ISRG Journal of Arts, Humanities and Social Sciences (ISRGJAHSS)

ISRG PUBLISHERS
Abbreviated Key Title: ISRG J Arts Humanit Soc Sci
ISSN: 2583-7672 (Online)
Journal homepage: https://isrgpublishers.com/isrgjahss
Volume – III Issue-I (January- February) 2025
Frequency: Bimonthly

Locating Legal Pluralism: Perspectives on the Informal Justice Systems in Sub-Saharan Africa

Dr. Aswathi. A. Nair

Assistant Professor Politics and International Relations School of Liberal Arts and Sciences RV University, RV Vidyanikethan Post, 8th Mile, Mysore Rd, Mailasandra, Bengaluru, Karnataka 560059.

| **Received:** 03.01.2025 | **Accepted:** 08.01.2025 | **Published:** 11.01.2025

***Corresponding author:** Dr. Aswathi. A. Nair

Assistant Professor Politics and International Relations School of Liberal Arts and Sciences RV University, RV Vidyanikethan Post, 8th Mile, Mysore Rd, Mailasandra, Bengaluru, Karnataka 560059.

Abstract

Conflicts are most generally understood as manifestations of adversarial social action, involving two or more actors, with the expression of differences often accompanied by intense hostilities. The conditions of scarcity, value incompatibilities, and ethnicity can all become a continuing source of this contention. When protracted conflict, arising from the failure to manage antagonistic relationships, are to be managed or resolved, it is the state that is most often called to play the role of an "honest" mediator. It is then the state's responsibility to harmonize and institutionally accommodate the opposing positions without the destruction of the social fabric. However, in understanding and attempting to resolve contemporary conflict, we also need to examine the ways in which the parties to a conflict relate to each other socially, economically and culturally, along with the nature of political decision making within the conflict locations. Despite the regional and cultural divergences across globe, post-colonial states world over have had to obliterate their traditional models of settling diverse, conflicting interests in favour of a more rule-governed society. The formal state organs thus became the new instruments of arbitration, giving way to abstract social legislations.

This paper aims to explore the revision of the idea and practice of justice in Sub-Saharan Africa, from a consent and justice-oriented informal system that accorded primacy to better access to justice to a purely state centred concept of the rule of law. The transition is symptomatic of the transfer of western-style judicial institutions to post-conflict societies with scant regard for the ground realities of the erstwhile colonized societies, like those in Sub-Saharan Africa. The traditional communities of these African countries continue to look up to informal justice structures for restoring social peace, even if they do not meet the requirements of the rule of law. "Civilizing the uncivilized" within the parameters of western values have effectively resulted in a neo-colonization of the legal cultures of post-colonial worlds like those in Sub-Saharan Africa. Hence, the attempt of the proposed paper would be to examine the potential of traditional justice mechanisms in Sub-Saharan African countries to effectively complement conventional

DOI: 10.5281/zenodo.14631150

judicial systems, along with their ability to link justice to democratic development. The paper would seek to develop critical insights by looking in to specific case studies in order to interrogate the modern justice system's commitment to instrumental objectives such as reconciliation, accountability, truth-telling, legitimacy and reparation, and in restoring and rebuilding hope and confidence in conflict-ridden communities of Sub-Saharan Africa.

Keywords: *Conflict, Informal Legal Systems, Justice, Neo-colonization, Rule of Law*

INTRODUCTION

Conflicts are never linear. Far from it, conflicts represent a complex set of social interactions that are prone to different phases- escalation, inflammation, transformation, and/or recurrence. They can also experience periods of "latency," in which underlying antagonisms and other root causes may temporarily become less salient but not necessarily resolved. The Handbook of Conflict Prevention (2018) defines conflict as "protracted disputes among social groups, whether inter- or intra-state, that threaten peace and security, hamper development, and negatively impact the well-being of a population. Typically, such friction emerges when the beliefs or actions of one or more members of the group are resisted, resented, or considered to be unacceptable to other group members, and it leads to outcomes that hamper the security and well-being of the society".

Conflict, as a theoretical paradigm, early on caught the attention of several social scientists including Robert Park, Albion Small, Lester Ward, and Charles Cooley, who emphasized on the importance of the central role of conflict in basic forms of human interaction. The Darwinian influence on the early social theorists was also pronounced as many of these social philosophers and writers like Walter Bagehot, Ludwig Gumplowicz, and Gustav Ratzenhofer, talked in detail about the evolutionary processes wherein societies competed against each other, with the strongest emerging victorious- a process that was seen as analogous to that of the biological selection among societies wherein conflict played a central role. Further, while the structural functional theory sought to view conflict as abnormal, deviant and harbingers of disruption and instability, a number of seasoned sociologists, like Small, Ward, Ross, and Cooley saw conflict as a functional process that could produce integration at higher levels. The interrogation of conflicts as functional social processes opened up the possibility of looking at conflicts as real, and not illusory (Williams 1976).

The modern sociology of conflict in fact rejects any orientations that looks at conflict as a disruptive and dysfunctional force while arguing that, on the contrary, the clash of social values and human interests can provide the impelling force to social progress and stability in a society. One of the most successful proponents of the conflict approach has been Lewis Coser, who maintains that conflict is a constructive process that gives rise to social change and can serve an integrating function. Coser (1956) notes: "Insofar as conflict is the resolution of tension between antagonists, it has stabilizing functions and becomes an integrating component of the relationship. . . . Loosely structured groups and open societies, by allowing conflicts, institute safe-guards against the type of conflict which would endanger basic consensus and thereby minimize the danger of divergences touching core values".

Thus conflict theory, with its openness to problems of coercion, pressure groups, social classes, political myths, cultural clashes, racial strife etc. covers over a wider and more profound range of questions including the more fundamental ones like "who gets what, when and how"? It would be prudent to add here that it is the interest of social scientists in social power that eventually led to the sensitization of some to conflict as a perspective from which to examine race relations. Thus race relations have been called 'power relations' and it has been proposed that research should be cast in terms of a conflict model that sees conflict as having integrating functions. Accordingly, scholars such as Olsen (1970) began to argue that if racial inequality is in fact largely a consequence of power exertion by whites, in the context of USA, it then follows that African Americans seeking to change the situation so as to gain greater equality of privileges and prestige must in turn exercise power against the dominant whites.

Despite the greater attention Africa has enjoyed of late in academia, relatively few scholars have delved into the political ramifications of Africa's social class structures, mostly Marxist Africanists and policy-makers. As a result, and owing to the deceptive nature of Africa's pre-capitalist social structure, it has been argued by African nationalists and several others that African societies are 'classless', and that class analysis has no validity or utility for the study of African politics. This ideological position is characteristic of the elite in many regimes (capitalist, socialist, and under-developed alike), who seek to rationalise, justify, and consolidate their dominant positions. It is a fact that all societies, in spite of exhortations to the contrary, are characterised by social divisions arising out of common social, economic, and political conditions. Often these stratifications are fluid and can be altered in the course of a generation or even less, but they are none the less significant (Grundy 1964).

The orifices between classes may be wider and deeper in certain societies but gaps nevertheless exist everywhere, including in African societies, which do mould the political thought and behaviour differently in different societies. Hence, any efforts on the part of the African ruling elites to minimise or 'gloss over' such cleavages to obscure Africa's underlying socio-political realties must be resisted. Historically too, certain groups in societies have been more conscious of the concept of 'nation' and have sought to fortify the nation at the cost of traditionalist forces. While in Europe, for example, the efforts of kings to centralise power in their own hands conflicted with feudal interests and the greatest feudal landowner, the Church, eventually assisted the kings with the task of nation-building, in African societies few groups were more predisposed towards the growth and centralisation of national power than others. Few were more determined to build the nation and take risks to secure that end than others. In West Africa, for instance, it was the emergent modernising elite that unfurled the banner of nationalism (ibid).

It is thus only a cognitive distortion of ideologies that can deny the presence of antagonistic social classes in any society. Although most ruling elites do not publicly speak the language of class conflict, they are not unaware of major social groupings and the

DOI: 10.5281/zenodo.14631150

political possibilities of social tensions and stratifications in their countries. Politicians the world over almost instinctively assess significant domestic pressures and interests to determine their relative strengths and weaknesses, and the African political experience has not been any different. Thus, for power holders or those ambitious for power, a healthy regard for and knowledge of internal social, economic, and political configurations is a necessary skill, regardless of whether their analysis of conflict situations is couched in class terms, or in the language of interest groups, or in the less systematic colloquialisms of domestic politics.

