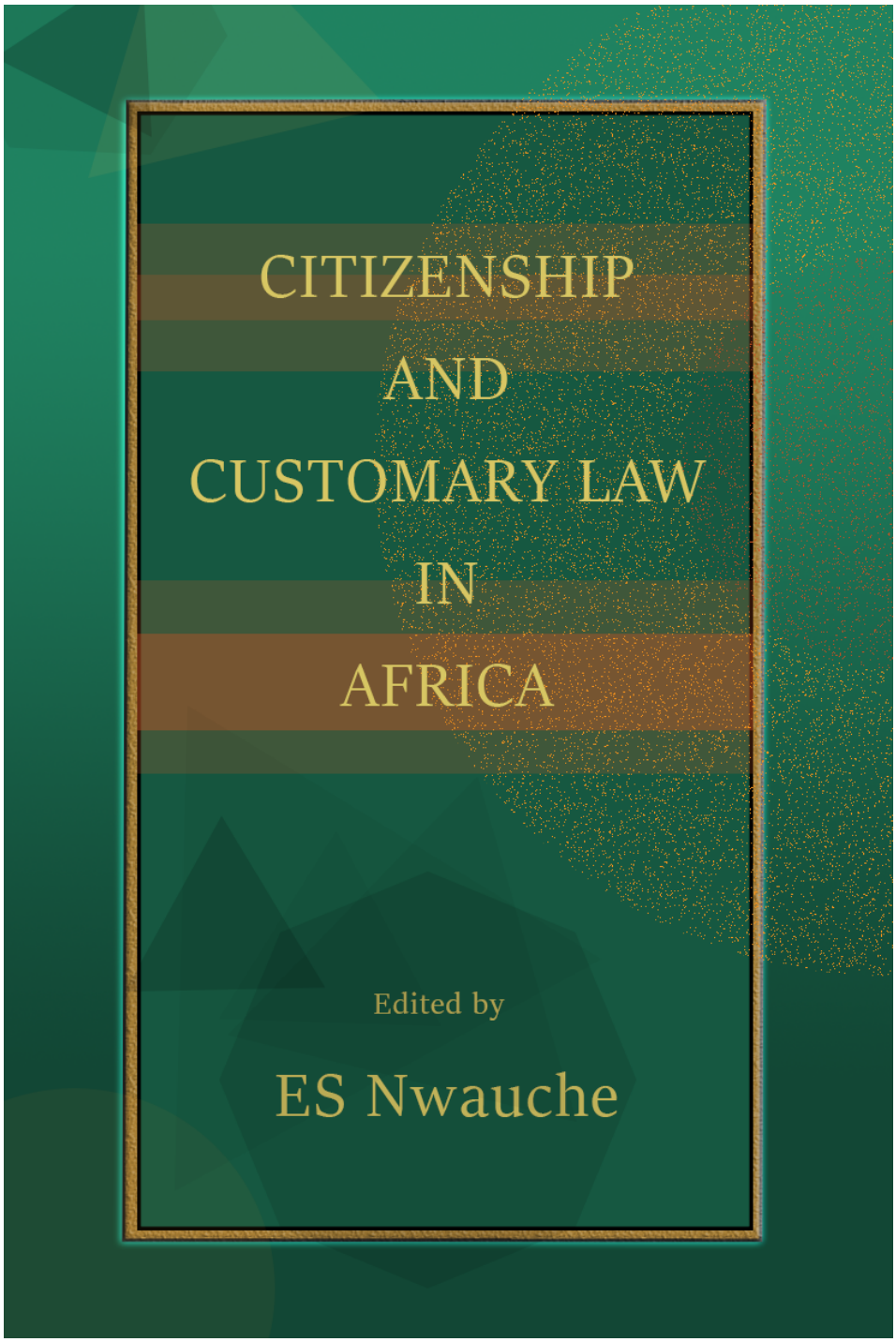
CITIZENSHIP
AND
CUSTOMARY LAW
IN
AFRICA
Edited by
ES Nwauche

CITIZENSHIP AND CUSTOMARY LAW IN AFRICA

Edited by *ES Nwauche*

CITIZENSHIP AND CUSTOMARY LAW IN AFRICA

Edited by

ES Nwauche

Professor of Law
University of Fort Hare, South Africa

First published 2020

PREFACE

In a continent where customary law is an exceptional legal order, largely oracular in a written world and struggling to come to terms with the impact of constitutionalism, this book of essays responds to a dearth of materials of engagement. Like colonialism, constitutionalism is an epoch with much meaning for Africans because of its juridical potential. In sum, constitutionalism in general and a human rights framework afford us great opportunity to determine the legal content of African plural legal systems. Constitutions are cultural documents to the extent that they shape our values, ideals, beliefs institutions and understanding. We can bemoan what constitutionalism has done to customary law, or we can embrace it to the advantage of the latter. Our essays engage with perspectives of citizenship where customary law and constitutionalism intersect.

I want to thank the contributors to this book. Our journey began with responses to a panel proposed for panel 2 of the 2018 conference of the Commission for Legal Pluralism holding at the University of Ottawa Canada titled “Citizenship and Customary Law in Africa. We were unable to attend the conference but continued with the development of our proposed presentations and papers. The presentations underwent double blind peer review and much editing. The decision to opt for open access is to ensure that these papers fully contribute to the much-needed conversation of the management of Africa’s plural legal regime.

A profound debt of gratitude is due to many people who contributed to the publication of this book. None more so than Tamunotonte Jack who made the open access possible.

Enyinna Nwauche
June 2020

Table of Contents

CONTRIBUTORS

Enyinna S Nwauche is a professor of law at the Nelson Mandela School of Law University of Fort Hare, East London where he is Head, Department of Private Law. He previously taught at Rhodes University Grahamstown; the University of Botswana; the Rivers State University of Nigeria. He is a rated NRF scholar and has held fellowship and visiting positions at the Max Planck Institute for Public International Law Heidelberg; the Max Planck Institute for Tax Competition and Intellectual Property Munich Germany; the AHRC Research Centre for IP and IT Law University of Edinburgh Scotland and the South African Institute for Advanced Constitutional Public Human Rights and International Law (SAIFAC). Prof Nwauche is a member of the editorial boards of the Constitutional Court Review; Scholarly and Research Communication (SCR) and Speculum Juris. He is Ag chair of the Coordinating Committee of the African Network of Constitutional Lawyers (ANCL); member of the African Union (AU) Working Group on a Model Law for the Protection of Cultural Goods and Heritage and former Director General of the Nigerian Copyright Commission. He has to his credit 2 books; 2 edited books and numerous peer-reviewed articles; chapters in books and numerous public lectures and conference presentations.

