

The Nature of Traditional Justice in Africa: A Case Study of the Bukusu People of Kenya

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ABSTRACT

The traditional justice systems have throughout history been fundamental in solving disputes and conflicts in African communities. They are seen as an alternative or a complement of the formal court systems. These courts are based on customary practices, traditions and rules of communities. In some countries, the traditional justice systems operate within the state control while in other countries the law recognizes them as mechanisms that are used to solve disputes and conflicts. Though some see these mechanisms as backward and not promoting development, most Africans in rural settlements prefer them. Most Africans resort to traditional justice systems to solve their disputes because of three reasons. One is that most Africans live in rural areas where the services of the formal court systems are limited. Two, the formal courts may not be able to offer the type of justice appropriate for disputes between people living in rural areas where such disputes can cause conflict within the communities thus affecting the relationship that exists between them. Three, the formal court systems may not subscribe to the cultural and religious traditions that are applied during the resolving of the disputes. The rural people because of the sacredness attached to it revere these traditions. This article seeks to examine the nature of traditional justice systems in Africa.

Keywords: Justice, Conflict Resolution, Traditional Justice System

INTRODUCTION

Before colonization, Africa was an already advanced society with its well-established institutions of administration that covered all spheres of life according to the needs of the society that make Africa operate and live independently and self-reliantly of any power. Such institutions did not come out of the blues. They were established and supervised by the authority and powers of the time for example the kingdoms and chiefdoms. These forms of authority and power were well established before the arrival of colonial Europe. This is why development, religion, governance and administration of justice was not something new in pre-colonial Africa. Colonialists did not find Africa in a vacuum or in lack of administrative systems and civilization as it has always been alleged (Mhango, 2018). Ademowo (2015) observes that before colonization and before the beginning of slave trade, African societies already had institutional mechanisms and cultural sources to uphold its values of justice, peace, tolerance, solidarity and respect. These structures were and are still responsible for making peace, managing and resolving of conflict however not to a larger extent as it used to be. The African philosophy and way of life is reflected in these structures that address the social, political and economic conflicts among people in the community.

The Understanding of Justice in the African Context

Justice may be defined as the principle, which dictates the conduct between a person and person, which may fairly be expected by both (Robinson, 2003). The element of right is significant to all human societies. Certain desires that humanity have are of greater validity and must prevail over forces, circumstances, or

mere being. The sense of justice is as central to Africans as it is to all human societies. The concept of justice in any given society provides the standards according to which life within that society is measured.

A society organizes itself by making laws. Laws bind all members of the society to behave in a particular way. Laws guide, order and help the society to behave in a manner that is expected of it. They create boundaries for practical social life. Laws are rules that are made by a given society for the purpose of survival and well-being. They are there to ensure that justice is made a reality within the society (Waldron, 2016). That is why there is existence of courts in any given society, which has a function of administering justice. Justice in most African traditional context is understood in terms of restoring relationships and balance in the cosmological sense. This means that it is related to both the physical and the metaphysical worlds (Wielenga, 2020). Benyera (2014) puts it this way “the relationship between ‘not yet living,’ ‘the living’ and ‘the living dead.’ Among the Shona in Zimbabwe justice is a verb and disposition that can be captured by local words such as ‘*kuenzanisa*’ (creating a balance or making equal), ‘*kunzwana nhunha*’ (listening to troubling issues), ‘*lunganisa*’ (making things right or equal) and ‘*kuringanisa*’ (making amendments or creating a balance). These expressions of justice speak to rebuilding relations in the physical and metaphysical realms in that they ascribe responsibility to the conflicting parties to work together and come up with amicable solutions that provide for social harmony at a cosmological level (Wielenga et al, 2020). Justice in African traditional context is restorative in nature. It is about encounter, reparation and transformation and of importance is the relational dimension, the victim’s voice, the community voice and creating spaces for encounter and dialogue. Balance and harmony cannot be restored through the imposition of pain and suffering on the offender rather it is through acknowledgement of responsibility on the part of the offender and the willingness to repair the harm that the victim has suffered (Wielenga et al, 2020). This is taken further by seeking to address the underlying causes of the incident, which includes the offenders own impaired personhood and needs. This becomes framed within the overarching goal of contributing to a more just society that is understood holistically.