Since the 1960's Africa has contributed to the maintenance of international peace and security through its contributions to peace operations and mediation both within and beyond the continent. Nevertheless, academic endeavours have perceived it as the 'other'; namely a problem or a conflict situation to be resolved. Accordingly, expressions such as 'off the radar', 'Afro-pessimism', 'collapsed states', 'failed states' and 'fragile states', to name a few, have been interchangeably used to demonstrate the African situation in international relations. To a large extent, the cradle of International Relations theories of realism, constructivism, idealism, neo-realism and other critical concepts are all derived from Western ideals and experiences that have always focused on the state as the main point of reference. Accordingly, the use of Western experiences as the basis of discourses in theory has in most part contributed to the alienation of other players in the field, especially the developing countries, including those in Africa. While conventional theories like realism focuses on the inter-dependency of states' 'utility functions' and neoliberalism depicts states as 'rational egoists who are concerned with their own gains and losses' (Hasenclever, Mayer and Volker 1997), it is to be noted that contemporary conflict or peace and security situations in continents like Africa are mostly characterized by sub-states and non-states actors; in contrast to the domain of the aforementioned orthodox theories.

The relevance of the non-states, sub-states and supra-states, in addition to the state structures, in bringing about peace and security in Africa, also makes it significant to turn attention towards the applicability of indigenous African experiences and institutions in conflict resolution and transformation. There is no part of Africa that is not afflicted by civil wars, violent upheavals, abject poverty, institutionalised corruption or mismanagement of resources. Yet, there have been hardly any systematic attempts to analyse and assess the role and impact of traditional African mechanisms in situations of conflict resolution and in post-conflict settings. Hence, it thus becomes pertinent to ask if it is possible to envisage a framework that facilitates a possible relationship/ interaction between the Western state-centric system of rule of law and the traditional non-state informal justice disbursal mechanisms in Sub-Saharan Africa. If so, it becomes equally important to make sure that the state and non-state justice systems work 'side by side' in a situation of mutual respect and recognition as advocated by many indigenous groups in African societies. In other words, there needs to be a continuing dialogue between the two systems about how their relationship can be restructured and renewed to allow each system to support the other in working towards certain common goals, namely social justice and democratic development.

Rule of law in harmony with Traditional Justice Mechanisms in Sub-Saharan Africa:

The African baobab is a remarkable tree species not only because of its size and lifespan but also in the special way in which it grows multiple fused stems. Bark grows in the space/ false cavities between the fused stems, which is unique to the baobab. Along with being an important nutritional complement in Africa, baobab also has medicinal qualities and the fruit pulp is made into jam locally or fermented to make beer. The young seedlings have a taproot which can be eaten like a carrot. The flowers are also edible. The roots can be used to make red dye, and the bark to make ropes and baskets. They are not only useful to humans, they are also key ecosystem elements in the dry African savannahs. Importantly, baobab trees keep soil conditions humid, favour nutrient recycling and avoid soil erosion. They also act as an important source of food, water and shelter for a wide range of animals, including birds, lizards, monkeys and even elephants – which can eat their bark to provide some moisture when there is no water nearby.

Baobab trees also play a big part in the cultural life of the communities, being at the centre of many African oral stories. According to traditional stories, the original baobab was planted upside down as punishment by gods, heroes, or hyenas. They heal over wounds that would kill other plant species and in many ways stands testament to the oldest relationship between humans and ancient trees that naturally began in Africa. This pre-historic species that predates both the mankind and the splitting of continents millions of years ago, is a symbol of life and positivity in a landscape where little else can thrive. The "tree of life" is thus evidently at the heart of many traditional African remedies and folklore. The longevity of the relationship between humans and baobabs in Africa can be best expressed in how the ethnic groups, all over Sub-Saharan Africa, devised customary rules to manage the utilization of this precious resource that combined the properties of wild organism, crop plant, and sacred tree. The belief that African baobab is one tree that nurtures and sustains an entire habitat might be based on unreliable "tradition", but it has nevertheless survived as the most ancient living monument in the earth.

Interestingly, while attempting to understand the relevance of traditional mechanisms in making possible conflict management, resolution and transformation, the question that is often posed is where has the approach of the 'Baobab Tree' gone, which used to be a consensual instrument for conflict resolution and a peace-building mechanism after conflict in Sub-Saharan Africa. While the need to foreground traditional justice mechanisms have triggered substantial debates in the field of transitional justice, both traditional and prosecutorial models continue to remain as two opposing models positioned at the extremes of a continuum. At one end of the continuum are scholars who view traditional justice mechanisms as the most legitimate and effective arena for reconciliation in societies like those of Africa, hailing the bottom-up nature of these mechanisms and the longevity of these practices for centuries. At the other end are staunch supporters of retributive and prosecutorial approaches, who are sceptical and dismissive of traditional justice mechanisms, arguing that they fail to reach minimum fair trial standards or do not uphold the duty to prosecute crimes against humanity, genocide and war crimes (Huyse and Salter 2008).

DOI: 10.5281/zenodo.14631150

It is certainly important to preserve the constitutional powers of a state to adjudicate and to uphold its obligation to ensure fair trial for all. However, the possibility of such a top-down approach being complimented with a bottom-up initiative, where a non-state justice system retains its integrity and wholeness while working together with a state system, is worth exploring. The prospect of state incorporating the non-state justice system into its formal legal system, instead of outlawing and suppressing the non-state mechanisms, has intrigued many scholars across the world and especially in Africa. Although state systems are and will always be important, there have been periods of history (especially before the Treaty of Westphalia in 1648) when this was widely not true, and scholars like Chanock argue that even to this day there are countries where state laws have a limited/ restrained role—'not only in the normative universe, but also in its use as a means of settling disputes' (Chanock 2005). However, because of the way the international system of granting states' sovereignty over law making works today, it would be prudent to note that the nation-state and the inter-state system will continue to remain the central political bulwarks of the capitalist world system for the foreseeable future.

Nevertheless, it is still possible that there might prevail two or more different models of relationship between the state and non-state systems simultaneously in one country. For example, in Bangladesh, the *shalish* system of dispute resolution exists in three ways: as traditionally administered by village leaders; as administered by a local government body; and in a modified form introduced and overseen by NGOs (Golub 2003). The situation is even more complicated in African countries like Botswana where there are warranted customary courts, unwarranted recognised customary courts (that are permitted to engage in reconciliation) and unwarranted, not formally recognised courts (Bouman 1987). Indeed, research suggests that it is likely that if a state co-opts the non-state justice system in a way that restricts, rather than improves, effective access to justice, a non-state-authorised version of the same system will develop and exist simultaneously with the state form. For example, in Nigeria, although there are state customary courts, local people to a great extent till date prefer to use the non-state traditional courts, as these are seen as not being imposed by the government (Elechi 1996).

The relationship between the state and the non-state is primarily based on the understanding of them being different from one another and consequently there is a separation between state and non-state organs. However, given the increasingly elastic boundaries between state and non-state institutions, the possibility of a framework of institutional pluralism which involves recognition of the structures, institutions and processes of other legal systems, rather than an unreflecting adherence to the formal legal norms, might not be implausible. One has ample examples of hybrid legal structures from world over such as the Village Courts in Papua New Guinea or the Island Courts in Vanuatu. In fact in majority of countries across the world where there is a weak state and a non-state justice system of some sort, despite no formal recognition to the latter, the state choses to turn a blind eye to how the non-state justice system processes the majority of disputes. The state actors often also unofficially encourage reliance on the non-state justice system (Forsyth 2009). For example, in the context of the southeast Asian nation of East Timor or Timor Leste, Mearns (2002) writes: "Police are acting pragmatically at the village level by encouraging some (often most) situations to be resolved through the village chief (*Chefe de Suco*) and a village council. Like it or not, the local justice system is operating and appears to be the preferred system".

Further, in countries where state systems are becoming increasingly aware of the limitations of the formal state justice system and consequently the value of non-state justice systems in overcoming some of these limitations, governments are increasingly fostering and actively endorsing non-state justice systems at an informal level. An example of this model is the Zwelethemba Model of Peace Committees in South Africa, a pilot project in a poor black community, the aim of which was to improve security for members of the community by utilizing the ability and knowledge of those very members. The programme was initiated with the support of the national police and the Ministry of Justice. In essence, the Peace Committees receive complaints and convene gatherings of members of the community who are thought to have the knowledge and capacity to solve the disputes. The Peace Committee members then facilitate the process whereby those invited help to outline a plan of action to establish peace. Further, if any one of the parties to the conflict wishes to go to the police, the Peace Committee members would facilitate the process and no force is used to ensure compliance (Johnston and Clifford 2003).