Elizabeth Macharia-Mokobl Dr Elizabeth Macharia-Mokobi is a senior lecturer in the Department of Law at the university of Botswana. She holds an LLB from the University of Botswana, an LLM in international Law from Cambridge University and an LLD from the University of Pretoria. In her doctoral thesis, a comparative study on the death penalty, judicial corporal punishment and mandatory sentencing, Dr Macharia-Mokobi made the case for law reform in these areas of law in Botswana. Her areas of research are international law, criminal procedure and the law of succession. She has written widely on refugee rights in Botswana advocating for law reform and strengthening protection of asylum seekers and refugees, in particular child migrants, in Botswana.

Francis Kariuki holds a Bachelor of Laws (LL.B) and a Master of Laws degree (LL.M) from the University of Nairobi, and a doctorate degree from the University of the Witwatersrand in South Africa. Francis is an Advocate of the High Court of Kenya, an arbitrator, accredited mediator and a doctoral fellow at Strathmore University Law School. He is an accredited trainer in ADR and a Fellow of the Chartered Institute of Arbitrators (CIArb). Francis is also a listed arbitrator and mediator with the Nairobi Centre for International Arbitration (NCIA) in Kenya, and a member of the Strathmore Dispute Resolution Centre (SDRC). He is also accredited as a mediator by the Mediation Accreditation Committee (MAC) under the Kenyan Judiciary. His research interests are in property law, traditional knowledge, conflict management and traditional justice systems.

Nqobizitha Ndlovu Legal Practitioner and Doctoral Candidate, University of Fort Hare, South Africa Nqobizitha Ndlovu is a legal practitioner and academic who is the is the National Policy and Legal Advisor at Zimbabwe Environmental Law

Association (ZELA). He holds a Master of Laws (Constitutional and Human Rights Law) from the Midlands State University, a Post graduate Diploma in Monitoring and Evaluation from Stellenbosch University and a Bachelor of Laws (Hons) degree from the University of Zimbabwe. He is also a doctoral candidate with the Nelson Mandela School of Law, University of Fort Hare, South Africa. His research interests are in indigenous peoples' rights, natural resources management, property rights and legal pluralism.

Muradu Abdo Srur received an undergraduate degree in law from Addis Ababa University and his LL.M degree from the University of San Francisco. He completed a PhD in law at the University of Warwick, School of Law, writing a dissertation on the theme: "State Policy and Law in Relation to Land Alienation in Ethiopia". He has published journal articles, book chapters, book reviews, and comments, text-books in the areas of land law, property law, legal pluralism, human rights and legal history. He also edited books on law and development, human rights and legal pluralism. His research interest is law in development focusing on land law, property law, customary legal systems and human rights. He is currently an associate professor of law at Addis Ababa University, School of Law. He may be reached at: muradu.abdo@aau.edu.et or muradu1@yahoo.co.nz or +251911449742.

Dr. Tapiwa Victor Warikandwa is a Senior Lecturer in the Faculty of Law at the University of Namibia. He specializes in International Trade Law, Labour Law, Indigenisation Laws, Mining Law and Constitutional Law amongst other disciplines. He has published seven books in the areas of Jurisprudence, Labour Law, Women's rights, Mining Law, Land rights, Economic Law, amongst other discourses. Prior to coming to Namibia, Dr Warikandwa worked as a legal officer and later legal advisor in the Ministry of Public Service Labour and Social Welfare Zimbabwe; with the law reviser of the Ministry of Justice in Zimbabwe in reviewing laws administered by the Ministry of Public Service Labour and Social Welfare; and with the activities of the Cabinet Committee on Legislation on behalf of the Ministry of Public Service Labour and Social Welfare.

Dr Warikandwa also completed an ordinary and advanced training in Labour Law Making at the International Labour Organization's International Training Centre in Turin Italy. Dr. Warikandwa has also attended numerous work related conferences and business meetings such as the 2007 International Labour Conference in Geneva Switzerland and the African Regional Labour Advisory Council meetings to name but a few. Dr. Warikandwa has since written a book on labour law in South Africa and published articles in accredited peer reviewed journals. Dr. has served as a Post-doctoral Fellow with the University of Fort Hare in South Africa. He has also worked as a senior lecturer at the University of Fort Hare and presented papers at conferences in and outside South Africa. Dr Warikandwa studied for his Bachelor of Laws, Master's degree and Doctoral degree at the University of Fort Hare in South Africa.

Introduction

ES Nwauche*

This collection of essays explores the dialectical relationship between formal conceptions of citizenship ('civic citizenship') arising from a state grant and recognition of a bundle of rights[1] and cultural norms entitlements privileges and relationships (cultural citizenship')[2] that are considered obligatory by communities of religion language and culture whether formally recognised by the State or otherwise. Civic citizenship in Africa is constitutionally recognised because many African States through their constitutions define the status and rights that flow from being a citizen. Four examples will suffice. South Africa in section 3 of the Constitution of the Republic of South Africa 1996 recognises a common South African citizenship and provides that all citizens are equally entitled to rights, privileges benefits duties, and responsibility of citizenship. Chapter three of the 2010 Kenyan Constitution defines citizens as entitled to the rights privileges and benefits of citizenship subject to constitutionally permissible limitations.[3] The 1999 Constitution of the Federal Republic of Nigeria, which in chapter three also recognise Nigerian citizenship. Legislation is often required to define the duties and rights of citizens[4] even though the Bills of Rights of African Constitution appears primarily reserved for citizens. Our last example is Zimbabwe that defines law as including customary law[5] and protects the right of every person to participate in the cultural life of their choice.[6] On the other hand, the recognition of cultural citizenship proceeds through the recognition and enforcement of customary law. Three constitutional designs are evident in African constitutions. The first example is countries that expressly recognise and protect customary law through recognition of cultural rights such as

* *Professor Nelson Mandela School of Law, University of Fort Hare, South Africa* enwauche@ufh.ac.za

[1] See generally C. Joppke " Transformation of Citizenship: Status, Rights and Identity" 2007 11 Citizenship Studies, 37-48.

[2] See generally J. Pakulski " Cultural Citizenship" 1997 1 Citizenship Studies, 73-86.

[3] See section 12(1) of the Constitution of the Republic of Kenya 2010.

[4] See, for example, section 18(1)(f) of the Kenyan Constitution and section 3(3) of the Nigerian

[5] See section 322 (2) of the Constitution. Other relevant parts of the Constitution include sections 162, 174(b), 176, 280, 282 of the 2013 Constitution of Zimbabwe.

[6] See section 63 above.

