011) 3(1) *Inkanyiso Journal of Human and Social* Sociology 40–41.

[21] See Roberts S *Order and dispute: an introduction tolLegal anthropology* (London: St Martin's 1979) 31.

resolving the dispute, the rationale being that a conflict between individuals would automatically affect the whole community.[22]

Predominantly, the dispute resolution process in African societies provided individuals with an opportunity to air their grievances, an element which connotes fairness. Justice in these indigenous processes was for the most part simple, understandable and flexible; and for those reasons, popular, speedy, inexpensive and accessible.[23] Dispute resolution mechanisms also enabled the disputants to express themselves fully, without complexity or formality, and yet assured them of a knowledgeable and just resolution that would maintain communal relations.[24] Nhlapo contrasts the Western concept of retribution in criminal cases, with the African concept of restorative justice.[25] He argues that traditional tribunals promote reconciliatory processes, in opposition to the technical rules in Western courts, designed for punishment – not social healing.[26] Tshehla, in his study in parts of the Limpopo province, confirms the importance of restored social relations in serious cases, affecting the family and community at large.[27]

With colonisation came the Western style justice system and its major fallout, namely, incompatibility with traditional justice processes, which were considered grossly inadequate.[28] Traditional systems of dispute resolution were perceived as vastly different from notions of what constituted a fair trial in the justice systems of the colonising countries. In criminal matters, for example, the interpretation of justice as a means of restoring peaceful relationships conflicted with the European concept of retributive justice.[29] Colonial authorities and business entities were naturally unwilling to submit personal or commercial affairs to indigenous systems that were foreign to them. Consequently, colonial administrators separated the jurisdiction of the courts based on race, with the result that while Europeans litigated in the formal courts, Africans used the local courts.[30] Traditional justice systems were thus relegated to the background, a development that was more pronounced in countries, such as, Tanzania

[22] See Cappelletti & Garth (1978) 271.

[23] Cappelletti & Garth (1978) 271.

[24] See Roberts (1979) 14.

[25] See Nhlapo T "The judicial function of traditional leaders: a contribution to restorative justice?" Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa Cape Town 14–17 March 2005 3, 6 and 17.

[26] Nhlapo (2005) 3, 6 & 17.

[27] See Tshehla B *Traditional justice in practice: a Limpopo case study* (2005) ISS Monograph Series No 115 20.

[28] A critical observer of the potentialities and limitations of legislation in the independent African States, David commented that "the regulation of internal relationships between members of a family or, in Africa, of a village or tribe is a matter of mores, not of law … [I]t is not the function of jurists operating in the courts". Cited in Keuning J *Conference on the integration of customary and modern legal systems in Africa* (London: Africana Pub Corp1971) 58.

[29] See Elias (1956) 112–16. See also Bohannan P *Justice and judgment among the Tiv* (Oxford: Oxford University Press 1957) 69. See Stevens J *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems* (London: Penal Reform International 2000) 4–9.

[30] Cappelletti & Garth (1978) 278.

and Mozambique.[31] The dual structure of dispute resolution, which features indigenous resolution processes alongside Western style courts, thus emerged.[32]

While the focus of the Western courts was mainly adjudication, the traditional based dispute resolution processes tended towards variations of arbitration, negotiation and mediation.[33] Not surprisingly, these differences presented challenges that African States have had to grapple with post-independence, as Roberts and Palmer describe:

> A broadly similar pattern of pluralist socio-legal ordering emerged with the spread of European economic power and political authority in the nineteenth and early twentieth centuries, resulting in many parts of Africa and Asia in the subordination of local society to colonial rule and its new forms of government, economic relations and systems of law. A common pattern was for the colonial state not only to monopolise criminal prosecutions but also to introduce 'Western-style' civil justice for more important and larger disputes, and in which colonial settlers, traders, missionaries and others might have interest. The focus here was on adjudication. For less significant civil disputes, and especially those involving the indigenous population and that raised issues of 'customary law' – itself a product of local social ordering and colonial ideology – the colonial state allowed issues to be dealt with by more traditional-based dispute resolution processes, which often emphasised negotiation and mediation.[34]

Today, most African States maintain dual or even multiple legal systems. However, the superior positioning of formal courts has made access to the justice system severely cumbersome and costly for litigants. This is compounded by the intricacies of professional legal representation and language that often place proceedings above the heads of ordinary litigants. In these circumstances, many people find themselves in a position where they are without recourse to the law, being outside the purview of traditional courts and yet unable to afford access to the formal courts.

3 NAVIGATING PLURAL LEGAL LANDSCAPES

The combination of received or imposed laws of foreign origin and diverse customary laws creates the fabric of pluralism within which contemporary African States have to function. Thus, the legal landscape in any given African country reflects an interaction between two or more sources or systems of law, the dominant ones being customary law, Islamic law, common law, civil law – specifically Roman-Dutch law in the cases of South Africa and Namibia – and international legal instruments. Nigeria, for instance,

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[31] See United Nations Development Programme (UNDP) "*Informal justice systems: charting a course for human rights-based engagement.* "A study of informal justice systems: access to justice and human rights" (2012) 55. Available at *http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf*. (accessed 1 July 2016).

[32] Cappelletti & Garth (1978) 272.

[33] Roberts S & Palmer M *Dispute processes: ADR and the primary forms of decision-making* (Cambridge: Cambridge University Press 2005) 15.