In discussing the approach of the Zwelethemba Model of Peace Committees, Johnston and Shearing (2003) comment that it does not subscribe to a neo-liberal strategy whereby the state "steers" and the community "rows". On the contrary, the model is based on a process in which governments provide support to local people who on their own constitute a significant node in the governance of security. There are a number of advantages with such an arrangement as this model allows the state to significantly support the non-state justice system and also to exercise a degree of informal regulation over it, while simultaneously permitting it to develop through its own processes. It also develops clearer pathways between the systems, reducing the confusion about and conflict over different roles and also ideally reinforcing each other's legitimacy, as they are perceived as working together rather than in competition with each other. The value of traditional justice systems in most African countries emanate from their power of social pressure to secure attendance and compliance of general public in the discussion and implementation of an arrangement.

Although informal justice systems are not without flaws and opens up questions on equality before law and poses challenges pertaining to abuse of human rights and natural justice in the name of 'tradition', the relevance of culture for law makes a strong case for the co-existence of traditional mechanisms for justice and reconciliation alongside the formal system of rule of law. In most African countries, where the rural population have no access or recourse to state judicial systems, informal systems have proven to be both popular and functional. The procedures of traditional systems are on site, they are more or less free of cost and less prone to corruption. Most importantly, these are exercised by trusted people in the language everybody speaks, and decisions are taken according to rules known to all community members. For the people, thus, informal mechanisms are more about restoring social peace rather than enforcing abstract legislation. They are consent and justice oriented and hence, in this sense, informal justice systems allow for better "access to justice" (Roder 2012).

Apart from these common features, informal justice institutions are, in large geographical areas, the only choice due to the absence of the state. This is often the case in regions where colonial powers

DOI: 10.5281/zenodo.14631150

did not attempt to establish formal court systems, such as North Yemen or Afghanistan. In the situation of armed conflict, informal justice institutions often gain more importance due to the breakdown of the formal court systems. And in post-conflict societies they can play a crucial role in the stabilisation and reconciliation process. The growing attention to informal justice systems also stems from the failure of the billion dollar worth of institution-building and rule of law promotion, by western style state systems, to build and re-establish peace in many of the post-conflict societies in Asia, Africa and Latin America. Thus while the non-state justice systems might not be the functional equivalents of state courts, their potential to play a critical role in establishing and maintaining rule governed behaviour between citizens cannot be overlooked. This has indeed given shape to strengthening and reforming existing traditional institutions and linking them to state institutions in many post-colonial societies including those of Africa.

The formal embracing of legal pluralism by the state increases the likelihood of state working together with the non-state justice system. While state systems derive legitimacy from national legislations or international law, the informal justice institutions derive legitimacy from members of the respective communities through an inclusive process of consent. Hence, the prospects of interpersonal and community-based practices of truth-telling living side by side with state-organised and/or internationally sponsored forms of retributive justice are worth interrogating in countries like those of Sub-Saharan Africa with a rich tradition of informal/ traditional institutions working for a common good. In fact the African belief in the Baobab Tree method, as a significant instrument for post-conflict communities to sustain peace, trust and reconciliation and rebuild their tragic past in a positive, progressive and humane manner, throws open the possibilities of the modern co-existing with the traditional systems of justice. However, it is to be also noted, especially in the context of Sub-Saharan Africa, that traditional techniques have undergone alterations in form and substance due to the impact of colonisation, modernisation and civil war.

Case Studies of Sub-Saharan African Experiences with Traditional Justice Mechanisms:

There are widespread debates on if and how the states should incorporate traditional justice systems in to their legal framework. While some argue that such an incorporation would ensure both an improved compliance with human rights and facilitate an alternative dispute resolution mechanism, there are others wary of the lack of strict procedural rules in traditional forums that might then result in incompetent decisions, or overturning of seasoned decisions. Further, there have also been a demand for increased representation of women in traditional justice mechanisms to make them more inclusive so that the problems experienced by women could be addressed better and the political influence of women strengthened. For instance, in Namibia, there have been gender mainstreaming efforts to include women in traditional courts (Ubink 2011). Similarly, in Limpopo, South Africa, women comprises of at least one third of the members of traditional councils (Limpopo Traditional Leadership and Institutions Act 6 of 2005, art. 4 (6)(a)).

In the context of legal pluralism being acknowledged as a framework that lets the traditional and formal justice mechanisms to complement each other, let us examine the prevalence and suitability of such co-existence in few Sub Saharan African countries. Along with the question of accessibility to justice for people in traditional communities, such a co-existence of the formal and traditional is also meant to address the specific problems faced by traditional communities in African countries while also taking in to account the broader social and political contexts.

Case Study 1- Rwanda: The focus on customary/ informal/ traditional justice gained significant momentum with the setting up of the gacaca community courts in Rwanda. Triponel and Pearson (2010) talks of how high degrees of public participation in the implementation of traditional justice mechanisms and selection of judges from among the local population over which they had jurisdiction, became the accepted customary practices within Rwanda's gacaca courts. The Truth and Reconciliation Commission (TRC) of Rwanda also serves as a reminder of how non-judicial bodies could be effectively employed to map patterns of past human rights abuses and how TRCs can even be combined with high court or trial-type procedures. Some form of truth-telling is integral to many of the traditional mechanisms and reconciliation here is a primary goal, often focusing on the return of ex-combatants.

Coming to the Rwandan history it must be noted that before 1994, Rwanda was an almost unknown country hidden in the heart of Africa. When Rwanda gained independence in 1962, the ethnic majority, Hutus, were left in power. Hutu rule resulted in widespread discrimination against the Tutsi minority, laying the groundwork for the 1994 genocide. On 6 April 1994, the aircraft carrying the then President Juvénal Habyarimana was shot down over the capital of Kigali. This signalled the start of a campaign of genocidal violence against the Tutsi minority ethnic group and in the space of 100 days approximately 800,000 people died. These tragic events not only shook the world but also placed Rwanda on the global map. Additionally, the Rwandan Genocide must also be understood as taking place within the context of a civil war. According to Ingelaere (2008), "The Rwandan genocide took place in the context of a civil war and an attempt gone awry to introduce multiparty democracy. It was the violent apex of a country's history marked by sporadic eruptions of ethnic violence as a consequence of the struggle over power (and wealth) over the course of time—a struggle grafted on to the Hutu–Tutsi ethnic bipolarity that marks the Rwandan socio-political landscape".

In most of the vast literature available on the Rwandan tragedy, the main paradigm used by observers to interpret the 1994 genocide is the ethnic character of the conflict: the majority ethnic group—the Bahutu—attempting to achieve a complete extermination of the minority ethnic group—the Batutsi. Other paradigms focus on elite manipulation; ecological resource scarcity; the socio-psychological features of the perpetrators; and the role of the international community. While the 'elite manipulation paradigm' explores the desire of the Rwandan elite to stay in power, the ecological resource scarcity focuses on how the country's resource crunch coupled with highest population density in Africa and high population growth rates, became fertile grounds for genocidal violence. Further, the role of the international community also received a great deal of attention where the focus was mostly on how the (in)action of international stakeholders, in the months preceding and during the genocide, paved the way towards genocide, either intentionally—implicitly—or unintentionally. It is also argued that the long-standing presence of the international community in Rwanda in the form of development enterprise also

DOI: 10.5281/zenodo.14631150

fuelled the momentum of the genocide through its socially and culturally ignorant presence in the country (Ingelaere 2008).

A comparative micro-analysis of the genocide demonstrates that the violence unleashed at the macro level was appropriated and fundamentally shaped by the micro-political matrixes and social formations in which it took hold. Genocide, although shaped from above, was significantly reshaped in a highly differentiated terrain of local social tensions and cleavages, regional differences and communal or individual particularities. The genocidal violence reflected both the goals of the supra-local forces and factors—mainly the Hutu– Tutsi cleavage mobilized by political actors for political purposes—and their local shadows—struggles for power, fear, (intra-group) coercion, the quest for economic resources and personal gain, vendettas and the settling of old scores (Ingelaere 2006).