The intrinsic essential importance of the intersection of the physical and the metaphysical are most visible in the cleansing rituals that characterize most African systems of justice (Baines, 2010). In case the conflict is resolved through the formal state systems, on returning to their community, the involved parties sometimes engage in a cleansing ritual that involves the whole community in the cosmological sense (Baines, 2010). Individual accountability or social contract between and individual and the state are not the main concerns of justice in the African traditional context. It is also not about the rights and duties of a citizen or protecting an individual from the state. It is about restoring social harmony and balance in the web of relationships that are integral to the survival of the community.

The Traditional Justice Systems

The traditional justice systems exist at the local or community level to manage disputes but have not been set up by the state (Kariuki, 2018, p.1). They normally have long-standing cultural and historical foundations and frequently predate colonialism. Most of the Traditional Justice Systems are embedded in African customary laws hence reflecting traditional African norms and values. They apply customary procedural and substantive law. These institutions are not static. They have changed significantly throughout history through interaction with both the colonial legal traditions and the formal justice system in the independent state. Traditional justice systems appear to have an enduring cultural legacy in large parts of Africa. In some States, they are the subject of specific constitutional or legislative provisions that recognize them and regulate their authority and jurisdiction (UNHR, 2016, p.11). For instance, in the constitution of Kenya 2010, the traditional justice systems have been incorporated into the law subject to some limitations according to article 159 (2) (c) and (3). They are not to be used in a manner that contravenes the Bill of Rights; it is repugnant to justice and morality or is inconsistent in the Constitution or any written laws (Bwire, 2019, p.4).

In Some countries like Malawi, Zambia and Namibia the state retains a vertical structure with the traditional system forming the lowest levels of the court system. Other countries like Uganda have a parallel system, with the traditional forum and the formal court serving alongside one another and providing the parties with a choice of forum (UNHR, 2016, p.13). The Traditional Justice Systems function as alternative or as a complement to the formal state court system. The traditional courts form an important part of the administering of justice in African societies. Some people see them as conservative and unable to deliver justice in modern social, economic and political climate while others see them, as prototypes of the kind of dispute resolution mechanism that are desirable in modern society (www.justice.gov.za). Traditional courts are responsible for administering justice, restoring peace and promoting reconciliation. African jurisprudence in its indigenous societies is deeply rooted in the philosophy of collective responsibility (Khunou and Koketso, 2013, p.52).

The Composition of the Traditional Justice System

In most of the African traditional societies, the Traditional Justice Systems are composed of a council of elders, who are led by either a chief or a king depending on the political organization of the community. The council of elders are heads of families or clans that are found in the community. In the African context, formal training and qualifications are not required. Authority to intervene is conferred on elders because they have a reputation in the community as persons who have wisdom and integrity. The elders understand the traditions, culture and usages of the community that are interwoven in the patterns of the dispute. By listening carefully to the different and various views, the elders proffer solutions that restore unity and sustain cohesion within the community (Faris, 2015).

In other communities, the members of the Traditional Justice Systems are elders and leaders who provide leadership for the community itself in form of a general assembly. Some of the communities chose traditional leaders for explicit purpose of performing judicial or quasi-judicial role (UNHR, 2016, P.24). In others, a person's position as a leader of the community includes the responsibility to hear and resolve disputes. The authority of the traditional leader derives from his or her status as a respected member of the community and in some cases, the position maybe inherited. In some communities solving of disputes begin at the family level. The family is considered the lowest political unit and the head is the father who has a duty of maintaining peace and order in the family. The father solves disputes such as quarreling between wives and between children, fights and arguments concerning duties and responsibilities of the family members and even marriage disputes between sons and their wives. For instance, among the Bukusu in Kenya, the father is very instrumental in maintaining peace and solving disputes at the family level.

In other African societies, there are traditional courts at the level of the chief who is the community's supreme traditional leader. For instance, in Namibia there are 49 recognized traditional authorities and most have a traditional court at the level of the chief.

The territories of many traditional communities are subdivided into districts under the leadership of "senior headmen", who preside over cases in district traditional courts. Within districts, there are villages under persons known as "headmen", who adjudicate cases in their village courts with the help of village elders.

A case is normally first brought at the village level. Mostly they are minor matters that disturb peace in the village. Cases that are beyond the village headman are referred to the district traditional courts. Serious matters such as murder, land disputes go directly to the chief (UNHR, 2016, p.33).

The Court Process at Traditional Justice Systems.