[34] See Roberts & Palmer (2005) 14–15.

has a legal system based on customary laws, Islamic law and the English common law.[35] Indigenous and foreign systems operate side-by-side within the same jurisdiction.[36] For example, justice within the Igbo ethnic group of Nigeria is based partly on the traditional system and partly on the imported English law system.[37] While the traditional Igbo system is based on precolonial African philosophies, the English justice system is based on English philosophies and principles of law and justice as introduced into the Nigerian legal system.[38] In Somalia, traditional structures developed and changed hand-in-hand with the socio-political structures established by the colonial rulers. Subsequently, attempts by the modernising independent Somali State to suppress and eradicate the traditional authority structures failed because the traditional social structures of the Somali clan system remained vital for the survival and protection of the cultural identity of the Somalis.[39]

However, although precolonial dispute resolution processes in indigenous African societies, generically described as customary law, are found across Africa, they do not constitute the core of the corpus juris of African legal systems. This position is reserved for the received laws, while customary law is accorded mere recognition.[40] For administrative convenience, colonial governments allowed Africans to be governed by their own laws and by their own leaders.[41] This resulted in a system of indirect rule in parts of Africa, including South Africa.[42] Traditional leaders were allowed to administer customary laws, provided that the laws were not repugnant to natural justice, equity and good conscience and were not in conflict with public policy or contrary to the stipulations of the Constitution or any other formal legislation.[43] Customs that were perceived as "barbaric" or "anachronistic" were condemned or banned.[44]

> [T]he formal court system almost certainly could not provide justice for Africans, not simply because it requires too much in the way of direct fees and costs, but also because it involves too much in the way of indirect costs – the time and energy demanded by litigation in an unfamiliar and perhaps intimidating atmosphere, and even more important, the negative impact a formal adversary proceeding must have on any relationship existing between the disputants.[45]

As a result of this oversight, formal courts in Africa today are only partially effective in urban and rural areas. There is much evidence of this situation, primarily because most rural

[35] Mwalimu C *The Nigerian legal system* (New York: Peter Lang 2005) 134.

[36] Okereafoezeke N *Law and justice in post-British Nigeria: conflicts and interactions between native and foreign systems of social control in Igbo* (Westport, Connecticut: Greenwood Press 2002) 11.

[37] Okereafoezeke (2002) 12.

[38] Okereafoezeke (2002) 12.

[39] Gundel J *Clans in Somalia* (Vienna: ACCORD 2006) 42– 43.

[40] See Keuning (1971) 88.

[41] Bennett (2004) 106–7.

[42] Bennett (2004) 106–7.

[43] See s 11A of the Black Administration Act 38 of 1927 of South Africa.

[44] Hinz MO "Legal pluralism in jurisprudential perspective" in Hinz MO & Patemann HK (eds) *The shade of new leaves: governance in traditional authority: a southern African perspective* (Munster: LIT Verlag 2006) 51.

[45] Cappelletti & Garth (1978) 306 (emphasis added).

litigants cannot afford the high cost of formal justice, are unable to travel long distances for court procedures, do not understand the foreign language of the courts, and value African customs above foreign legal rules, and so they frequently rely on informal forms of justice.[46]

Across sub-Saharan Africa, the hierarchy or chain of informal dispute resolution mechanisms appears similar even though details in one society may differ from those in another.[47] Thus, in postcolonial Africa, the formal State justice system exists alongside the informal or non-State systems, including traditional justice systems.[48] Informal justice systems are alternative dispute resolution mechanisms established by communities or non-governmental organisations, whereas traditional systems may be State or non-State institutions. Generally, non-State justice systems and traditional courts operate as informal justice mechanisms, largely applying flexible processes.[49] The distinction between the systems, however, is that non-State systems are community owned institutions outside the State apparatus, whereas formal traditional courts are supported by the State.[50] Another distinguishing factor is that the former typically apply living customary law, while the latter, until recently, tended towards official customary law.[51]

A number of features commend traditional justice systems as the dispute resolution forum of choice in many African communities. In addition to easy accessibility to disputants in rural communities, other features include

> [k]nowledge of the environment, the possibility to speak the local language, the easy access to the adjudicating body, the expectation to achieve solutions that guarantee the restoration of local peace in accordance with local customs; these are the advantages people attach to their own system of law: they want to maintain their own systems of laws because they serve them better than the law of the state.[52]

Other elements which make traditional justice systems the preferred option include their non-bureaucratic structure, non-dependence on professional legal services, reliance on the services of lay people and common sense thinking, with emphasis on substantive issues rather than procedural technicalities.[53] These are contrasted with the ideals of formal justice systems, which include independent and technically correct decisions, expert professional skill, impartial judges, fair procedures and the observance of due process.[54] Roberts and Palmer suggest that "the ideals of formal justice may well

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[46] Stevens (2000) 6.

[47] These systems are all directed at the reconciliation of the parties to a dispute. See accounts on the Barotse, Bhaca, Tiv and Shona in Bennett (2004) 161–8. See also Oomen B *Chiefs in South Africa: law, power and culture in the post-apartheid era* (Oxford: James Currey Publishers 2005) 21, 24 & 64.

[48] Stapleton A "Introduction and Overview of Legal Aid in Africa" in *Access to justice in Africa and beyond: making the rule of law a reality* (Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law 2007) 4.

[49] Stevens (2000) 30.

[50] Moult K *Justice served? Exploring alternative mechanisms to address violence against women* (South Africa: UNICEF 2004) 15.