In post-genocide Rwanda, Rwandan Patriotic Front (RPF) that took power in July 1994 sought to create a true post-colonial Rwanda by harping on how Rwandanness/ Rwandanicity, and not ethnicity, should define relations between state and society. There was also an acknowledgement of how the colonial powers had distorted the real essence of the Rwandan culture, which in turn led to the understanding that home-grown traditions derived from the Rwandan socio-cultural fabric had to replace imported, divisive practices. Gacaca was one of them. It was seen as a step towards the building of a democratic culture that in essence was closer to the idea of a consensus-based democracy. The choice and installation of the gacaca courts fitted perfectly in to the traditional conflict resolution mechanism. To fully understand the origins and purposes of the ancient practice of gacaca, it needs to be placed in the cosmology of the Rwandan socio-political universe of the time, wherein the extended lineage or family (*umuryango*) that encompassed several households (*inzu*) was the main unit of social organization. Age and sex defined status within the lineage. Lineage was the primary source of protection and security, and the family unit was the guarantor of security. Political structures were later superimposed over the lineages (Ingelaere 2008).

The term 'gacaca' literally means 'justice on the grass'. In fact, the name Gacaca is derived from the word '*umugaca*', the Kinyarwandan word referring to a plant so soft to sit on that people preferred to gather on it. These gatherings were meant to restore order and harmony. The primary aim of the settlement was the restoration of social harmony, and to a lesser extent establishment of the truth about what had happened, punishment of the perpetrator, or even compensation through a gift. Although the latter elements could be part of the resolution, they were secondary to the primary goal of return to harmony between the lineages and a purification of the social order. However, colonialism with its introduction of Western style legal system, had a divisive impact on Rwandan society as a whole, and on the gacaca in particular. The colonial powers' stance towards Rwandan society was marked by indirect rule and at the judicial level, this was most visible through the introduction of written law and a 'Western' court system imposed over the 'traditional' institutions. Even though the latter continued to function, they were hierarchically inferior to the new system. Consequently, severe cases such as manslaughter were now to be handled in the Western-style courts which also implied a waning of the legitimacy of the gacaca courts (ibid).

Post-independence, when the modern state became powerful, it gradually absorbed the informal and traditional. The institution of gacaca evolved towards a semi-traditional or semi-administrative body that represented both the justice of proximity and a handy mechanism to relieve the pressure on the ordinary court system. The institution functioned as a barrier so that quarrelling parties would not immediately (have to) resort to the formal court system at the provincial level. Thus, despite the introduction of some formal elements and its instrumental relation with the overarching judicial structures, the conciliatory and informal character of the gacaca remained the cornerstone of the institution since decisions were to a great extent not in conformity with written state law (Reyntjens 1990). The spontaneous emergence of the gacaca and the gradual support for it by the authorities were clearly motivated by the fact that the gacaca had to do what it did before—relieve the pressure on the ordinary courts. In fact, a new element came into play in the practice of gacaca in the post-genocide era— genocide-related offences and the consequences of the genocide. Accordingly, crimes related to property which was the main focus of the 'ancient gacaca' now committed itself particularly to dealing with the destruction of houses, the theft of cows, appropriation of land and so on during and after the genocide.

The 1996 UNHCR Report, in the light of the observations made of the practice of gacaca that they found existing in the years 1995–6, concluded that the gacaca institution could play a role in dealing with the genocide-related crimes. The 1996 Report in fact talks of how gacaca could function as a truth commission entrusted with the task of collecting facts about the atrocities experienced by the local communities, upon which information so gathered could be forwarded to the classical tribunals. The Report also looks at gacaca as a space to reunite Rwandans wherein they could debate and deliberate on the common values they share, and subsequently evolve a mechanism that helps people to live together and be reconciled. Despite criticisms of how the trial of serious crimes of genocides and massacres in gacaca would minimize the seriousness of these crimes, the counter arguments stood resolutely in favour of Rwandans building a new Rwanda which in turn required involving and engaging people in the trying and resolution of genocide crimes through the gacaca courts.

Gacaca system has indeed been critiqued on several counts. It has come under scrutiny for being not decentralized enough as the gacaca in particular and the reconciliation process in Rwanda in general are an extremely state-driven, state-owned and top–down process with people abiding by the principles, mechanisms and discourses laid out for them. For instance, state officials often become involved in a judicial procedure, circumventing the 'ownership' of the population as the state controls what can be aired or spoken, thereby creating an atmosphere of self-censorship within the population. On the other hand, gacaca has also been criticised for being too decentralized, especially in the context of its harsh retributive powers. Gacaca operates in the social constellation of local communities all of which are characterized by their particular demographic make-up, power structure and existing conflicts. This creates the possibility for people to forge alliances or the need to follow a certain strategy in the practice of 'accusing' or 'conspiring in silence', not necessarily reflecting the procedure envisioned. Further, the power of authority, money or the gun also allows some to influence the proceedings (Ingelaere 2008).

Nevertheless, ordinary Rwandans continued to prefer the gacaca courts over the physically and psychologically remote national courts for dealing with the genocide crimes. They preferred justice of proximity despite its many limitations. The gacaca trials also

DOI: 10.5281/zenodo.14631150

broke all records in quantitative terms by not only effectively dealing with the approximately 130,000 persons incarcerated after the genocide, but also handling the thousands more who were unexpectedly accused when the gacaca courts started operating on the hills in the countryside, thus ensuring mass justice for mass atrocity, in quantitative terms (ibid). The Government of Rwanda also gave the public a large role in deciding which people would implement the traditional justice system. Indeed, in keeping with the accepted custom pertaining to the gacaca courts, the judges are elected from among the local population over which they have jurisdiction. In Rwanda public participation was vital to the success of the gacaca system. Public input was sought at every step of the process, and the feedback was used to improve and streamline the final traditional justice system seen in the country now (Triponel and Pearson 2010).

The success of the gacaca system in Rwanda is testament to how the public can assist the state in creating a transitional justice system that better responds to local needs. Input from the public can assist in creating a fairer system, taking into account the many actors and perspectives involved in the conflict. This in turn will help increase the chances of successful reconciliation. More importantly, the public is more likely to support a transitional justice system if they are familiar with the system and are instrumental in its creation. At the same time, public participation in a country like Rwanda emerging from conflict on issues as sensitive as torture, disappearances and mass murder is difficult. There is hence a need to address conflict expeditiously while at the same time ensuring feedback from as many groups as possible. The Rwandan Gacacan system at one level, barring its shortcomings, let people take ownership of their transitional justice mechanisms and also built upon the shortcomings of the more formal tribunals. Ownership should be viewed as a continuum and it is only through meaningful public participation and ownership of the various transitional justice mechanisms available, can the goal of reconciliation be truly realized (ibid).

Case Study 2- Sierra Leone: It remains a fact that despite remarkable advancements in statutory justice service delivery, most rural people in Sierra Leone lack the time, money, or even the literacy required to access formal justice structures such as police, courts, or legal services. Instead, they rely on traditional mechanisms like the Chiefdom structure, which are perceived as quicker, less expensive (in time and money), and more accessible. Since the 1991–2002 civil conflict in the country, donor assistance has largely focused on Sierra Leone's formal justice system. While it is crucial to strengthen the formal statutory provisions, it is also equally critical to acknowledge the central role of traditional, informal, or non-statutory services delivered at the local level. This becomes more so relevant in a country where chiefs to this day hold significant sway over arbitrating on domestic and neighbourhood disputes, acts of violence and aggression, debt disputes, damage to personal property, and disagreements over business contracts.

In March 1991 Sierra Leone plunged into anarchy when an insurgency force calling itself the Revolutionary United Front (RUF) invaded the country from three directions on the Sierra Leone–Liberian border. The invading force numbered about 100, with the aim to overthrow the one-party government of President Joseph Saidu Momoh, which the rebel leadership described as corrupt, tribalistic and lacking a popular mandate. They indicated that their goal was to establish a dictatorship of the proletariat in which ordinary citizens would be actively involved in all the decision-making processes. Moreover, the RUF would vigorously promote socio-economic development including rural regeneration. After a prolonged period of unrest and multiple political take overs, on 7 July 1999 the Lomé Peace Agreement was signed. Following the signing of the agreement, on 18 January 2002, the incumbent President Alhaji Ahmad Tejan Kabbah of the Sierra Leone People's Party (SLPP) formally declared the civil conflict over (Alie 2008).