Finding the Truth

The offended party presents the case to the council. In some communities there might be a fee charged while in some there is no fee. Once the case is presented, investigations commence to find out the truth

The council of elders are endowed with the power to investigate the truth on the cause of conflict. The reason why they investigate is to identify the offender after which he or she will be fined as a punishment but not to be taken out of the community, as the modern courts of law sentence persons to imprisonment (Achar, 2018, p.75). Investigations are conducted to find out the root cause of the conflict. Among the Luo people in Kenya, the elders have a responsibility to investigate friends of the suspects for the purpose of discovering truth. Sometimes truth could be disclosed by a threat to pronounce a curse on the offender if they do not comply and tell truth about the case (Achar, 2018). Parrinder (1961) in *West African Religion* says that mediums and seers are key instruments in traditional truth findings. Truth finding also involves services of the traditional medicine men and women. The truth is very crucial in any given case. It is believed among Africans that the truth brings healing and reconciliation between the disputing parties.

Realization of Justice in Traditional Justice Systems.

When the investigations have been carried out and they are complete, the council of elders convenes a meeting to solve the conflict. The parties involved are informed of the day of the hearing. The hearing of the case is done in public. The participation of the community is another feature of traditional justice systems. Traditional systems are often present in communities that have “multiplex relationships” that means that the community members are connected through economic, social and familial bonds. Because of the close connection among community members, the group as a whole often assumes responsibility for regulating the actions of its members (UNHR, 2016, p.26). The involvement of the community in the hearing of the case lends authority to the process, which is necessary to ensure fair and right judgements are implemented. It also fosters reconciliation and maintains the social order, both, which are important in TJS. The hearings are done in public to give the community an opportunity to learn from the mistakes of the offenders and as a warning to those who cause problems in the community to avoid such mistakes. Before the hearing begins, both parties are supposed to swear and confess that whatever they will say will only be the truth. Lack of saying the truth attracts a curse on an individual. Curses are not a mere wish for misfortune on a person but are a power that produces tangible results; a power is released and is effective in determining the destiny of the recipient (Donkor, 2011, p.92). The idea of curses is one of the most feared manifestation and therefore the parties have no option than to speak the truth before the council.

During the hearing, the council of elders listens to both sides of the story. The presence of witnesses in a case is very important in the case. Testimony of the witnesses is crucial because they make the case understandable. Witnesses help the traditional judicial council to identify evidence (truth) that results to a just judgment of the case (Achar, 2018, p.61). The witnesses too are supposed to swear to say the truth. The council then deliberates on the issue and pass judgement. Judgment is passed as guided by the traditional norms or virtues of the community. The Chief or the headman that presides over the case gives the judgement quoting wise sayings and proverbs, which explains why such a judgement is passed or has been taken. The reconciliatory nature of traditional justice systems and the types of judgments awarded are in many ways a reflection of the goal of restoring equilibrium and harmony in the community, and encouraging collective responsibility (UNHR, 2016, p. 29). Judgments most frequently result in orders to provide some form of payment to the aggrieved party, either in money, livestock or crops from the harvest. Fines to those who are found guilty vary according to cases. They range from strokes of canes, goats, sheep, working in the community. The conflict person, immediate family members, clan, and community are also exposed to public shame (Achar, 2018, p.63). This is because of the African philosophy ‘I am because you are.’ It means the family has failed in bringing up the accused. If the person is not able to pay the fine, the family has to pay it.

In the Traditional Justice Systems, the focus is more on healing and reconciliation because the accused and the person that has been offended will continue to live in the same community. Therefore, there is need for forgiveness for harmony to reign in the community. Ubuntu is central to the essence of humanity among the local community, in that even those accused of wrongdoing are still seen as human beings though they have deviated from the moral codes of the community.

Hence, the justice pursued seeks to acknowledge the wrongs done and make the offender aware of the impact their actions have to others (Wielenga et al, 2020).

Once an offender has become aware, they are expected to take responsibility by reaching out to the affected party and ask for forgiveness as well as pay any compensation that may be required. For example, among the Shona, in the case of murder, the offender is expected to follow the tradition-based practice of '*kuripira ngozi*' (appeasing avenging spirits), which is a ritual that is done to offer compensation and appeasement to the spirit of the deceased (Wielenga et al, 2020)

Reconciliation

Reconciliation and maintaining harmony in the community are the guiding principles of traditional dispute resolution. As a result, the processes developed and followed by traditional justice systems attempt to leave both parties, as well as the community, satisfied with the outcome. Compromise and obtaining consent to the outcome are highly valued. Individual responsibility and retribution are considered less important (UNHR, 2016, p.27). Among the local community, restoration of social harmony is not only done to repair relations between the living beings (spirit of the living persons) but extends to the bigger community made up of the living dead (spirit of deceased persons) and unborn living (spirit of a person yet to exist in the physical realm). This stems from the understanding that a living being is a spirit being, who belongs to a cosmological community made up of the physical and metaphysical realms. Within each realm are living entities bound by an interdependent relationship that connects those existing in the physical world and the metaphysical (Wielenga et al, 2020). This captures the humanistic and spiritual values of Ubuntu that it preserves social harmony between the living, the unborn and the living dead in all circumstances.