[51] See Bennett (2004) 48–9. See also Stevens (2000) 4.

[52] Hinz (2006) 39.

[53] Roberts & Palmer (2005) 10.

[54] Roberts & Palmer (2005) 10–11.

come to act as a barrier to the provision of substantive justice" to disputants who are members of traditional communities.[55] These dynamics of traditional court processes, which often make them the preferred alternative channel for dispute resolution in rural communities, are discussed in some detail in the next section. It is of course important to observe at this point, that it is not in all societies and not in all matters that a traditional justice system may be preferred. Consequently, the recognition of individual human rights gives an individual the opportunity of seeking recourse to justice in a non-traditional forum as a matter of choice.

4 THE DYNAMICS OF TRADITIONAL JUSTICE PROCESSES

Even though Africans have the right to exercise their choice of a dispute resolutiton forum, a number of factors account for the appeal of traditional courts to members of rural communities, some of which are highlighted in this section. First, while in formal courts, the justice of a case is anchored in the observance of formal procedures conducted openly except in certain instances, traditional courts are not rigidly bound by procedural rules in adjudicating cases. For example, a Malawi country study featured in the UNDP Report on informal justice systems found that

> women often cited the confidentiality of the process as one of the primary reasons for preferring the community-based mediation alternative, as it allowed them to raise issues, for example, domestic violence, which they would not be able to bring up as part of the dispute in other forums.[56]

Secondly, the accessibility of traditional forums is fundamental to the first step in dispute resolution, that is, the reporting of a dispute, and so crucially informs disputants' exercise of choice. The administration of justice in rural parts of South Africa, for instance, has been predominantly carried out in traditional courts because they are more accessible to rural people.[57] Thirdly, processes before traditional courts are perceived by litigants as quicker, cheaper, and more compatible with their indigenous cultural ideologies.[58] Therefore, in rural areas, where about 40 per cent of South Africans live, informal tribunals are found to offer more effective means of conflict resolution.[59]

In spite of the wide appeal of traditional tribunals and the significant role they play in enforcing social order and exercising authority over a considerable segment of the population in accordance with customary law tenets, they are criticised for not adhering to international fair trial standards.[60] Three grounds of objection in particular are that they do not apply due process in civil matters; they do not uphold procedural

[55] Roberts & Palmer (2005) 10–11.

[56] See UNDP (2012) 55.

[57] South African Law Commission (SALC) Project 90 Customary Law "Report on *Traditional courts and the judicial function of traditional leaders* (2003) 1.

[58] SALC (2003) 1.

[59] Bennett (2004) 111.

[60] See Wojkowska E *Doing justice: how informal justice systems can contribute* (Oslo: UNDP 2006) 20–4.

guarantees required in criminal cases, and they discriminate against women in their proceedings.[61]

With regard to the first two criticisms, namely, not following due process and not upholding procedural guarantees, it is important to understand that traditional leaders place more emphasis on how disputing parties reach a decision than on how proceedings are conducted.[62] Hence, while the minimum guarantees for fairness in the South African Constitution include the rights to an impartial and independent tribunal, and legal representation in criminal cases,[63] traditional tribunals apply the natural justice principles of *audi alterem partem* and *nemo judex in causa sua* (hear the other side, and no one shall be a judge in his or her own cause) and not necessarily 'equality before the law' as provided for in international law.[64]

Furthermore, in African customary law, the principles of natural justice lie at the heart of the concept of fairness as opposed to the constitutional requirements of separation of powers and the rule of law, as articulated in Western jurisprudence.[65] Thus, fairness in the traditional context sometimes differs from its connotations in the received law, although in both cases the concept seems to be aimed at upholding human dignity and restoring relationships.[66] Seen in this way, it seems evident that justice in precolonial times recognised concepts of due process and judicial accountability to the community in some form. Importantly, the system ensured that traditional leaders did not act against the wishes of the people, and could be removed if they did.[67] These elements of democracy and judicial accountability in traditional justice systems, at the very least indicate that notions of human rights in African societies were not arbitrary, and that thorough dispute resolution processes were in place in many communities.[68]

Bennett suggests that procedures in African tribunals in postcolonial African communities probably guarantee individuals a fairer hearing than those in Western

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[61] Bennett T "Access to justice and human rights in the traditional courts of sub-Saharan Africa" in Bennett T et al (eds) *African perspectives on tradition and justice* (Antwerp: Intersentia 2012) 21–9. Claassens A & Ngubane S "Women, land and power: the impact of the Communal Land Rights Act" in Claassens A & Cousins B *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act* (Cape Town: Juta 2008) 156. See also Oomen B "Walking in the middle of the road: people's perspectives on the legitimacy of traditional leadership in Sekhukhune, South Africa" in Hinz MO & Gatter FT (eds) *Global responsibility – local agenda: the legitimacy of modern self-determination and African traditional authority* (Munster: LIT Verlag 2006) 127. See Weeks S "Traditional Courts Bill: access to justice or gender trap?" in Nhlapo T, Arogundade E & Garuba H (eds) *African culture, human rights and modern constitutions* (Cape Town: University of Cape Town & UCT Centre for African Studies Celebrating Africa Series 2013) 25. See also Curran E & Bonthuys E "Customary law and domestic violence in rural South African communities" (2005) 21 *SAJHR* 607 632–3.

[62] Bennett TW *Human rights and African customary law under the South African Constitution* (Cape Town: Juta 1995) 4.

[63] See ss 34 and 35(3) of the 1996 South African Constitution.