Looking back at the history of the country, Sierra Leone is a small country on the West African coast measuring about 27,000 square miles, with a population of roughly 5 million that regained independence from the British in 1961. At independence, the country seemed to hold great promise; the educational, political, administrative, judicial and other institutions critical to the well-being of the state were functioning relatively well. However, as in many other independent African countries, the euphoria that greeted the birth of the new nation, with its accompanying high hopes and great expectations, soon turned to despair and despondence largely as a result of the actions (and inaction) of its political leadership. The RUF rebel onslaught had been preceded by a long period of political, economic and social decline as well as a prolonged history of social injustice. From maladministration that involved dictatorial tendencies of the political elites and the liberal use of the language of violence as an instrument of political competition, to over-centralization of state machinery that led to a near state collapse due to the encroachment on Sierra Leone's sovereignty by some foreign countries including Burkina Faso, Côte d'Ivoire, Liberia and Libya by involving themselves in its politics directly and by hosting dissident groups who played politics from neighbouring sanctuaries, Sierra Leone was crumbling under an over-centralized, inefficient and bankrupt one-party system that rewarded sycophancy and punished hard work, patriotism and independent thought (ibid).

The disastrous effects were further accentuated by a weak access to justice. The corruption and politicization of important state institutions such as the judiciary led to abuse of power by judges, lawyers and local court officials. Particularly in the provincial areas, young men suffered at the hands of corrupt and high-handed local authorities. Many socialized in a climate of violence, drugs and criminality, and it was among this ready pool of alienated young people that many of the rebel leaders recruited their first crop of fighters. Hence, it can be safely concluded that there were structural and other forms of violence existing in plenty in Sierra Leone even before the civil conflict began, which then gave the rebel leaders the opportunity to capitalize on people's suffering so as to pose as their liberators (Alie 2008).

Given these stark realities, at the end of the war, the country was faced with the immediate challenge of whether to punish those who had brought mayhem on the people, or to forgive them. In essence, the country was in a unique position of experimenting with two types of transitional justice systems in parallel—the Truth, and Reconciliation Commission, brought in to effect by the Lomé Peace Agreement, to establish the truth about the conflict and promote healing and reconciliation; and the Special Court, established to try those who bore the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law during the war. It was however soon realized that addressing issues of justice and reconciliation through the TRC and Special Court is necessary, but not sufficient. Of greater import

DOI: 10.5281/zenodo.14631150

was addressing the causes of the war, if peace was to be consolidated. This essentially rested in acknowledging the relevance of popular consensus and in the non-(social) exclusion of masses during the peace-building initiatives (ibid).

The traditional or the indigenous systems in African countries have always involved deliberations within the communities and "justice" in these institutions meant seeking or establishing truth without fear or favour, after allowing each party an opportunity to express themselves. It also signalled impartiality and fairness. It must be reiterated here that truth telling has always been an integral part of the justice system in indigenous societies, especially those in Africa. Similarly, "reconciliation" was seen as the act of reuniting groups who have been fractured as a result of conflict, which often also involved the granting of some form of reparation to the aggrieved party. In the traditional context, justice and reconciliation thus are generally inseparable. Tradition-based practices in Sierra Leone have mostly been community-centred, open and transparent with a belief in the supernatural, and people credited with special gifts— diviners, 'medicine men' and the like- playing a critical role in the judicial processes and rituals such as cleansing ceremonies, songs and dance (Alie 2008).

In the case of Sierra Leone, the ethnic divisions in the country clearly had consequences for the reconciliation processes. Sierra Leone is a multi-ethnic country with over 18 ethnic groups residing in its territory. However, two major groups dominate—the Temne and the Mende. The Temne live mainly in most parts of the northern and western regions, and the Mende in the southern and eastern regions. According to Pettersson (2004), a certain tension appears to exist between the Temne and Mende which should be acknowledged. The Mende dominate the SLPP, while the civil war was initiated by the RUF leader Foday Sankoh (a 'northerner' and a Temne), although the first fighting took place in the heartland of Mende territory (Eastern Province). Many Mende therefore perceived the war as an invasion by the Temne from the north of the country. While over the years each ethnic group has developed complex social system of their own including administration of justice, one of the prominent and populous subgroups, the Kpaa Mende, have tried as far as possible to preserve many of their customs, even in the face of modernization and other challenges. They have a powerful secret society, the *Wonde*, that unites them all around a high degree of nationalism.

The cultural life of Kpaa Mende is controlled by certain codes of behaviour and their activities are sustained by religious beliefs. Fundamental to their cultural beliefs is the assertion that the human being is a spiritual entity. Three main strands can be discerned in their concept of the supernatural. The first is the belief in a supreme being, who is the ultimate source of power and the upholder of truth and justice, referred to as *Ngewo*. The second is the veneration of the ancestors and the third is a belief in natural divinities. The Kpaa Mende have complex ways of dealing with crime and punishment with two interrelated ways of seeking justice—restorative and retributive. The form of justice used in a particular case may be determined by the gravity of the crime or the object of the punishment (Alie 2008).

Generally, tradition-based practices among the Kpaa Mende aim to repair and restore (restorative justice). In the words of Alie (2008), "restorative justice is largely dependent on an acknowledgement by the wrongdoers of their crime or action, an apology to the person who has been injured, and a genuine expression of remorse. It may also require assisting the victim to cope with their plight, for example, as in the case of payment of reparation". Kpaa Mende's social life is conditioned by the idea that a human being is not just an individual but also part of a wider community and so his individual action have repercussions on the well-being of the entire community. This is illustrated, for example, in the laws regulating sexual conduct as licit or illicit, wherein incestuous sexual relations are forbidden (ibid).

Further the Kpaa Mende are a predominantly farming community. Chiefs and other community elders generally adjudicate in civil cases such as land grabbing, seduction, and criminal offences such as arson, theft and violation of community sanctions. In civil cases the plaintiff and defender are encouraged to advance their cases together with their witnesses (if any), before the chiefs can take a final decision. Generally, some compensation is paid to the aggrieved party. While the justice system is heavily tilted against women, especially in husband–wife relationships, there is an important social element here which is in the customary need to hold the marriage together. Further the punishment for criminal offences range from public reproach and the payment of reparation to cleansing ceremonies. Where an alleged offender denies his guilt, the services of diviners, medicine men and other supernatural agencies are sought to help identify the culprit (Alie 2008).

What is interesting to note here is that the ultimate goal of the traditional justice system among the Kpaa Mende (and indeed among most African communities) is reconciliation. This is, for example, vividly portrayed in their *Wonde* ceremonies. Alie (2008) talks of how "during a ceremonial dance, done in a circle, a battle scene is enacted. The initial single group of dancers breaks into two concentric circles, representing the parties to the conflict. Later the peacemakers arrive. These are men dressed as women making characteristically feminine movements and gestures (symbolizing the important role of women in peacemaking). They come between the combatants and eventually all the dancers form a single circle again. The values reinforced in this ceremony reflect indigenous beliefs about complementarity and the importance of all segments of society in efforts to re-establish".

The imposition of British colonial rule in Sierra Leone in the late 19th century had an adverse effect on the traditional mechanisms of justice and reconciliation within the country, as the colonialists reorganized the judicial system to suit their own ends. To this end, they established three types of court in the Sierra Leone hinterland—the Court of Native Chiefs, the Court of the (European) District Commissioner and native chiefs, and the Court of the District Commissioner. All criminal offences were henceforth decided by the district commissioner's court, while the chiefs decided minor civil cases affecting their local subjects. More importantly, emphasis was now placed on litigation. In addition, court fines and fees became an important mechanism for generating revenue for the local administration. Not surprisingly, miscarriages of justice slowly crept into the fabric of the justice system. For instance, even when the TRC made use of traditional rulers in its truth-seeking and reconciliation processes, it largely eschewed local rituals like cleansing and purification, which may in turn have limited its ability to induce confessions and effect reconciliation due to its disconnect from the local cultural practices. In effect, traditional practices like the Kpaa Mende came under severe stress (Alie 2008).

Despite limitations such as limited jurisdiction over other communities, over reliance of village elders, the use of the supernatural, inflexibility and incapacity to withstand the pressures

DOI: 10.5281/zenodo.14631150

of the war, tradition -based justice and reconciliation mechanisms like Kpaa Mende had the confidence of the community and witnessed high levels of community participation as they were transparent, open, cheap and affordable and socially inclusive. Further, in traditional systems like Kpaa Mende, the decisions were generally arrived at after a lengthy process of consultation and debate, thus giving each aggrieved party ample opportunity to state their case. Punishments were meted out with the view that it would act as a deterrent, especially for crimes that affected the entire community. This was in line with the ultimate goal of Mende culture to foster social harmony and hence, the breaking up of such traditional practices also destroyed the social systems of these ethnic groups (ibid).