South Africa[7] Kenya Zimbabwe and Angola.[8] The other example are states like Nigeria[9] that does not protect cultural rights but provides instrumental frameworks for the protection of customary law. Some African Constitutions set out a framework for the interaction of civic and cultural citizenship. For example, the Constitution of the Republic of Ghana provides in section 26(2) that all customary practices which dehumanise or are injurious to the physical and mental well-being of a person are prohibited, as part, of its recognition of the rights of every person to enjoy practise profess maintain and promote any culture language tradition or religion in section 26(1). Zimbabwe makes similar provisions in section 56(3) that recognises 'culture' and 'custom' as prohibited grounds of discrimination. Even where such interaction between civic and cultural citizenship is not evident, national judiciaries have subjected aspects of customary law and cultural citizenship to scrutiny based on standards of human rights that are traceable to aspects of civic citizenship especially the right to equality. Thus courts in South Africa; Nigeria; Ghana; Kenya; Zimbabwe have struck down rules and practices of gender discrimination. To a large extent, African constitutional jurisprudence strongly suggests that the relationship between the civic and cultural is unidirectional from the civic to the cultural. When it is organised to promote national identity and nation-building civic citizenship is deliberately homogenous. Coupled with the notion of the equality of all citizens in a state, it is easy to wonder whether cultural citizenship that is essentially parochial and discriminatory can and should survive the scrutiny of civic citizenship. If a legal system treats all its citizens equally, it cannot be state policy, it could be argued, to promote a citizen's ethnicity language religion and community. These social facts are often imagined, as promoting diversity that may not be conducive to nation-building. Yet it is a fact that citizens are different based on their social realities and circumstances that challenge the homogeneity which civic citizenship promotes. Customary norms and laws arising from the belonging of a citizen to an ethnic

[7] See for example sections 30 and 31 of the 1996 Constitution. Section 30 provides that " Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Section 31 recognises the rights of persons to belong to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

[8] See Article 87 of the Republic of Angola 2010 which provides that "(1). Citizens and communities shall have the right to the respect, appreciation and preservation of their cultural, linguistic and artistic identity. (2). The state shall promote and encourage the conservation and appreciation of the historic, cultural and artistic heritage of the Angolan people."

[9] Nigeria recognizes the establishment of customary courts and customary courts of appeal. See for example s. 265 of the Nigerian Constitution.

community is one of the social facts that challenge the homogeneity of civic citizenship.

The collection of essays in this book advances the idea of a multidirectional and dialectical relationship of the civic and cultural. Through nuanced interpretations of how Africans live their civic and cultural life, we call attention to how these threads of citizenship deserve equal consideration because they constitute oppose define and refine each other. This is even more so because the Bills of Rights of many African constitutions contain expressions of civic and cultural citizenship suggesting they are or at the least should be equal. Our responsibility in these essays is to draw attention to how these threads of citizenship interact; whether African legal systems recognise and address the outcomes of these interactions; and suggestions on how these interactions could improve the lives of ordinary Africans. We have deliberately abandoned the simple but hegemonic categorisation of the relationship between civic and cultural citizenship as 'human rights and customary law' because many principles of 'customary law' are also human rights. In constructing our intervention as 'citizenship and customary law' we have chosen to emphasise the latter but not as an alternative to the former. We strongly imagine the possibility that aspects of cultural citizenship clarify refine and constitute civic citizenship. Even though Ubuntu as a normative value is not part of the essays in this book, we are inspired, by the transformative manner in which South African courts have enriched different aspects of South African law. Thomas Bennett describes as remarkable the process by which Ubuntu, a principle of African customary law, that obliges the humane treatment of others, has been incorporated into the mainstream of South African law including the constitutional transformation of South Africa.[10] No other process and substance of African customary law that we know of has shown the resilience and importance of cultural citizenship through cultural norms. Bennett demonstrates how Ubuntu has been used by South African courts to mediate conflicting norms; interpret terms of contracts and statutes; develop the common and customary law according to the Bill of Rights; modify the exercise of rights and powers; promote national unity and reconciliation; complement the policy of restorative justice; require a fair and efficient service procedure; ensure equality; promote cultural diversity; and set new norms of conduct.[11] None of the essays in this collection examine a principle of African customary law similar or even near to Ubuntu. How Ubuntu has become a foundational value of South African law is inspirational

[10] See TW Bennett, AR Munro & PJ Jacobs *Ubuntu: An African Jurisprudence* (Juta Claremont) 2018, p.1. See also a swathe of literature and cases that illustrate the depth and influence of Ubuntu in South African law. Bennett, for example, asserts that see

[11] See generally TW Bennett, chapter 4, note 10.

as it is indicative of the potential of the impact of African customary law on African legal systems.

The essays in this book interrogate the context in which civic and cultural citizenship interact collide and align to enable us to understand the outcomes towards enhanced and meaningful plural systems in African countries. In using several social facts and contexts such as relationships, urbanisation, religion, association and movement, these essays reflect the lived social realities of Africans within the context of conceptions of civic and cultural citizenship. In all, these essays identify and examine new understandings that may or may not have received a communal and judicial blessing.

Urbanisation as a social context for Africans reflects an important facet of their cultural citizenship since urbanisation reflects a social reality different from the traditional context in which much of customary law may have developed. In modern centers away from the traditional settings in which customary law as we know it developed Africans living as civic citizens have enacted new cultural realities that require us to think carefully about normative claims generally and about customary law in its present and future sense. We may be required to reimagine customary law to approximate the reality of its place in the interactions of people living in urban centers. One perspective of this re-imagination relates to whether customary law is necessarily 'traditional' and suited for the rural areas where modern appliances and lifestyles are not usual. The other side of this observation is whether customary law can embrace modernity such that persons who have adopted modern life styles, are not delinked from their customary law. If citizens can live anywhere they want, and embrace any lifestyle their changing social realities could be ambiguous in the determination whether there is still exists a connecting link to customary law. If urbanisation for example increasingly removes people from the reach of customary law it is important to understand whether this is normal and the consequences of such removal. Under this rubric is a paper that explores the link between an urban lifestyle and customary norms in Botswana. Elizabeth Macharia-Mokobi examines a recent decision of the Botswana Court of Appeal- *Pony Hopkins v The Representatives of the Estate of the Late Nkopo Phiri and three others* (Civil Appeal No. CACGB 087-17) in an essay titled "The Mode of Life Test Wins at Last: Interpreting Section 3 of the Administration of Estates Act".[12] Her essay examines the interpretation of section 3 of the Administration of Estates Act in Botswana which provides that the estates of tribesmen must devolve in accordance with the Customary Law except where the person has left a will. At first blush, this section appears

[12] Chapter 1.

ambiguous. On one hand, it meant that all Batswana who die intestate would be regarded as 'tribesmen'. Their customary law will as it were follow them from birth. On the other hand, another interpretation is that persons who have adopted a lifestyle that appears 'foreign' to customary law would by such conduct, indicate their disassociation with customary law. These two interpretations featured in Botswana case law and the Pony Hopkins decision has seemingly put this matter to rest so that by conduct Batswana can shed the toga of 'tribesmen'. What appears from the *Pony Hopkins* decision is the fact that a Batswana could also indicate a willingness to be bound by customary law concerning some assets. This may be regarded as a complementary reading of civil and cultural citizenship.