[64] See clauses 9(2)(b)(i) and (ii) Traditional Courts Bill 2012. See also Bennett (2004) 168–9.

[65] Bennett (2012) 1–2.

[66] See Murithi T "Practical peacemaking wisdom from Africa: reflections on ubuntu" (2006) 1(4) *The Journal of Pan African* Studies 30–32.

[67] Elias (1956) 238–56.

[68] Gluckman M "Natural justice in Africa" (1964) 9 *Natural LF* 25. See also Asante SKB "Nation building and human rights in emergent African nations" (1969) 2 *Cornell Int LJ* 72 73–4.

courts, because disputes are heard expeditiously, and may be extensively debated by members of the community, who thereby arrive at a well-considered decision.[69] In other words, the traditional justice system seeks a consensual outcome, operating on the principles of "community participation, consultation, consensus and an acceptable level of transparency through the village council or open, consultative meetings".[70] With presiding officers at the helm of affairs and members of the community arriving at decisions in a collective manner, the process is perceived as participatory, focused on the restoration of amicable relationships within the community and the reformation of offenders.[71] In summary, therefore, traditional tribunals favour the contextual application of rules, as agreed upon by the majority of the members of the community, to secure a substantively fair decision for the parties as opposed to a procedurally accurate outcome. The question of who decides the rules applied in traditional tribunals is a pertinent one and although not exactly the focus of this article, it needs to be mentioned that there might be dissenting voices which are not heard with regard to what is presented as customary rules.[72]

5 DISTINCTIONS BETWEEN INDIGENOUS AFRICAN AND WESTERN SYSTEMS

Given that different communities have varying normative frameworks, the dangers of conducting cross-cultural studies premised on Western legal theory have long been highlighted.[73] Roberts emphasises that most centralised societies, such as those in which typical Western courts operate, were quite different from non-centralised or acephalous societies, observing that in these small-scale 'face-to-face' communities, procedures were subject to adaptation.[74] This observation echoes Holleman, who describes the social context in which procedure is made subordinate to justice as follows:

> In the determination of a lawsuit, law is not taken as the only determining factor. The completely social setting and relationship of parties and their position in the community are taken into consideration; and in the interest of justice, 'legal rules' are sometimes thrown overboard.[75]

[69] See Bennett (2004) 169. See also Bennett (2004) 4. Some other scholars have argued that, in their original form, traditional dispute resolution mechanisms were compatible with human rights norms. See Holomisa NSP *According to tradition: a cultural perspective on current affairs* (Somerset West: Essential Books 2009) 148, where Holomisa states that "African culture does not sanction or condone these acts against women and children".

[70] See Holomisa (2009) 136. See also Bennett (2004) 4.

[71] Holomisa (2009) 136.

[72] Mamdani M *Citizen and subject: contemporary Africa and the legacy of late colonialism* (Princeton: Princeton University Press 1996) 118.

[73] See Roberts (1979) 13.

[74] Roberts (1979) 18.

[75] See Holleman J *Issues in African law* (The Hague: Mouton 1974) 17. See also Allott A & Woodman G (eds) *People's law and state law: the Bellagio Papers* (Dordrecht: Foris 1985) 2.

Furthermore, while centralised societies resolved conflicts by applying specific rules to particular facts to produce win-or-lose results, non-centralised communities worked with compromises.[76] A rule based system had several disadvantages, including a lack of flexibility and judicial discretion where the rule did not match the facts. In such a case, it imposed decisions and allowed little concern for disputants' opinions.[77] Furthermore, a rule based system applied coercive means of enforcement, such as police arrest, and maintained impartial adjudication with no regard for the parties' future relationships.[78] On the other hand, traditional African justice systems were concerned with resolving disputes with the aim of bringing about unity and harmony within the community, which also tended to promote a sense of fairness, because these values were in keeping with the accountability of the traditional leader to the people. Unfair judgments would lead to disunity and popular discontent, while a popular decision was generally considered as fair by the community.[79] The relatively small sizes of traditional communities meant that disputes among members inevitably affected the broader public and, as such, the process oriented techniques of small-scale communities involved mediatory procedures, which allowed parties to find a solution to their own problems.[80] Thus, traditional justice processes were conducted bearing in mind, as Roberts observes, the following:

> Those concerned will continue at close quarters, participating in the same complex of relationships as existed before the dispute occurred. It will be rare in such a context for trouble to arise out of a single-stranded relationship of the kind that is possible in our society, where disputants may have no further contact with each other after the immediate issues have been resolved. Existing loyalties and hostilities will be tested in the context of each successive dispute, each one will be closely related to those that precede and follow it, and through them the relationships of people within the community will gradually change over time.[81]

Considering the variations between English and African law, Elias maintains that criminal law in African communities was centred on achieving social equilibrium by focusing on restitution, while European criminal law operated on the basis of punishment and retribution against the individual offender.[82] Thus, in English law, a crime was any act which injured society and for which punishment served as a deterrent to others and a corrective measure for the wrongdoer.[83] African justice systems, on the other hand, are seen as more rehabilitative for the community as a whole, while Western laws promote individual rights above communal ones.[84] Both deterrence and rehabilitation are important components of an

[76] Bennett (2004) 163. Stevens (2000) 28.

[77] Roberts (1979) 20–3.

[78] Roberts (1979) 20–3.