There have been growing concerns in Sierra Leone that international transitional justice undermined internal restorative justice, and consequently communal structures have generated intense debates over what a comprehensive transitional justice process should entail. These debates tie into a politics of legitimacy between international and national justice mechanisms. Members of Sierra Leonean civil society – including members of the TRC – have argued that the international influence on transitional justice practices has side lined local culture, civil society and authority structures; this despite the fact that many of the traditional practices of reintegration preceded the TRC in some communities. This fact led many to question the value of the formal court systems and the perceived distance between international versions and the local ideas of what constituted justice. A holistic, long-term, multifaceted approach, linking transitional justice to peace-building hence would require maintaining an ample balance between institutionalizing formal restorative justice processes and restoring traditional support structures (Friedman 2015).

Case Study 3-Zimbabwe: The serious crimes and violations that victims of politically motivated and state sanctioned violence have been subjected to in Zimbabwe are numerous, multiple and recurring. From the colonial period to independence and even in present day Zimbabwe what remains lacking is an effective and finite way for the nation to come to terms with its bleak past, riddled with gross human rights violations, in a process that provides people with truth, justice, a reformed state and security institutions, and remedies and guarantees of non – repetition. It is here that traditional justice as a form of transitional justice gains prominence in its application and these include individual prosecutions, truth seeking, reparations and institutional reform. The relevance of traditional justice mechanisms as an important ingredient in resolving everyday societal challenges, including political violence, is more pronounced than ever today in the case of Zimbabwe.

Indigenous processes of conflict resolution, outside the scope of Western understanding and influence, have always played significant roles in settling disputes in Zimbabwe, since the pre-colonial period. With minimum political interference, traditional leaders have always played a prominent role in facilitating reconciliation in communities affected by political violence, among other challenges. Reconciliation, in the purest African sense, involves the community as a whole. The African philosophy of *Ubuntu* (African norms and values) in fact sees reconciliation as aimed at creating a context for learning to live together (Mutanda 2022). The philosophy of *ubuntu* is concerned with unity, oneness and solidarity and it is a multi-faceted philosophical system that involves logic, metaphysics, epistemology and ethics. The distinctive nature of *ubuntu* is that the philosophical facets are practically aimed at promoting social harmony and peace within the community through applications based on both knowledge and experience (Gwaravanda 2011).

The strength of *ubuntu* as a philosophical base for African realist transitional justice mechanisms lies in its ability to permeate the broad spectrum of African civilisations. Further, its efficacy as the base theory for realist transitional justice can be located in its ability to conceptualize a realist paradigm of transitional justice with a focus on limitation of power, respect for human rights, acknowledgement of wrongdoing, communal solidarity, unity, and the rectifiability of humanity despite differences. While these ideals are already inherent in most rural societies, traditional transitional justice mechanisms pursue these values in a manner that seeks to balance restorative and retributive justice; hence retributive justice goes beyond punishing the offender and leans towards vindicating the victim and restorative justice emphasises on bottom-up processes found in ordinary citizens' experiences and is concerned with taking steps that the victims feel will set things right. This is in contrast to idealist justice mechanisms which involve the elite who present themselves in various forms, such as peacemakers, truth commissioners, prosecutors, and attorneys (Benyera 2014).

In Africa in general and Zimbabwe in particular, customary institutions such as traditional courts have always had the history of presiding over both civil and criminal cases, including transitional justice cases. Customary law which is the primary custodian of traditional transitional justice mechanisms hands down rulings through chiefs and headmen which are binding on both victims and offenders, thus validating these mechanisms as upholders of grassroots transitional justice. In fact the most widely acknowledged traditional justice mechanisms in Zimbabwe, for healing and reconciliation, are *kurova guva/umbuyiso* (bringing back the spirit of the deceased back home to watch over the family left behind, thereby giving value to human life in death), *ngozi/uzimu* (avenging spirits), reburials, *kutanda botso* (self-shaming), *chenura* (cleansing ceremonies), *nhimbe/ulima* (community working groups) and *nyaradzo* (memorial services). These practices embrace bottom-up, non-legal and victim-centred approaches in order to heal and reconcile communities affected by gross violations of human rights (Benyera 2014).

Further the traditional Shona court system (*dare*), still functioning in contemporary rural Zimbabwe, demonstrates a uniquely African approach to jurisprudence and legality. The core foundational principles of justice, peace and love constitute the Zimbabwean Shona universe, and these principles need to be adhered to at all times. For the Shona, a crime (*mhosva*) is seen as affecting the whole community, hence the social, ontological and moral dimension of crime. This view can be summed up in the dictum, "*I am because we are, and since we are, therefore I am*." As a result, the corrective procedures involve all communities, including the extended family of the offender as the accused and the extended family of the offended as the complainant. The main objective of the court system is to ensure social order and harmony within the community. In addition, the Shona court system is a process and not an event because it takes care of individuals even after the court trial (Gwaravanda 2011).

In the scholarly opinion of Gwaravanda (2011), the Shona system demonstrates some of the rich traditional African philosophical principles that are intrinsically linked to the reasoning process

DOI: 10.5281/zenodo.14631150

relating to crime, law and judgement. These philosophical principles are inextricably connected to logic, ethics and epistemology. Logical principles reflect the coherence and internal consistency of the Shona thought pattern in relation to interpretation of the law and custom of the land. For instance, logical principles, such as the principle of non-contradiction and clarity of expression, help to ensure consistency of statements and soundness of arguments. Ethical principles provide solid justification for the need to value and respect human beings in the court process; in other words these provide a firm grounding for the exercise of *ubuntu* which encompasses principles such as truth telling, self- control, conflict resolution and peace building, among others. Epistemic principles govern responsibility related to knowledge claims and epistemic responsibility further is guaranteed by knowledge related principles such as verification, falsification and openness of dialogue. The influence of colonial mentality/ prejudice against unwritten thought, as may be done to the Shona thought system, has hence been challenged by many African scholars.

A noteworthy mention in this regard could be the invoking of Sage philosophy by the Kenyan scholar, Henry Odera Oruka. Oruka sees the Sage philosophy as a body of thought that emanated from persons considered wise in African communities, and more specifically refers to those who seek a rational foundation for ideas and concepts used to describe and view the world by critically examining the justification of those ideas and concepts. Oruka has in fact published a series of his interviews with these sages in an attempt to counter the criticism and marginalisation of African thought, based on the Western understanding of how philosophy is and can only be a 'written' enterprise and that a tradition without writing is hence incapable of philosophy (Gwaravanda 2011).

Contrary to the Western patterns, the philosophy of *ubuntu* was itself transmitted mainly through oral tradition and accordingly the mental framework of the Shona court system is made up of collective ideas that were absorbed through orature and then became models of thinking and inference. African law based on *Ubuntu* is a living law, based on their recognition of the continuous oneness and wholeness of the living, the living-dead and the unborn and hence by implication, the Shona traditional court system is aimed at promoting this African unity. It is for this reason that the Shona traditional court system responds easily and organically to the demands for reconciliation as a means of restoring the equilibrium of the flow of life when it is disturbed (ibid).

The philosophical underpinning of the Shona court systems relies on the relevance of studying African thought through stories, oral traditions and social institutions. It also upholds the virtue of honesty and the process of consultation before the actual trial, as opposed to the widely practiced fabrication of offences and false witnesses that then becomes a recipe for unfair judgement in the Zimbabwean formal court system. The belief that wisdom is not a monopoly and that sharing of ideas enriches individual perceptions and insights on any given matter, to facilitate binding and logical decisions, demonstrates the uniqueness of African jurisprudence in general and Shona jurisprudence in particular as opposed to the marginalization by the West. In essence, the African philosophy enshrined in indigenous institutions like the Shona court systems does not believe in creating offences or creating criminals, rather it attempts to maintain equilibrium between individuals and communities, and as such the penalties of African law are directed, not against infractions, but towards the restoration of this equilibrium (Gwaravanda 2011).

Although the existence and decisions made by traditional institutions have largely been undermined by both colonial and post-colonial governments, the purpose of their existence has never been doubted. Traditional justice helps to promote social reconstruction, peace and justice after episodes of war by rebuilding traditional order. Traditional interventions offer possible advantages such as sustainability and participation and in the context of political violence, traditional leaders play important roles in encouraging social harmony, and in creating cultural social spaces needed for healing and promoting tolerance. Consequently, they must be viewed as critical stakeholders if countries like Zimbabwe are to successfully transition from violence to peace and stability. In Zimbabwe, for instance, some sections of the war veterans of the Second *Chimurenga* (Second War of Liberation, 1966–1979) came out in support of traditional healing by arguing that it should have started in 1980 with independence, either through ritual cleansing or through other cultural means in order to equip masses to deal with the horrors of the war. There is thus a growing acknowledgement of how traditional justice mechanism lets communal reconciliation processes to achieve mutually beneficial justice without retribution (Mutanda 2022).