Gender equality is another social fact which mirrors an important reason for the interaction of civic and cultural citizenship. The fact that equality and non- discrimination are significant markers of civic citizenship has generated a consensus that gender inequality which is as an important traditional feature of customary law is contrary to constitutional norms in many African countries. Numerous instances in which African courts have infused gender equality into rules of customary law can be traced to the rights available to cultural citizens. This is one example that has given rise to the belief that the Bill of Rights is against customary law and ultimately cultural citizenship. Yet, it appears untenable to assert that customary law is solely constructed around gender inequality. Indeed, customary law can thrive with gender equality as its fundamental principle. To argue otherwise could be interpreted as asserting that women are considered as lesser cultural citizens. It is of course true that long periods of customary law have been characterised by patriarchy. It is also true that during this period dignity has been an avowed principle of customary law. The impact of civic citizenship on customary law recognises the reality of the social changes that are needed to confront obnoxious interpretations of customary law. The importance of dignity is partly explored by Nqobizitha Ndlovu who examines the factors determining unregistered customary marriages and the consequences of the dissolution of such marriages in Zimbabwe. [13] His essay identifies female partners in such marriages as the most vulnerable and explores how the right to equality in Zimbabwe have assisted these women. His findings of an ambiguous approach to this problem reflect a persistent challenge for the emancipation of cultural citizenship across African countries. Francis Kariuki also dwells on how Kenyan courts have explored the demand for gender equality in traditional justice mechanisms.[14]

[13] See chapter 4, N. Ndlovu "Factors determining unregistered customary marriages and the distribution of property on their dissolution in Zimbabwe."

[14] See F. Kariuki, chapter 2 " Traditional dispute resolution mechanisms in the administration of justice in Kenya"

The attraction of traditional justice mechanisms is significantly affected by gender equality. A significant part of Kenyan citizens will find traditional dispute mechanisms unattractive if such systems promote patriarchy.

Civic citizenship requires a deeper reflection of the connecting links to cultural citizenship. One such link is whether customary law should be available to all citizens of a country even if they were not born into and part of an ethnic community. Universal access to customary law appears to be a more meaningful link to customary law than the hitherto restrictive access defined largely around consanguinity. Why should civic citizens be barred from taking advantage of any customary law that they desire just as they should be free to exit that legal order as they deem fit. Universal access would not destroy the essence of customary law that is regularly defined as normative orders which citizens feel obligated to obey. The papers under this theme explore the plausibility that all citizens should have access to all courts as an incident of their citizenship. The first paper under this theme is penned by Kariuki who examines the jurisdiction of traditional dispute resolution mechanisms (TRDMs) in Kenya to determine whether the jurisdiction of such TDRMs is limited only to persons belonging to that ethnic group or to any Kenyan even if the TDRMs is outside his/her ethnic group.[15] Kariuki finds numerous instances where the consent of the parties has become the basis of accessing TDRMS across Kenya. Universal access is also a significant feature of the reform of customary land tenure in Namibia that is part of the essay written by Tapiwa Warikandiwa.[16] The ability of all Namibian citizens to apply for land in any part of Namibia is an example of how universal access can lead to the fulfillment of civic rights to property. The fact that all Namibians are free to apply for customary tenure does not free them from some jurisdiction of traditional authorities.

Proper interaction of civic and cultural citizenship is important in a multi-ethnic society because an improper alignment often leads to conflict strife and governance challenges. Since civic and cultural citizenship enables the people of a state to reaffirm their identity and dignity, the improper realisation of either of these norms leads to advocacy for their realisation that has the potential for conflict. Civic citizens who express their rights outside their traditional domain are likely to confront cultural norms in other parts of the country. Unless these clashes are properly aligned, there is likely to be conflict arising thereby. Two papers explore how the ability of citizens to move around in their country including a decision to reside in any part of that country impact on the customary norms that govern their lives.

---

[15] See F. Kariuki, note 12.

[16] T Warikandiwa, chapter 7 " Citizenship communal land rights and "new" cultural communities in Namibia"

In “Residence as a factor in determining choice of law in the distribution of property at the dissolution of unregistered customary marriages in Zimbabwe” Ndlovu examines how residence and other factors that Zimbabwean courts take into account in determining the applicability of customary law. It considers the effects, if any, that urbanization has on the factors determining the application of customary law on the distribution of property upon dissolution of unregistered customary law unions. The chapter written by ES Nwauche titled “*Eze Ndigbo* Customary law and Associational Ethnicity in a Federal Nigeria”[17] engages with the extent to which Nigerians can carry their customary law as they move and reside in different parts of their country. Nwauche examines attributes of civic citizenship in a federal State such as Nigeria which includes the freedom of movement and association within Nigeria and the attendant desire of ethnic groups to ‘carry’ ‘practice’ and ‘observe’ their customary norms in their new ‘domain’ as well as the reaction of their ‘host’ communities who accept tolerate or oppose such norms.’ This chapter examines the inadequacy of the Nigerian Bill of Rights to manage the conflicts that are likely to emerge from diasporic chieftaincy institutions as an example of associational ethnicity. A theoretical perspective of the relationship between civic citizenship and customary law is set out in this chapter to explore how cultural citizens can exercise their freedom of association and movement. This perspective argues that cultural citizenship cannot facilitate incidents of civic citizenship if it is interpreted as inflexible. A recognition that customary law can be flexible and changed by a Nigerian citizen by conduct makes it possible to regard a Nigerian as indigenes of any part of Nigerian where they reside. An inflexible customary law which follows Nigerians through life ossifies the difference between ‘indigenes’ and ‘non-indigenes’. The latter are regarded as outsiders who find it difficult to enjoy their civic rights. The chapter argues that rather than courts of law, it would appear that respect dignity and a negotiated consensus are an alternative means of accommodating the tensions that arise from the insistence by civic citizens to exercise their cultural rights. Nqobizitha Ndlovu explores how the right to equality and non-discrimination can be used to improve the distribution of assets of persons married under unregistered customary marriages. In his essay titled “ Factors Determining the Application of Customary Law at the Dissolution of Unregistered Customary Marriages in Zimbabwe”[18] Ndlovu explores how the test provided for by section 3 of the Customary Law and Local Courts Act is applied. The said section provides that unless the justice of the case requires, customary law shall apply where the parties have

[17] Chapter 5.
[18] Note 13.

expressly agreed that it should apply or the nature of the case and the surrounding circumstances, the parties have agreed that customary law shall apply in all other cases. The 'surrounding circumstances' test is to be used in determining when customary law applies to a civil matter where the parties have not expressly decided that customary law should apply to a case. The surrounding circumstances include the mode of life of the parties; the subject matter of the case, the understanding by the parties of the provision of customary law or the general law of Zimbabwe; the relative closeness of the case and parties to the customary law or the general law of Zimbabwe. Thus, when a choice of law issue arises a Zimbabwean Court would apply the general law if the justice of the case requires even if the parties have expressly agreed that customary law shall apply. If the justice of the case does not require the general law should apply, customary law will apply if the nature of the case or surrounding circumstances so indicate. Ndlovu argues that Zimbabwean Courts have resorted to use the 'justice of the case' provision to ensure appropriate remedies when unregistered customary marriage is dissolved. He argues that when Zimbabwean courts sidestep clear cases where customary law ought to apply in favour of the general law, customary law is diminished. After considering and pointing out the inability of the harmonisation of Zimbabwe's marriage laws to resolve the question of whether the general law or customary law applies to an unregistered marriage, he argues that the right to equality requires the development of customary law to recognise joint and female ownership of immovable property under customary law. This dialectical relationship between civic and customary citizenship in Zimbabwe explores how the former can influence the latter so that women in unregistered customary marriages are treated like their male partners in their cultural life.