[79] Steiner HJ, Alston P & Goodman R *International human rights in context: law, politics, morals: texts and materials* 3rd ed (Oxford: Oxford University Press 2008) 357. See Nhlapo T (2005) 3, 6 & 17. See also Schoeman MI "A Philosophical view of social transformation through restorative justice teachings: a case study of traditional leaders in Ixopo, South Africa" (2012) 13(2) *Phronimon* 23.

[80] Roberts (1979) 14, 20–3.

[81] Roberts (1979) 51.

[82] Elias (1956) 110.

[83] See Elias (1956) 112–16.

[84] Elias (1956) 130.

effective criminal justice system and key elements of the integration discourse, recognised to varying degrees in African and Western ideals of justice.

Elias suggests that African law had its punitive and compensatory sides and that English law was geared towards restoring social order, with criminal law being punitive and civil law compensatory.[85] For example, in the mid-19th century, Ugandans distinguished between murder and manslaughter by imposing death as a just punishment for the former and awarding compensation for the latter.[86] There was a similar differentiation among the Yorubas of southern Nigeria.[87] Elias, however, concedes that what was categorised as intent, may have been different in African and English law, thus not ruling out the possibility that African legal systems were fundamentally distinguishable from Western ones.

Furthermore, while in some communities there was no distinction between civil and criminal matters, in others there was a fundamental distinction between the two.[88] Among the AmaXhosa, for example, criminal matters included political offences, sorcery and crimes against the persons of tribesmen.[89] The chiefs brought charges in respect of offences of a criminal nature, while the plaintiffs initiated civil cases. In criminal cases the chiefs claimed fines awarded, but in civil cases the plaintiffs were the beneficiaries of any awards made.[90]

Writing on customary law in post-apartheid South Africa, Himonga and Nhlapo examine the concept of a weak legal pluralism which promotes equal co-existence of customary law and common law. [91] They provide a very important discussion on the role of traditional leaders in the country and highlight the accessibility of traditional courts to rural litigants. In particular, they emphasise the equality challenges often encountered by women who use traditional courts in the country.[92] Bennett also observes that many human rights activists object to the customary justice system on three grounds, namely: it does not apply due process in civil matters; it does not uphold the procedural guarantees required in criminal cases; and it discriminates against women.[93]

In summing up this segment, it is important to understand that while there are key elements of traditional African justice systems which distinguish them from Western systems, wide-ranging variations exist between multiple configurations of traditional justice systems

[85] See Elias (1956) 130–1.

[86] Elias (1956) 136.

[87] Elias (1956) 136. See also Rattray RS *Ashanti law and constitution* (Oxford: The Clarendon Press 1969) 296–303.

[88] See Talbot PA *The peoples of southern Nigeria: a sketch of their history, ethnology and languages, with an abstract of the 1921 census* (London: Oxford University Press H. Milford 1926) 625, cited in Elias (1956) 112–13.

[89] See Elias (1956) 112–3. See also Masina (2000).

[90] Elias (1956) 112-3.

[91] Nhlapo T & Himonga (eds) *African customary law in South Africa: post-apartheid and living law perspectives* (Cape Town: Oxford University Press 2014) chap 3.

[92] Nhlapo & Himonga (2014) chap 14.

[93] Bennett (2012) 21–29.

across African communities themselves and the dynamism of customary law only adds to this mix.

6 INSIGHTS FROM SPECIFIC CUSTOMARY LAW SYSTEMS

As earlier observed, the approach to conflict resolution in African communities as against Western forms of dispute resolution was less concerned with local notions of right or wrong as it was with arriving at a consensus on the dispute. The traditional leader worked with the elders of the court and members of the community to arrive at a judgment aimed at satisfying the parties to the dispute. If parties were unhappy with the judgment, it was the duty of the court to debate the issues until a compromise was achieved.[94] Thus public interest and participation were critical to the acceptance of an outcome and public hearings secured the public interest.[95]

In his study of various communities in southern Africa, Holleman describes how traditional leaders allowed the active participation of community members, beyond those who were strictly witnesses to a case, acting only as moderators of their views and opinions.[96] Dispute resolution was community driven, reflected in jural relationships, such as land ownership, which was vested not in individuals but in the extended family.[97] A normal hearing among the Shona took place out of doors, and would be presided over by the traditional leader supported by assessors, who knew the law and advised the court on judicial matters, as well as councillors and officers of the court, who were in charge of administrative duties.[98] Prospective litigants were required to pay a fee to the court as an indication that they were willing to submit to its jurisdiction. This sum was usually reclaimed by the successful party to a suit, but the tribunal retained that of the unsuccessful party.[99] This is comparable to the Western-derived mainstream court system where court fees are paid for any case instituted or for any service requested, and presents a clear point of integration.

Among the Vaheras, a Shona speaking ethnic group, the hearing commenced with the complainant stating his or her case in accordance with the Vahera saying that "the one who has eaten the most is the one that first opens the door". Thereafter, the defendant would do the same, for as long as it took to relay all the grievances and defences.[100] This was followed by the questioning of witnesses and an open discussion of the facts of the case in a process described as "throwing the case to the dogs to chew

[94] Schapera I *A handbook of Tswana law and custom* (London: Oxford University Press 1938, reissued 1970) 289–90. Myburgh AC & Prinsloo MW *Indigenous public law in KwaNdebele* (Pretoria: JL van Schaik 1985) 130.

[95] See Holleman (1974) 3. Comaroff JL & Roberts S "Chiefly decision and the devolution of property in a Tswana chiefdom" (1975) in Comaroff JL & Roberts S *Rules and processes: the cultural logic of dispute in an African context* (Chicago: University of Chicago Press 1981) 25–26.