A case in point could be the especially volatile security situation in Zimbabwe from 2000 to 2008, which effectively rendered many parts of the country uninhabitable. The then serving President Mugabe was accused of relying heavily on violence among other tactics, to consolidate power. This necessitated the creation of cultural social spaces where the traditional leaders could potentially play useful roles in the process of healing communities. Healing was in fact viewed as a useful strategy in resolving matters that fell outside the scope of formal courts. Traditional leaders were also seen as occupying a strategic role in encouraging social harmony in societies by ensuring that their people receive justice, following periods of inequality or abuse. For instance, prior to the land reform initiated by Mugabe in 2000, there were several precedents of how land invasions by the natives under the leadership of traditional community chiefs were viewed as acts of social cohesion that united people under the belief that since politics had failed to get people land, what was left to do was resorting to the old tradition of bringing land to the people (ibid).

Since the nature of political violence in Zimbabwe can be characterised as systemic, reproduced, deep and wide, and can also be cast as racialized, tribalized, and class based, this complex nature of violence requires equally complex set of tools and mechanisms to heal and reconcile such communities divided by violence for decades. These mechanisms have to be bottom up, locally sensitive to such nuances as culture and most importantly endogenous to the communities; inductive owing to their origin within the violated communities. In this regard, along with the formal justice mechanism, non-state transitional justice mechanisms could also be treated as viable means of making substantial strides in the otherwise stagnant healing and reconciliation processes in Zimbabwe. The main reason for this being that the wronged are the best people to ascertain how they want to be healed and how they intend, *if they do intend*, to reconcile with their abusers. This is in direct contrast to the Western understanding that puts the accused state as both the engineer and main implementer of transitional justice mechanisms,

DOI: 10.5281/zenodo.14631150

notwithstanding that the very state is the prime accused in the perpetration of most human rights abuses (Benyera 2015).

More recently, a broad range of bottom-up, victim-centred initiatives, taken up by communities in an endeavour to seek reconciliation and lasting peace, are being identified as viable reconciliation and peace building mechanisms. These mechanisms are based on the agency of the victims and decades-old customary practices, as opposed to the captured nature of the judiciary and the perpetual militarisation of the state in countries like Zimbabwe. Along with being victim-centred and bottom-up, these mechanisms/ initiatives are most importantly without the involvement of the state. The traditional transitional justice mechanisms instead utilise the family and the community as the core units around which reconciliation is centred. The advent of mass civilian-on-civilian violence in addition to uniformed force-on-civilian violence has necessitated that traditional transitional justice mechanisms are adapted to the new realities of gross human rights abuses, usually by known perpetrators. In Zimbabwe, a plethora of these mechanisms have been positively utilised to force offenders to face the reality of their wrongful actions, to take responsibility, seek repentance, pay restitution and reconcile with their victims. Besides, these traditional transitional justice mechanisms have ensured truth telling, compensation and forgiveness, resulting in reconciliation (Benyera 2014).

The stakeholders in the peacebuilding discourse thus have concurred that there is the need for mainstreaming endogenous and context-sensitive means for healing communities and restoring social relations in the aftermath of conflict. Accordingly, the government, through the institution of traditional leaders, among other strategies, should first and foremost seriously consider undertaking the process of restoring the traditional relationships disrupted by political violence. Simultaneously there should also be efforts to engage traditional leaders in peacebuilding efforts in light of how close and influential they are in societal functioning and well-being. Traditional leaders should be allowed, without hindrance, to objectively take steps to prevent, manage, resolve and transform conflict in their communities. Hence, it is beyond doubt that traditional mechanisms could be successfully implemented in Zimbabwe for their ability and utility to deal with human rights violations and situations of social disharmony, as well as for undertaking community development initiatives (Mutanda 2022).

CONCLUSION

A key question that emerges from the close inspection of African conflict situations is the question of how best to deal with the legacy of the past- a legacy often tainted by violence and fragmentation-that then transmutes itself into maintaining a fragile social ecosystem, characteristic of post-conflict societies in Africa. While bringing the perpetrators of past human rights violations to justice is and should definitely be a priority, thereby combating the culture of impunity that has come to characterize many civil conflicts, it is equally cardinal to focus on institutionalizing measures designed to ensure peace and stability, as only that would bolster the prospects for a country's longer-term recovery. In fact the dynamics of contemporary conflicts, more often protracted social conflicts, necessitates the need to look inwards, within the countries themselves, for conflict resolution.

In Africa in particular, an undervalued indigenous conflict management resource is to be found in the sphere of traditional social mechanisms. While it would be undesirable to project unrealistic expectations from traditional structures, one cannot deny the possibility of traditional mechanisms offering a sober, evidence-based assessment that can effectively complement the conventional judicial systems. In this regard, the viability of the indigenous systems in promoting justice, reconciliation and a culture of democracy is undeniable. Further, the Eurocentric bias or basis of the formal legal structures have most often obscured the lived experiences of the majority of Africans and how they conceive of themselves as a socio-political community. This is what precisely invites a rethinking on how the relationship between the individual and the state can be restored in post-conflict societies.

Accordingly, reconciliation, truth telling and reparation are the instrumental objectives that pave the way towards broader targets and this should mandatorily involve traditional justice practices that emphasizes on healing of survivors, social harmony and overall conflict transformation aimed at prevention of newer conflicts. The informal justice systems in Sub-Saharan Africa offers accessibility and transparency in legal proceedings to the rural people because of how they are carried out in the local language, within walking distance, with simple procedures which do not require the services of a lawyer, and without the delays associated with the formal system. In most cases, the type of justice they offer—based on reconciliation, reparation, restoration and rehabilitation—is more appropriate to people living in close-knit communities who must rely on continuous social and economic cooperation with their neighbours (Huyse and Salter 2008).

Although it is true that protracted social conflicts like civil war and genocide have brought in their wake mutual mistrust in small-scale communities, and this may limit the willingness of these communities to be reconciled in post-conflict situations, non-state mechanisms have a dimension of acknowledgement of responsibility. Their proximity to the victims and survivors makes them more lucrative interim alternatives to formal trials or systematic prosecutions. Of course several circumstances limit the scope of traditional tools of justice. They are culture-specific and, as a consequence, almost always limited to the ethnic, religious and regional communities in which they are applied. In addition, forms of intended exclusion of stakeholders reduce the radius of action; women and young people may be marginalized. Moreover, the tradition-based practices are also not immune from political manipulation, with the result that certain categories of offenders (e.g. middle- and top-level military or rebel commanders) are sometimes shielded from the accountability and reparation dimensions of non-state mechanisms (ibid). However, we also do need to acknowledge their potential and actual contributions at the micro level (individual victims and perpetrators), the meso level (clans, communities) and the macro level (national, regional and international).

The indigenous systems and methods might not be sufficiently effective, and their legitimacy locally and internationally might not be assured. However, the case studies have effectively revealed that tradition-based practices have the potential to produce a dividend in terms of the much needed post-conflict accountability, truth telling and reconciliation that is not negligible. Consequently, positive effects may be expected with regard to the more general transitional justice goals of healing and social repair. Most importantly, these informal/ indigenous mechanisms and practices are testament to the existence of a pre-colonial functioning legal

DOI: 10.5281/zenodo.14631150

system in Africa, the existence of which was denied for long by the Western scholars due to the wide socio-political differences between Western and African societies. Ancient African communities did have legal systems that served the needs of the era and it is remarkable to note that despite the absence of writings, jurisprudential and philosophical thoughts about concepts such as law and justice, power and rights thrived in these communities.

In fact a main attribute of justice in indigenous African jurisprudence is reconciliation: a restorative justice model that emphasises on the use of alternative dispute resolution methods by parties to a dispute. Apart from achieving the reconciliatory goal, justice in indigenous African jurisprudence is also meant to be non-discriminatory, ensure a fair hearing for parties in a dispute, not be dependent on volumes of evidence, and advance the rights of individual members of the community. Maintenance of peaceful relations in society is thus a primary goal in African societies. An understanding of the African conception of justice necessarily flows from this goal, as epitomized in this proverb: *[k]'aja ka dore, ko le dabi ere apilese* [becoming friends after a fight cannot be the same as being friends all along]. Africans thus take an unfavourable view of the adversarial western legal system that has been imported into their societies, as it is believed that a *ki i ti kootu de ka sore* [parties do not become friends after having their case decided in an English court]. A primary goal of justice is therefore reconciliation between parties who have been at loggerheads due to an occurrence that disturbed the peaceful relations between them. It is not primarily a finding of who is guilty and who is in the right (Arowosegbe 2017).