Following the resolution of the dispute, there is need for healing to take place between the two parties. The aim of traditional conflict resolution is to reconstruct the broken wounds of the individual with God, community which include the living dead, and nature. Reconciliation has potential power to heal wounded trust and ailing emotions by addressing hatred that leads to recurring conflict (Achar, 2018, p.74). This process among most African traditional societies requires symbolic gestures associated with rituals (Ndumbe, 2001). A religious leader leads the reconciliation process. The accused renders an apology and the offended renders forgiveness. A drink and food is shared between the two parties. The act of eating together solidifies the peace covenant between the two parties or communities.

An Example of Traditional Justice System in an African State

The Bukusu in Kenya

The Bukusu are Bantu speaking people found in the Western parts of Kenya. Like many other patrilineal societies, the Bukusu have a culture where they share customs, values and distinctive ways of living. Their culture is witnessed in their social, political, economic and spiritual arrangement and they are able to perpetuate and develop their knowledge and attitude towards life (Gumo, 2018, p.1245).

The Bukusu are organized into families and clans. The family is the smallest political unit and its head is the father. The clans are made up of families that descend from the same ancestor or share the same totem. The political organization of the Bukusu is based on exogamous clans (*ekholo*) and are the most effective political units among the Bukusu (Wekesa, 2000, p.41). Each clan has its own political structure, which is led by a leader known as *Omukasa* (elder). The *Omukasa* combines both the functions of a judge, priest as well as that of a political leader. He is assisted by the *Babwami we lichabe* (elders of the ivory armlet) who are in charge of the entrances of the fort that is led by '*Omukasa*' (Wekesa, 2000, p. 47.). Below '*Babwami we lichabe*' are honorable elders and specialists generally homestead heads that compose a council that settles disputes which are minor in nature (Wekesa, 2000, p.48).

The main disputes resolved in the traditional justice mechanism include the land disputes, marriage disputes, gender violence, family cases including inheritance, clan and welfare disputes such as nuisance and neglect

of children and elderly people. The traditional dispute resolution tribunals are male dominated; women are not majorly involved in the process of dispute resolution (Wekesa, 2000, p.45).

Women are only allowed to be witnesses and nothing more. The family is the basic unit of dispute resolution at the family level. The father is instrumental concerning dispute resolution. He is the head of the family and has power and authority over his wives, children and properties. His duties are allocation of land, solving of disputes among family members and warning the family against causing trouble. The council of elders is central of authority on eminent grievous matters that cannot be solved at the family level (Sanguine, www.academia.edu). The council of elders is made up of clan elders from each clan and are led by *Omukasa*. The council of elders under *Omukasa* is the highest institution for conflict resolution. Decisions and judgements made are based on the customary laws. The utmost aim of the Bukusu traditional courts is to restore peace and there are no jails or prisons for the offenders.

African cultures have procedures through which conflicts are resolved (Katola, 2003). At the family level, when there is a dispute for instance a fight among the wives, the husband calls both wives involved in fighting and then listens to both sides of the story. Basing on the two accounts, he then passes his judgement. The troublemaker is scolded and the one offended appeased. The troublemaker is asked to apologize for the wrongs done. As a way of appeasing the offended wife, the husband visits her and comfort her. The head of the family ensures that peace reigns all the time. At the clan level, elders are to be mediators to restore peace and administer justice. When a person is offended he reports the matter to ‘*Omwami we lichabe*’ within his area. No fee is charged. The ‘*Omwami we lichabe*’ then summons the conflicting groups to settle the dispute. In case, the matter is serious he consults with the council of elders for guidance (Wekesa, 2000, p.50). Resolving of conflicts mainly focuses on promoting reconciliation and that is why the process encourages the conflicting parties to use words of forgiveness.