[96] Holleman (1974) 10.

[97] Holleman (1974) 5-6.

[98] Holleman (1974) 10.

[99] Holleman (1974) 10.

[100] Holleman (1974) 5–6 & 18–19.

on". The hearing was concluded by a restatement of the merits of the case and the pronouncement of judgment.

Once the dispute was settled, the offender was expected to provide a goat or fowl for the community members to share. This encouraged reconciliation of the parties, because, having eaten together, they were considered to have buried the hatchet. Finally, the tribunal attempted to reconcile parties by sharing food or "a piece of each other's snuff". This proved that they were no longer feuding and that they were willing to repair their previous relationship(s). The question was not how far Shona law conformed to or fell short of Western legal standards, requirements and classifications, but what it really was, and how it fulfilled its essential function in that society.[101] Although the restoration of the relationship between parties is not the aim of Western court processes, the process of presentation of facts through the testimony of parties and the questioning of witnesses in the Shona culture resonate with the Western concept of a fair hearing and can advance the integration mission.

Gluckman, in his research on the Barotse of Zambia, uses the term "multiplex relationships" to describe "the intricate network of social ties that bind together kin and neighbours". [102] The connection between families and the community led to complicated disputes, including longstanding feuds that were better resolved in private, rather than in public.[103] In this context, the aims of dispute resolution varied depending on factors, such as, the type of case in question, the parties' relationship and the nature of the dispute.[104] In these societies the emphasis was on reconciliation, while in societies with "simplex" relationships (typified by Western countries) the outcomes were win-or-lose judgments.[105] Gluckman therefore concludes:

> Among the characteristics frequently alleged as typifying traditional African procedures are: simplicity and lack of formality; reliance on 'irrational' modes of proof and decision; the fact that the parties are normally involved in complex or multiplex relations outside the court-forum, relations which existed before and continue after the crucial appearance in court, and which largely determine the form that a judicial hearing takes; a common-sense as opposed to legalistic approach to problem-solving; the underlying desire to promote reconciliation of the contesting parties, rather than merely to rule on the overt dispute which they have brought to court; and the role of religious and ritual beliefs and practices in determining legal responsibility.[106]

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[101] See Holleman (1974) 10–15.

[102] See Gluckman M *Judicial process among the Barotse of Northern Rhodesia* (Manchester: Manchester University Press 1967) 14. Also Bennett (2004) 164–5.

[103] Gluckman (1967) 14. Also Bennett (2004) 164-5.

[104] Comaroff JL & Roberts SA "The invocation of norms in dispute settlement: the Tswana case" in Hamnett I (ed) *Social anthropology and law* (London: Academic Press 1977) 78 & 83–109.

[105] The term "multiplex societies" describes communities where parties have multiple relationships, and their political relationships affect the economic and domestic ones. Simplex societies are primarily single-interest oriented with no real connection between legal and social relationships. Hence, multiplex societies require reconciliatory systems of laws, but simplex societies do not. See Bennett (2004) 164.

[106] Gluckman M *Ideas and procedures in African customary law* (London: Oxford University Press 1969) 22.

This observation highlights various features which may change over time, but which nonetheless provide indicators for any integration effort between specific traditional legal systems and formal State systems. It would be useful to research how these features may have mutated, whether they have deepened or lessened, and take the findings into consideration in the overall process of integration.

Among the Tiv of Nigeria, dispute settlement usually required the participation of a third party, whose primary role would typically be that of an arbiter or mediator.[107] The primary aim of the Tiv justice system was the amicable resolution of disputes and the restoration of harmonious relationships within a community. In order for a decision to be legitimate, therefore, the principles applied had to be accepted by the community and be in accordance with its norms.[108] This system presents hallmarks of contemporary alternative dispute resolution processes, reflecting as it does, the focus on securing outcomes acceptable to all parties, with the resultant possibility of future interaction between parties. The discussion of specific traditional justice processes is further illustrated with a focus on a Limpopo community in the next segment.

7 TRADITIONAL DISPUTE RESOLUTION METHODS IN LIMPOPO

In these communities we will see how customary law is restated, ascertained and integrated with Western procedures. While in most cases, male elders restate and ascertain the law, there is a Western style process of evidence gathering and cross-examination involved before a decision is pronounced. Furthermore, traditional justice systems are entwined with the Western, in that appeals go from them to the magistrates' courts, or in some cases commence at the magistrates' courts. This shows how traditional and formal justice systems have become somewhat integrated in some parts of South Africa. The fluid movement between the traditional and formal by disputants, as well as the choice of law, ensures that litigants have easier access to justice.

This segment draws in detail on Van der Waal's research in Limpopo Province.[109] Dispute resolution in Limpopo is mostly carried out by adult males.[110] For example, in the Nkuna area, near Tzaneen, the language of the customary courts is Tsonga and matters commence with the headmen, while appeals go to the "cluster court" of headmen [tindhuna]. From the cluster court, a case could be taken to the chief and from there, of course, to a magistrate's court. Alternatively, a case may commence in a magistrate's court. In that area, traditional tribunals administer only less serious offences, such as, matters of verbal abuse, desertion, unrepaid loans, minor theft cases, issues of neglect, and land matters. Cases of

[107] Most of the disputes were resolved within the community, but where this proved substantially difficult the parties were referred to the formal justice legal system. Bohannan P *Law and warfare: studies in the anthropology of conflict* (Austin: University of Texas Press 1967) 44–6.