Land is crucial to an understanding of civic and cultural citizenship. How land is acquired and lost is therefore an important aspect of the entitlements that flow from citizenship. Two chapters in this collection address communal land tenure. The first paper is from Ethiopia by Muradu Srur[19] examines how modernisation schemes in Ethiopia have resulted in the termination of customary land tenure norms and institutions of pastoralists compulsorily ending their customary law and in breach of their rights guaranteed by the Ethiopian federal constitution. The second paper, authored by Tapiwa Warikandiwa, examines the cultural communities that have emerged in post-colonial Namibia the universal access to communal land.

An inquiry into the relationship between civic and cultural relationship assume that all citizens are entitled to both types of citizenship. While entitlement to civic citizenship is a foregone conclusion since it determines

[19] Chapter 6, " Compulsory loss of pastoral land tenure systems in Ethiopia".

an attachment to a State, it would also appear normal for the citizens of a State to be entitled to cultural citizenship since citizens belong in African States to cultural communities. Whether some citizens seek to identify with their cultural communities is another matter. It is difficult to imagine that any part of an African State is imagined to be post-modern and not be entitled to customary norms. It appears normal therefore that a legally plural African State should recognise the customary of its citizens. In a chapter titled "A Customary Law for Afrikaner People of South Africa"[20] ES Nwauche examines the plausible argument that Afrikaans people as an ethnic community are entitled to their customary law even if this is not recognised by the South African Legal system. Rather, the South African legal system scrubs Afrikaner people of South Africans of their cultural identity to the extent that their customary law is not recognised. To recognise Afrikaner customary law is to be faithful to the fact that South Africa is a plural state.

The contributors to this collection of essays are delighted to be signposts to an overdue conversation about civic and cultural citizenship in Africa

[20] Chapter 3.

Chapter 1

The mode of life test wins at last: Interpreting section 3 of Botswana's Administration of Estates Act

Elizabeth Macharia-Mokobi*

Abstract

It is over 100 years since Botswana received Roman Dutch common law from the Cape Colony of Good Hope. The rights of men, women and children, once tidily defined by customary law of succession now yield unsatisfactory outcomes. Citizens of Botswana, now alive to the greater breadth of rights to be enjoyed under the common law, have sought to break their bonds to customary law, with varying degrees of success. This paper explores several High Court decisions which have attempted to demarcate the boundaries of the customary law and common law of succession. The paper questions the categorisation of members of tribal communities in Botswana as "tribesmen" and the consequence of having customary law apply to such people in spite of their decidedly modern, sophisticated lifestyles. The paper examines if the courts have done enough to honour the wishes of citizens who wish to escape the discrimination of the customary law of succession by seeking refuge in common law. Ultimately, the paper asks, should personal law in matters of inheritance be unified under the fairer more inclusive common law.

Keywords: Mode of life; tribesmen; Botswana

1 Introduction

The debate on the meaning of the word "tribesman" as it appears in section 2 as read with section 3 of Botswana's Administration of Estates Act[1] (the Act) has raged for several years. Section 3(a) of the Act provides that the estates of deceased's tribesmen must devolve in accordance with the Customary Law, except in cases where the deceased tribesman has left a valid will. In such instances, the estate of the tribesman would devolve under the provisions of the Administration of Estates Act. [2]

**Senior Lecturer, Department of Law University of Botswana*. Macharia-mokobi@UB.AC.BW

[1] Section 2 of the Act defines a tribesman as any member of a tribe or tribal community in Botswana.

[2] Section 3(a) of the Act provides that the Act "shall not apply- (a) to the estates of deceased tribesmen, which as heretofore, shall be administered according to the customary law: Provided that whenever a tribesman dies after the commencement of this Act leaving a will valid in accordance with the Wills Act, this Act shall, notwithstanding any partial intestacy, apply as far as may be to the administration of the whole of his estate…".

The difficulties with this approach are immediately apparent. Section 3 of the Act corralled an entire section of the population, deeming them tribesmen by virtue of their membership of a particular community. The definition of a tribesman under the Act did not take any cognisance of the particular circumstances of any individual. It was as if customary law was literally foisted individuals as their personal law in matters of succession by accident of birth. For some, of course, this presented no difficulties. Their lives were decidedly traditional, and they owned none of the trappings of modern life. For others, section 3 was damning. Having lived their lives in cosmopolitan cities, with little connection to their tribal communities and the rural lifestyle, their estates now fell to be distributed through a law quite foreign to them in life and in death.

2 The tribesman debate through the cases[3]

In *BHC v Letsholo,*[4] Chief Justice Mokama adopted a purposive interpretation of section 3 of the Act. He stated that the decisive factor in determining whether a person was a tribesman was the mode of life test and the assets in the estate.[5] Applying the mode of life test, which test was revived from previously repealed versions of the Act, Chief Justice Mokama found that the deceased was not a tribesman and that his estate was to devolve under Act and not under customary law because his lifestyle was modern and his assets unknown to customary law. This decision was followed in several other cases including *Mmereki v Seleke and Another*[6] and *Samsam v Seakarea.*[7]

There was a second stream of cases that adopted a strict interpretation of section 3. These cases favoured a more literal interpretation, and always concluded that the language of the Act was unambiguous. Therefore, in the absence of a will, any member of a tribe or tribal community in Botswana would have his estate governed by the customary law. In this body of cases, we find several cases. In *Image Tongomani Khilane v The Registrar of the High Court and Another,*[8] the

[3] For a full discussion of these decisions see E Macharia-Mokobi, 'Who is a tribesman? An Examination of the Continued Utility of section 3 of Botswana's Administration of Estates Act' (2013) 17 University of Botswana Law Journal 23.
[4] Misca 399/93.
[5] *BHC v Letsholo* Misca 399/93 (unreported) as cited in *Samsam v. Seakarea* 2004 (1) BLR 378 at 383.
[6] 2001 (2) BLR 601.
[7] 2004 (1) BLR 378.
[8] Civil Appeal no F 171 of 2003.

learned judge expressed concern with Chief Justice Mokama's "ingenious interpretation" of the ambiguous section 3 of the Act. In *Popego Obopile v the Attorney General*,[9] the court considered the provisions of section 3 of the Act to be clear and free from ambiguity and not deserving of a purposive interpretation. In the *Obopile* case, the court broke ranks with *Letsholo*[10] decision rejecting the mode of life test. This Court of Appeal decision was followed in *Tshepo Mbenge Mosienyane v Lesetedinyana Lesetedi (N.O) and 15 others*.[11] In this decision, Justice Masuku felt bound to respect the findings of the Court of Appeal jettisoning the purposive approach in favour of the strict interpretation of the provisions of section 3. Nevertheless, he too made a call for law reform stating that the law ought to be responsive to the realities of our times.[12]

The last in this line of cases was *Thipe v Thipe*,[13] where Justice Kirby took the view that section 3 of the act was unambiguous and left no room for a purposive interpretation. Justice Kirby also lamented the absence of the flexibility that had existed under the Dissolution of Marriages of Persons subject to Customary Law (Disposal of Property) Act.[14] This statute made provision for a mode of life test to be applied where devolution under customary law would be inequitable. This statute, though still on the law books, only applied to marriages celebrated before 16 July 1926 and was effectively redundant.