Serious cases like murder, adultery and land disputes are referred to *Omukasa*, who together with the council of elders look into the matter. Once the case has been presented to the council, an investigation is carried out to find out the truth. This is done secretly by the council of elders and is used as evidence during the case hearing (Wekesa, 2000, p.52). Once the investigations are done, the hearing takes place. The hearing is done publicly so that the rest of the community can learn from the mistakes of the offenders. Before the hearing begins, both parties are supposed to swear and confess that whatever they will say will only be the truth. Lack of saying the truth attracts a curse on an individual. Curses are not a mere wish for misfortune on a person but are a power that produces tangible results; a power is released and is effective in determining the destiny of the recipient (Donkor, 2011, p.92). The idea of curses is one of the most feared manifestation and therefore the parties have no option than to speak the truth before the council.

The council listens to both parties and cross-examines the witnesses. The council then deliberates on what they have heard and then they pass judgement. Judgment is based on the traditional norms and laws of the community. The *Omukasa* quotes proverbs and use wise sayings to explain why the council is passing such judgement upon the accused (Wekesa, 2000, p.54). The punishment and fines depend on the gravity of the crime. The type of fines include animals or other items as grain. The punishment can be caning of the accused, working at the farm. If the convicted person does not have the fine, it is the family or the clan that pays. This is based on the principle that a person does not belong to himself or herself. The African philosophy of Ubuntu ‘I am because you are’ (Mbiti, 2015). The family also suffers the shame when accused is found guilty.

However, among the African traditional societies the purpose of the justice system is to restore the balance and to heal the relationships (Anderson, 2005). It is not so much about punishment but about healing the wounds caused by the crime and mending broken relationship. The Bukusu people believe in living in harmony. The accused is supposed to ask for apology and the offended is to render forgiveness. They believe that lack of harmony with each other means lack of harmony with God (*Were*). Therefore, the end goal of the process is supposed to ensure that peace prevails and reconciliation is effected. The reconciliation process is to be led by a religious leader.

There can be slaughtering of a chicken, a sheep or a goat and sharing of the traditional beer *Busaa*. Eating and drinking together signifies no 'bad blood' between the two parties that are in conflict. This cements the relationship (Mbiti, 2015).

Mechanisms for conflict Resolution

During conflict resolution, the Bukusu like any other African society employs various mechanisms such as mediation, negotiation, and adjudication. Negotiation mechanism is only applicable to the parties' subject to the conflict at hand. Negotiation is done in private settings, the two parties meet privately and negotiate on a settlement that eventually turns out to be a win – win settlement (Bwire, 2019). This mechanism however depends on the mutual consent of the parties and therefore a person cannot be compelled against his or her will to agree to meet with the other party. Mediation likewise is used as a mechanism to solve disputes in the Bukusu system of traditional dispute resolution. Mediation is an old method of conflict management in traditional African societies surrounded by secrecy (Olaoba, 2005). Mediation only becomes instrumental where negotiation between the parties has failed. A third party mediates on behalf of the parties. The neutral party involved in the mediation process leads the parties into a discussion and ultimately suggest various possible solutions.

Adjudication in the traditional African society, involves bringing all disputants in the conflict to a meeting usually in the chambers and then dialogue commences (Olaoba, 2005). Reconciliation is the most significant aspect of conflict resolution. It is the end product of adjudication. After the disputants has been persuaded to end the dispute, peace is restored. Today the council of elders amongst the Bukusu tribe is not very instrumental in the justice system because of the intervention of a system of community chiefs (*Omwami*) who are central in solving communal conflicts. Community elders (*Makhuru*) help the community chiefs. The elders understand the scope of the customary law applicable to the members of the tribe; hence, their knowledge of the customary law is important in solving disputes. Cases like murder, land disputes, rape and gender violence are mostly referred to the formal courts. The family unit remains a valid institution of traditional dispute resolution. The father still has the ultimate authority to oversee the resolution of the family feuds.

CONCLUSIONS

The Traditional Justice Systems exist at local or community level to manage and resolve disputes. They are embedded in African customary laws hence reflect traditional African norms and values. Judgement therefore is done based on these norms and values. Truth is very crucial in resolving of the cases presented. Truth finding begins from the investigations of the case as well as the witnessing so that judgement is fairly passed. The accused person does not bear the shame alone, the family too bears the shame because it means it failed in bringing up the accused. The focus of the Traditional Justice Systems is more on healing and reconciliation because the accused person and the one offended will continue to live in the same community.

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