[108] Bohannan (1957) 64–5.

[109] See Van der Waal CS "Formal and informal dispute resolution" in Hinz MO & Pateman K (eds) *The shade of new leaves: governance in traditional authority: a southern African perspective* (Munster: LIT Verlag 2006) 140.

[110] Van der Waal (2006) 140. See also Aiyedun A "*Fair trial and access to justice: how traditional tribunals cater to the needs to rural female litigants*" (unpublished PhD thesis, University of Cape Town 2013).

assault, rape, theft of expensive items or murder, have to be referred to the police or a magistrate. All cases of witchcraft accusation must be referred to the higher courts.[111] Although the traditional leaders are not legally trained, they are assisted by councillors or by the headmen, who are in turn assisted by the village committee.[112]

In the Berlyn settlement, men and women usually assemble under a tree outside the headman's house, but in separate groups. The village committee decides the date on which a case will be heard, and it also assists the headman in deciding the case. When the headman and his committee enter the court arena, everyone stands up. A prayer is said at the beginning and at the end of the proceedings. The disputants and their witnesses sit in front of the headman, the women on the floor to the left of the headman and the men on stones, poles and low chairs to the right. [113] The complainant is asked to speak first, followed by the defendant, their witnesses, and then members of the community. The court hears cases, such as: marital desertion, outstanding loan payments, and verbal abuse. Men are supposed to stand when they speak. It is not clear whether or not women are granted an audience. After the parties to the dispute have been heard, someone sums up the matter before the headman gives a decision.[114] On appeal, the cases from the Berlyn settlement are sent to the cluster court at Ntsako which convenes only once a month.[115]

In Ntsako, court cases are heard in a building or underneath a tree. Both parties must swear an oath before they present their evidence.[116] One headman keeps a record of the proceedings, while another leads the evidence. If a case cannot be resolved here, or if it is outside the jurisdiction of the court, it is sent to the traditional leader with a letter. Cases within the jurisdiction of the cluster court include debt, insult and theft matters.[117] If the matter is referred to the traditional leader, he deliberates with his advisors in order to resolve the conflict. Traditional leaders listen to complaints on Mondays and try cases on Wednesdays. Generally, the cluster headmen and the people involved in these matters are supposed to attend the proceedings. These courts deal with more serious offences and matters including the dissolution of marriages.[118]

In the areas of Mokopane, Moletji and Ramokgopa, traditional leaders attest to mediating all disputes, including dissolution of customary marriages, but excluding serious ones, such as, rape, murder, serious assault and maintenance cases. Parties usually attempt to resolve spousal conflicts through the family structure, before going to the headman or the chief. Where there is no headman, however, they go straight to the chief. In these forums, male councillors outnumber females, even though women may also ask disputants questions during the process. The court allows men and women to explain their versions of a dispute, then they cross-examine them while standing. The procedure is flexible, extensive and open

[111] See Van der Waal (2006) 142.

[112] Van der Waal (2006) 140–141.

[113] Van der Waal (2006) 141.

[114] Van der Waal (2006) 142.

[115] Van der Waal (2006) 142.

[116] This area is inhabited by many Tsonga people and some Sotho-speaking people.

[117] Van der Waal (2006) 144.

[118] Van der Waal (2006) 145. This is so despite the prohibition of this action by the Recognition of Customary Marriages Act 120 of 1998.

for discussion by other members of the community. Together, they mediate decisions, which are favourable to both parties. If the dispute cannot be conclusively resolved, it may be referred back to the family council.[119]

In Mamone, also in Limpopo, the traditional tribunal convenes under a tree, close to the King's palace. Dispute resolution occurs on Wednesdays, with a council of men and the traditional leader. Even though there are more women than men, they only participate as litigants or witnesses during conflicts involving land or family matters, while kneeling to address the court. Male elders, however, discuss disputes before the leader summarises a consensual opinion.[120] Dispute processes usually allow flexible debates, and lengthy discussions within a communal atmosphere, leading to acceptable decisions and restored relationships.[121]

Conflict resolution forums include family heads, headmen and traditional leaders. Magistrates in Sekhukune, a district of Limpopo, encourage disputants to undergo family negotiation before instituting an action in the traditional tribunals, in matters involving land disputes, family feuds and insults. The magistrates' courts resolve mainly criminal cases of assault and theft.[122] In the traditional tribunals, the procedure is similar to that of the headmen. Parties to a dispute state their case, witnesses present evidence, members of the community ask questions, and then the leader seeks a consensual settlement with the help of his councillors or advisors (bakgomana). During court sessions, men wear jackets and can speak while standing, while women must cover their heads and sit down. However, "the involvement of women varies as well. In some courts, women can only be witnesses or silent listeners while in others, they have won the right to present a case themselves or even adjudicate in the role of kgosigadi or councillor (regent)".[123]

Although these accounts come from very different communities and cultures, they nonetheless give an overarching and illuminating view of various types of traditional tribunals and their methods for resolving disputes in Limpopo at the time. Ultimately, whatever the specifics of each traditional system, certain features of traditional dispute resolution reflect universal notions of justice across cultural divides, as highlighted in the next segment.

8 SHARED FEATURES OF DIVERGENT JUSTICE PROCESSES

Certain similarities are identifiable between traditional justice systems and formal State courts. In formal court proceedings, for example, the amicus curiae concept is one that

[119] Tshehla B *Traditional justice in practice: a Limpopo case study* (Pretoria: ISS 2005) (ISS Monograph Series No 115) 19–25.