These two steams of cases presented diametrically opposite views. What is clear is that judges appreciated the challenges presented by section three. Some sought to circumvent them; others sought change by encouraging a legislative response. Parliament did not amend the law to resolve the obvious difficulties. However, an opportunity presented itself to the Court of appeal to reconsider the question. This time, the decision was decisive and clear. The tribesman debate finally came to a satisfactory conclusion in the *Pony Hopkins v The Representatives of the Estate of the Late Nkopo Phiri and Ntuka Phiri and 3 others* [15] decision. The next section examines the decision in the *Pony Hopkins* case and outlines how the debate has finally been laid to rest.

---

[9] 2005 (1) BLR 86 (CA)
[10] Note 4.
[11] Misca F 257/2005.
[12] See para 45 (n. 11 above).
[13] 2007 (3) BLR 273).
[14] Chapter 29:05. This act applied to marriages concluded between Batswana under Christian religious rites before 1 April 1926 and marriages solemnised by a marriage officer after 1 April 1917 and before 16 July 1926.
[15] Civil Appeal No. CACGB 087 – 17 (Unreported).

3 The *Pony Hopkins* decision

The vexing question of the applicability of section 3 of the Administration of Estates Act to estates of deceased's tribesmen would not belong out of the courts. In 2017, the relatives of the deceased persons Nkopo and Ntuka Phiri approached the High Court presenting much the same issues and arguments that had been presented in the cases discussed above in previous years. This time, however, the Court of Appeal settled the debate once and for all. The opinion of the majority written by Judge President Kirby will be discussed first. The separate opinion of Judge of Appeal Lesetedi, which agreed with Judge President Kirby on all salient points, but highlighted some questions of the interpretation of law, that was not addressed in the main judgment, will follow.

The facts

This case arose following the passing of Nkopo and Ntuka Phiri. The two were members of the *Bakgatla* tribe. They had a home in Mosanta Ward in Mochudi Village. They had married in a civil ceremony. There was no exclusion of customary law through any instrument signed upon marriage because they probably married prior to the promulgation of the Married Persons Property Act[16] on 1 January 1971. Their marriage was governed by the Marriage Act of 1917 which was the law in force at the time. The marriage was therefore in community of property, as all civil marriages before 1970 were, in the absence of an antenuptial contract. Their property would have been subject to the customary law in terms of section 19 of the Marriage Act of 1917.[17]

Nkopo died in 2004 predeceasing his wife Ntuka by a few years. Ntuka took care of the joint estate which remained undivided until she passed away in 2009.[18] There were six children of the marriage. Dr. Lucas Gakale, Chiki Moganetsi, and Pony Hopkins survived their parents. Disono Gakale had passed and was survived by his wife Thenese and two children. Two other sisters Sarah Molatlhegi and Nanki Wright had also passed away. The estate consisted of a 19-hectare field, a house in Gaborone, a firearm and the family home at Mosanta Ward. The estate was valued at just over P1 000 000.[19] In accordance with *Sekgatla* customary law, the eldest son, Lucas Gakale, attempted to distribute the estate of his deceased parents at

[16]Act no. 69 of 1970; Laws of Botswana Cap 29:03.
[17] See Chapter 144 of the 1959 Edition of the Laws of Bechuanaland.
[18] *Pony Hopkins* (n. 15 above*)* para 1 – 3.
[19] *Pony Hopkins* (n. 15 above) para 1 – 3.

the family level with the advice from *Kgosi* Mothibe Linchwe,[20] senior uncles and other family members. His efforts were unsuccessful. At the centre of the tussle between the siblings was the house built at the family home at Mosanta Ward.

The roots of the dispute arose from a decision taken by the sibling's late mother. Upon the passing of the youngest son, Disono, the matriarch Ntuka had requested his wife Thenese to move into the house with her children. The house had, in any event, been built by Disono and Thenese, although it was not complete. Thenese moved in a completed the house. She had been residing there ever since. This decision had pitted family members against one another. On the one hand, Pony Hopkins together with the now deceased Sarah took the view that the family home should be shared equally between the three surviving children of the marriage and children of their deceased siblings. This would have resulted in Thenese being evicted from the home. For his part, Lucas Gakale believed that in accordance with custom, the family home had been bequeathed to Disono as the youngest son, and that being the case, the yard ought to be inherited by his surviving spouse Thenese.[21]

The parties approach the High Court

Unable to agree, with her siblings, Pony Hopkins approached the High Court in 2016 seeking a declaration that Nkopo and Ntuka Phiri had died intestate; that given the size of their estate, it could not be distributed under customary law; that the estate ought to be placed under the administration of the Master of the High Court who would the appoint an executor to distribute the estate under customary law, and that the surviving children of Nkopo and Ntuka, together with the estates of those siblings who had also died, should inherit the estate in equal shares.[22]

The matter came before the High Court where it was agreed that the second prayer in the pleadings, that is whether the estate should be placed under the administration of the Master of the High Court who would appoint an executor to administer the estate under customary law, should be hived off and dealt with first. The rationale for dealing this issue first was that if the High Court were to find that the estate could not be administered by the Master of the High Court, that would bring the case to an abrupt end at the High Court and the parties would have to reconvene at the suitable forum dictated by customary law in order to conclude the devolution of the estate.[23]

[20] The tribal chief of Bakgatla at the time.
[21] *Pony Hopkins* (n. 15 above) para 4-5.
[22] *Pony Hopkins (*n. 15 above) para 6.
[23] *Pony Hopkins* (n. 15 above) para 8.