The indigenous African jurisprudence also has a heavy reliance on the metaphysical component, precisely because to the African, the metaphysical world is a given reality. In fact, every social, political, economic and natural phenomenon or reality is taken to have metaphysical properties or undertones. The metaphysical nature of justice also leads to the assertion that every act of injustice will eventually be corrected. This recognizes the fact that an act of injustice may be occasioned through the evil contrivances of wicked people or simply because the truth of the matter was unknown at the relevant time. In the understanding of Arowosegbe (2017), such a philosophical thought has at least three direct implications:

"First, it imposes a duty on society to ensure that an act of injustice occasioned on misleading and false premises is corrected as soon as the truth about the matter becomes revealed. Secondly, it puts the person or persons profiting from the lie on notice that the days of their so profiting are numbered; that, no matter how hard they try, the truth will be established one day. Thirdly, it gives credence to the constancy and power of the truth. Accordingly, truth is an invariable matter, that is unaffected by elemental factors of the human world, whether social, natural or supernatural. It is innately powerful and efficacious, requiring no extra efforts for acceptance and effect."

The indigenous African conceptions of justice hence are to be understood not in their comparisons with the Western jurisprudence, but rather in their proper understanding and appreciation within the indigenous African setting. As suggested by Oyeniyi (2017), it cannot be denied that these conceptions are integral constituents of the world view of a people, manifesting their life choices, cultures, traditions, beliefs etc. and the social, legal and political organization of their societies. They are theoretical postulations intended to give pragmatic solutions to the problems of achieving justice, peace and order in society, with the intention of firmly placing society on the path to progress and development. Consequently, while certain structures such as an independent judiciary and enforcement capabilities are instrumental to reconstructing a post conflict community, peace and justness only flourishes in communities that recognize the importance of community building and restructuring after a prolonged conflict.

In traditional African communities, people lived communally either by clan, village, tribe, or along ethnic lines. Social cohesion, values, norms, and beliefs gave the elders the legitimacy to preside over conflicts. There are similar examples of how in other cultures like in ancient India, the decisions of local village councils (*panchayats*) were considered binding. There is some evidence pointing to how the informal nature of the early Indian legal proceedings, that preferred panchayat dispute settlement to litigation before judges appointed by political authorities, had significant advantages. Hence, even amidst Westernisation, there is a growing sense of need for African tradition and customs to be taught as part of formal education curriculum, as these customs are not written or codified in any form. These laws therefore require to be codified for the generations yet unborn so that even when mixed with the Western world, they will not lose their 'African-ness' and would get an opportunity to reflect on the value of indigenous justice mechanisms in establishing peace and order.

References

1. Alie A.D. Joe (2008), Reconciliation and Traditional Justice: Tradition-based Practices of the Kpaa Mende in Sierra Leone, *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, in International Institute for Democracy and Electoral Assistance (Luc Huyse et al. eds., 2008),pp. 123-145.
2. Arowosegbe O Jacob (2017), Indigenous African Jurisprudential Thoughts on the Concept of Justice, *Journal of African Law* , Vol. 61, No. 2 , pp. 155-170.
3. Benyera Everisto (2014), Exploring Zimbabwe's Traditional Transitional Justice Mechanisms, *Journal of Social Sciences*, Vol. 41, No.3, pp. 335-344.
4. Benyera Everisto (2015), Idealist or Realist Transitional Justice: Which Way for Zimbabwe? *Journal of Social Sciences*, Vol. 45, No.3, pp. 199-211.
5. Bouman, Marlies 1987, A Note on Chiefly and National Policing in Botswana, *The Journal of Legal Pluralism and Unofficial Law* , Vol. 25–26, No.19, pp. 275-300.
6. Chanock Martin (2005), *Customary Law, Sustainable Development and the Failing State*, Cambridge University Press: Cambridge, UK.
7. Coser, Lewis (1956), *The Functions of Social Conflict*, Free Press: Glencoe, Illinois
8. Elechi, Ogbonnaya Oko (1996), Doing justice without the State: the Afikpo (Ehugbo) Nigeria Model of Conflict Resolution, *International Journal of Comparative and Applied Criminal Justice*, Vol. 20, No. 2, p. 344.
9. Forsyth Miranda (2009), *A Bird that Flies with Two Wings: Kastom and State Justice Systems in Vanuatu*, ANU Press: Acton.
10. Friedman Rebekka (2015), Restorative Justice in Sierra Leone: Promises and Limitations, in *Evaluating Transitional Justice*, eds. Kirsten Ainley, Rebekka

DOI: 10.5281/zenodo.14631150

Friedman and Chris Mahony (Palgrave Macmillan: New York), pp 55–76.
11. Golub, Stephen (2003), *Non-state justice systems in Bangladesh and the Philippines*, Paper presented at the Workshop on Working with Non-State Justice Systems, UK Department for International Development, 6–7 March 2003
12. Grundy.W. Kenneth (1964), The 'Class Struggle' in Africa: An Examination of Conflicting Theories, *The Journal of Modern African Studies*, Vol. 2, No. 3, pp. 379-393.
13. Gwaravanda Taurai Ephraim (2011), Philosophical Principles in the Shona Traditional Court System, *International Journal of Peace and Development Studies*, Vol. 2, No.5, pp. 148-155
14. Hasenclever, A., Mayer, P. and Volker Rittberger (1997), *Theories of International Regimes*, Cambridge University Press: Cambridge.
15. Huyse Luc and Salter Mark (eds) (2008), *Traditional Justice and Reconciliation after Violent Conflict – Learning from African Experiences*, International IDEA: Stockholm.
16. Igarape Institute (2018), Defining Conflict Prevention, *The Handbook of Conflict Prevention*, Nov. 1, 2018, pp. 6-20, https://www.jstor.org/stable/resrep20660.5.
17. Ingelaere Bert (2006), Changing Lenses and Contextualizing the Rwandan (Post-) Genocide, in *Africa of the Great Lakes: Ten years of Conflictual Transitions* (F. Reyntjens and S. Marysse (eds), Yearbook, 2005–2006), pp. 389–414.
18. Ingelaere Bert (2008), The Gacaca courts in Rwanda, *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experiences*, in International Institute for Democracy and Electoral Assistance (Luc Huyse et al. eds., 2008),pp. 25-57.
19. Johnston, Les and Shearing, Clifford (2003), *Governing Security: Explorations in Policing and Justice*, Routledge: Oxfordshire.
20. Mearns.J. David (2002), *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International: Barton, ACT.
21. Mutanda Darlington (2022), Traditional Justice Mechanisms and Reconciliation in Zimbabwe: Assessing the Benefits, *Social Dynamics: A journal of African Studies*, Vol. 48, No.2, pp. 294-313.
22. Olsen, Marvin (1970), *Power in Societies*, Macmillan: New York.
23. Oyeniyi Abe (2017), Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa, *Willamette Journal of International Law and Dispute Resolution*, Vol. 25, No. 1, pp. 56-77.
24. Pettersson, Björn (2004), Post-conflict Reconciliation in Sierra Leone: Lessons Learned, *Reconciliation Lessons Learned from United Nations Peacekeeping Missions: Report Prepared by International IDEA for the Office of the High Commissioner for Human Rights (OHCHR)*, in International IDEA: Stockholm.
25. Reyntjens Filip (1990), Gacaca, or 'Justice on the Grass' in Rwanda, *Politique Africaine*, Vol. 40, No.1, pp.31-41.
26. Roder J. Tillman (2012), Informal Justice Systems: Challenges and Perspectives, in *Innovations in Rule of Law: A Compilation of Concise Essays*, eds. Botero Carlos Juan, Janse Ronald, Muller Sam and Pratt Chistine, (HiiL and The World Justice Project: Washington DC), 58-61.
27. Triponel Anna and Pearson Stephen (2010), What Do You Think Should Happen? Public Participation in Transitional Justice, *Peace International Law Review*, Vol. 22, No.1, pp.103-142.
28. Ubink Janine (2011), *Gender Equality on the Horizon? The Case of Uukwambi Traditional Authority, Northern Namibia*, IDLO Customary Justice Working Paper Series, Paper No.3, International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University: Rome.
29. Williams T John (1976), Conflict Theory and Race Conflict, *Social Science*, Vol. 51, No. 1, pp. 32-36.

DOI: 10.5281/zenodo.14631150