[120] In a place called Ga-Matlala, women are now granted full participation under the thorn tree. See Oomen B *Tradition on the move: chiefs, democracy and change in rural South Africa* (Amsterdam: Netherlands Institute for Southern Africa 2000) 21 & 64.

[121] Oomen (2000) 24.

[122] Of the people interviewed, 42 per cent avoid magistrates' courts for their: "adversarial character, lengthy procedures, corruptibility, costliness, unintelligibility in terms of language and procedure and the fact that the magistrate is far away, 'doesn't look at who you are and where you come from', has the power to imprison and 'just decides on his own'." See Oomen (2005) 204–206.

[123] Oomen (2005) 207.

recognises the usefulness of opinions from persons who are not parties to the case but are in attendance as friends of the court. In traditional dispute resolution forums, hearing sessions accommodate comments and interventions by community members who are not parties to the dispute, described in Holleman's account as "the most crucial stage of the process, because it is during this stage that the public, having a vital interest in the successful outcome of the case, voices its opinion with the utmost candour".[124]

Another similarity is the goal of consensus outcomes practised in traditional courts, which are also now pursued in alternative dispute resolution processes. A third element common to both traditional and formal court proceedings is the opportunity to be heard, which ensures that parties are able to make representations on the facts of the case.[125] This is closely connected with the fourth element, that parties cannot be in the position of a judge in relation to their own case. A fifth point is the flexibility of processes, where the justice of a case demands an adjustment of the regular hearing procedure. In the Malawi example, for instance, it was the possibility of having confidential hearings, where they could raise sensitive issues, such as domestic violence, that made traditional justice systems appealing to women. This is comparable to certain situations in formal courts, where proceedings are held in camera to preserve the justice of the case, as for instance happens in cases involving minors and other situations where it is considered to be in the public interest for proceedings to be held in camera.

While the similarities highlighted in this segment may not be exact parallels, they point to the fact that many elements of justice are shared across cultural and normative boundaries and are reflected in various dispute resolution processes in different jurisdictions within and beyond Africa. What needs to be explored further is how these different systems can be integrated in a way that ensures access to justice for disputing parties, whatever their cultural context and physical location may be.

9 CONCLUSION

Studies of various African communities over the years have helped to establish essential features of dispute resolution processes in traditional settings. While highlighting specific culturally imbued legal concepts, these studies have shown that there are shared notions of justice across diverse legal cultures. The concern in contemporary research seems to be with issues of ascertainment, interpretation and application of traditional legal concepts within the rubric of living customary law. Closely linked to this is the prospect of integrating traditional normative systems with formal State administered legal systems, an issue that informed the subject matter of this article.

There are certain similarities between traditional and contemporary dispute resolution methods that make the idea of integration feasible. First, the idea of having external parties contribute during judicial hearings is common to both formal courts and traditional tribunals, and could be facilitating for integration. Secondly, decision

[124] Holleman (1974) 19.

[125] Elias (1956) 238–67.

making processes for both justice systems require either a consensus or a majority agreement. Thirdly, judicial proceedings are directed at giving a fair hearing to all parties to a dispute. Fourthly, the notion of natural justice, particularly in the sense of a litigant not adjudicating his or her own case, cuts across formal and traditional spheres of justice. Furthermore, under certain circumstances, such as where a juvenile is involved, even formal court proceedings may be flexible, but traditional dispute resolution methods are usually always flexible. These elements indicate more commonality between traditional and formal systems than might at first appear and make further research for purposes of effective integration an imperative.[126]

One way of strengthening traditional institutions of dispute resolution and enhancing integration would be to fund their administrative structures in a way that improves access to disputing parties. Given their potential to provide easier access for rural and urban dwellers seeking traditional justice mechanisms, it is important that traditional justice institutions are enabled to deliver more efficiently and effectively. For instance, the South African government mostly funds formal courts, but this has not enhanced wider access for rural litigants. Consequently, it has been observed that there is a need for more financing of traditional tribunals, to provide for, among other things, the training of traditional leaders regarding the right to equality in South Africa.[127] Careful analysis must, however, precede any such financial intervention, considering that the core strength of traditional dispute resolution systems is the flexibility of their processes. With funding comes a suite of accountability requirements that may inadvertently rigidify the processes of traditional systems. It is therefore imperative that these factors are taken into consideration in developing a funding system.

It is also important that research into customary law systems in Africa examines in more detail, lesser known practices that are not often, if at all, the subject matter of litigation. In particular, considering that social ordering in traditional communities is intertwined with governance structures, property ownership and economic influence, it is no simple matter to compartmentalise information on various kinds of transactions under standard legal subjects such as contract law, company law and labour law, and perhaps that should not be the aim. It would however be useful to understand the normative principles that govern less overt kinds of relationships and transactions and to consider whether or not these are changing in contemporary settings. Valuable insights may well be acquired to feed into the making of policy on challenging issues affecting rural dwellers, such as, State provision of social security, governance of natural resources, penal reform, and even cultural rites of passage.

[126] The research-led imperative for integration in the area of customary law marriage is demonstrated in the work by Chuma Himonga and Elena Moore: *Reform of customary marriage, divorce and succession in South Africa: living customary law and social realities* (Cape Town: Juta 2015).

[127] Aiyedun (2013) 185-189.