The findings of Justice Nthomiwa at the High Court regarding the question of appointment of the master to administer the estate of the late Nkopo and Ntuka Phiri had five limbs. First, Nthomiwa J found that the office of the executor is unknown under customary law. The appointment of an executor who distributes the estate under the supervision of the Master of the High Court following the rules of the Administration of Estates Act was a process known to statutory law and not customary law. This was a restatement of the law as stated in *Teapot v The Attorney General*.[24] Second, the learned judge also stated that the process of distribution of estates under *Sekgatla* customary law was led by a family member, usually the eldest son, in consultation with other family members, the Chief or the headman. The debts of the estate were settled first followed by the distribution. Anyone with a grievance was free to approach the Customary Court to appeal the distribution. The Court of Appeal endorsed this finding as correct.[25] Third, the Court of Appeal accepted Nthomiwa J's finding that customary law was transparent and was understood widely. Further, the court accepted that the size of the estate should not be a hindrance to its distribution under that law.[26] Fourth, Justice Nthomiwa, apparently relying on the decision in *Mmereki*[27] found that the Master of the High Court was empowered to administer the estates of deceased tribesmen. Lastly, the High Court considered the conflicting decisions on whether the estates of deceased tribesmen could be administered under the Administration of Estates Act. In this regard, the *Letsholo*[28], *Mmereki*[29] and the *Samsam*[30] decisions which favoured the mode of life test were considered against *Thipe*[31]; *Sipo Sami Engineering v Seipobi*[32] and the *Obopile*[33] all of which seemed to adopt a strict view of the meaning of section 3 of the Administration of Estates Act.[34]

In his High Court decision, Justice Nthomiwa took the view that the later line of cases was to be preferred.[35] Justice Nthomiwa then held that the estate of the late Nkopo and Ntuka Phiri had to devolve under customary

[24] [1998] BLR 515 at 517
[25] *Pony Hopkins* (n. 15 above) para 10.
[26] *Pony Hopkins* (n. 15 above) para 10.
[27] N. 6 above.
[28] N. 4 above.
[29] N. 6 above.
[30] N. 7 above.
[31] N. 13 above
[32] [2009] 2 BLR 196 CA.
[33] N. 9 above
[34] *Pony Hopkins* (n. 15 above) para 13.
[35] *Pony Hopkins* (n. 15 above) para 14.

law and that the Master of the High court could not administer the estate as that would be tantamount to appointing an executor.[36] It is this order of Justice Nthomiwa which the Appellant, Pony Hopkins, challenged at the Court of Appeal.

The Judge President Kirby's Opinion

The case at the Court of appeal was heard by Judge President Kirby, Justice Lesetedi and Justice Brand. The main opinion was written by Judge President Kirby. Justice Lesetedi, although agreeing with the findings of the majority, opted to write a separate opinion addressing some points not mentioned in the main judgment. This opinion is discussed later in this article. This section confines itself to Judge President Kirby's opinion starting with the grounds of appeal, then traversing the development of the law since the early 1900s to 1974, and concluding with the findings of the majority.

The Grounds of Appeal

The grounds of appeal were listed as follows: First that the High Court erred in finding that the Master[37] had jurisdiction over all estates in Botswana and then finding that the master did not have jurisdiction over the deceased estates of Nkopo and Ntuka. Second that the High Court erred when it held that the Master of the High Court was not empowered to apply customary law in the devolution of estates. Third, that the High Court erred when it held that the estate of the late Nkopo and Ntuka was not so large that the application of customary law would be excluded by reason of the size of the estate alone. Fourth, that the High Court erred in finding that the lifestyle of the deceased persons did not exclude the operation of customary law despite oral evidence presented to the contrary.

The development of the law from the early 1900s to 1974

Judge President Kirby's opinion delved into statutes, both current and obsolete, to paint a picture of the development of the law of succession since the early 1900s. His particular focus was to illustrate how the law affecting "deceased Africans", later referred to as "tribesmen", developed over almost 100 years.

[36] *Pony Hopkins* (n. 15 above) para 19.

[37] The Registrar and Master of the High Court is the Chief Executive Officer of the Administration of Justice whose functions extend to deceased person's estates.

Judge President Kirby pointed out that the Administration of Estates Act, which came into force in on 1 July 1974, was not intended to apply to the estates of deceased tribesmen who died intestate.[38] Parliament had anticipated that such estates were to continue to be administered under the customary law. There is a caveat to this, however. The *proviso* to section 3(a) of the Administration of Estates Act provides that were a tribesman died leaving a will, his estate would be administered under the Administration of Estates Act despite any partial intestacy. Further, any voluntary testamentation under customary law would be deemed valid and would be given effect provided it was not inconsistent with the will.[39]

Judge President Kirby noted that the Administration of Estates Act of 1974 had replaced the Administration of Estates Proclamation of 1933[40] whose application did not extend to the estates of deceased Africans. Such estates were to devolve in accordance with the laws and customs of the tribe to which such individuals belonged. There was once exception to this rule. This exception was found in section 4 of the African Divorce Proclamation of 1926 - also referred to as Chapter 77.[41]

Section 4 of the African Divorce Proclamation Act provided that any Africans spouses married under civil law were entitled, upon divorce or upon the death of one of the spouses, to have their property devolve under civil law, if it appeared to the court that it would not be just and equitable that the property of the spouses be dealt with under African law and custom having regard to the mode of life of the spouses and of any disposition of property made by either of the spouses during the subsistence of the marriage. Interestingly though, section 4 applied to marriages subsisting as of 16 July 1926. The effect was that over the course of time, the Act ceased to have operation.[42] It suffices to say that this provision was the origin of the mode of life test in Botswana. As Kirby notes, the drafters were mindful of the fact that "there might be circumstances where the mode of life of a deceased

---

[38] *Pony Hopkins* (n. 15 above) para 25.

[39] See *Pony Hopkins* (n. 15 above) para 25. The proviso to section 3(a) of the Administration of Estates Act reads as follows: whenever a tribesman dies after the commencement if thus Act leaving a valid will, this act shall, notwithstanding any partial intestacy apply, insofar as may be to the administration of the whole of his estate; and for the purpose of such application informed testamentary instructions in accordance with any written law relating to customary succession given by the deceased shall be deemed insofar as they are not inconsistent with the will, to be part of the will.

[40] No. 33 of 1933.

[41] No. 19 of 1926 which came into force on 16 July 1926. This Proclamation was renamed in 1973 as the Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act Cap 29:05. Its essential provisions remained the same.

[42] *Pony Hopkins* (n. 15 above) para 28. As Judge President Kirby notes at [29] anyone whose marriage could be subject to the provisions of this statute would be well over 100 years.

person was such as to make the distribution of his estate according to customary law inequitable."[43]

When the Administration of Estates Act of 1933 was re-enacted into the current Administration of Estates Act of 1974, the proviso allowing for the mode of life test to apply to estates of spouses who had contracted a civil marriage was omitted. Kirby surmises that the reason for the exclusion must have been the promulgation of the Married Persons Property Act (MPPA).[44] The MPPA allowed persons married under civil law to exclude the operation of customary law to their marital property.[45] This provision replaced the law as it stood under the old Marriage Act of 1917 which provided that in the absence of an antenuptial contract, a civil marriage between Africans would not affect the property of spouses which would be disposed of under Tswana customary law unless disposed of by will.[46]

This was the trajectory of the development of the law from the early 1900s to 1974. This informed the position of the statutory law with respect to the application of customary law to the property of a deceased tribesman. In summary, unless the customary law is excluded by way of an instrument signed under section 5 of the Married Persons Property Act 2014, or by the execution of a valid will, the estate of a deceased's tribesman will devolve under customary law. The mode of life test remained ring-fenced in a statutory provision that limited its application to estates of persons married before 1 July 1926. The relevance of the mode of life test, therefore, diminished steeply over the years.

The question "who is a tribesman?" arose from this state of affairs. The two streams of case law discussed above developed. One stream supporting a strict interpretation of section 3 of the Administration of Estates Act, and the other supporting a more purposive approach which include the mode of life test and attempted to apply its rules to snatch the estates of deceased tribesmen from the jurisdiction of customary law and place them squarely under the umbrage of the statutory law of succession. The cases will be discussed below, to reveal to the reader the jurisprudential underpinnings of *Pony Hopkins*.

---

[43] *Pony Hopkins* (n. 15 above) para 28.
[44] Act no. 69 of 1970.
[45] See section 5 of the Married Persons Property Act (amended in 2014). Formerly section 7 under the 1970 statute.
[46] Section 19 Marriage Act No. 1 of 1917. See also *Pony Hopkins* (n.15 above) para 31.

Distinguishing previous case law[47]

Judge President Kirby traversed the history of interpretation of section 3 of the Administration of Estates Act by considering the decisions in the steady stream of cases was spawned by the seemingly innocuous section 3 of the Administration of Estates Act. The purpose of this exercise was to distinguish the cases and establish which decisions had dealt directly with the question of section 3 of the Act, which cases considered section 3 merely in passing, and the reasoning behind each decision.

Letsholo

The first case to come to the courts regarding the applicability or otherwise of the Administration of Estates Act to the deceased estates of tribesmen was *Letsholo.*[48] The case arose out of allegations of fraud brought against Letsholo's estate by Botswana Housing Corporation (BHC), for whom the deceased Joseph Letsholo had worked as Chief Executive Officer. BHC sought to recover millions of Pula from the estate of the deceased, or from his widow an expatriate named Nicola Jane Letsholo, which it claimed had been improperly acquired. His widow resisted the proceedings brought by BHC. She claimed that her late husband was a tribesman and that his estate could not be wound up under the Administration of Estates act but in accordance with customary law in keeping with the provisions of section 3 of the Administration of Estate Act.

The court took a different view. Applying a purposive interpretation to section 3, Chief Justice Mokama held that the mode of life test should prevail. In so doing, he revived the chapter 77 exception which was found in the Administration of Estates Act of 1933, and not in the later amendment of the same act. He held that section 3 of the Administration of Estates Act could not apply to the estates of deceased tribesmen who had modern assets that were not amenable to administration under customary law.[49] This High Court decision was never the subject of an appeal.

In the end, Judge President Kirby took the view that the decision in *Letsholo* to adopt a purposive interpretation of section 3 was to ensure that the investigation and redress for suspected fraud alleged to have been perpetrated on BHC by the deceased were not frustrated by the case being dealt with under customary law. A reliance on customary law would have resulted in a failure of the state's effort to recoup embezzled funds through

[47] A full discussion of the case law can also be found in Mokobi (n 3 above).
[48] N. 4 above.
[49] *Pony Hopkins* (n. 15 above) para 40.

a process of sequestration, a procedure unknown to customary law. This was only possible following the order that the mode of life test was applicable and that the estate should be distributed under the Administration of Estates Act.

Judge President Kirby concluded that the court was motivated by the need to ensure the interests of justice were met by the case being resolved under the more robust common law, the focus of the court in *Letsholo* was not to define and indicate the effects of section 3 of the Act.

Mmereki

Mmereki [50] was another decision which followed the finding in *Letsholo.* In this decision, the Applicant sought to set aside the decision of the Master of the High Court who had determined that a vehicle registered in the name of the Applicant's deceased paramour was part of his estate. The Applicant claimed ownership of the vehicle. She averred that the Master had no jurisdiction over the state because the deceased was a tribesman whose estate should have been administered under customary law.

In his findings, Justice Chatikobo upheld the decision of *Letsholo* holding that the lifestyle of the deceased was non-tribal and that the assets concerned were unknown to customary law. Chatikobo J also made an interesting finding regarding the power of the Master of the High Court to administer estates of all persons. He held that section 6 and section 28 of the Administration of Estates Act directed that the estates of all persons were to be administered and distributed under the Act.

Justice Kirby differed fundamentally with the finding of Justice Chatikobo that all estates fell under the purview of the Masters Office. According to Kirby, this could not possibly be correct because Parliament clearly intended for estates of tribesmen to devolve under customary law.[51] He also took the view that this decision may have been motivated by the need to avoid the injustice of disinherison of a concubine and illegitimate children.[52] It is difficult to follow this argument because the status if unmarried women and illegitimate children is equally precarious under common law. Perhaps this was a reference to the possibility of claims of maintenance against the estate for dependents of the deceased which could be made under the Succession Act, and the possibility available to the cohabiting partner to assert the existence of a universal partnership under common law. Despite the suggestion that common law would treat the

[50] N. 6 above.
[51] *Pony Hopkins* (n. 15 above) para 41.
[52] *Pony Hopkins* (n. 15 above) para 49.

illegitimate child and cohabiting partner more justly, it is lamentable that this point was not elaborated by the court.

Samsam

Samsam[53] followed the *Mmereki*[54] decision. This case was brought by the lover of the deceased. She and the deceased had cohabited for a long period of time and shared children. The deceased lived a modern life, working as a bank manager and educating his children in English Medium Schools. On the other hand, he also owned livestock and had a house in Serowe which he had developed on his sister's piece of land. The Applicant sought to have the estate devolve under statutory law.

The deceased's mother, for her part, argued that the estate should devolve under customary law insisting that her son had died intestate and was a tribesman in terms of section 3 of the Administration of Estates Act. Lesetedi J took the view that the deceased lived a decidedly modern life evidenced by his occupation, his urban home and the modern technological gadgets that he owned. The court also put emphasis on his choice to educate his children in an English-medium school. The court placed little weight on the deceased's residence in Serowe holding that it was not uncommon for people to keep residential premises in the rural areas for convenience. The ownership of livestock was also given short shrift. The court characterised the ownership of cattle as a status symbol or a sentimental or purely economic activity that did not in any way evidence a connection to the customary way of life. The court adopted a purposive interpretation of section 3 of the Administration of Estates Act.[55]

Judge President Kirby distinguished this decision on the basis that it a purposive definition of section 3. Just as he did in *Mmereki*[56], the learned Judge President suggested that the court may have been driven by the need to arrive at a just decision that did not result in disinherison of a concubine and illegitimate children.[57] As mentioned above, how such disinherison could have been avoided at common law is not immediately apparent. In a stream of cases adopting an entirely contrary view, the High Court and Court of Appeal took the view that section 3 should be given a strict and literal interpretation dismissing the mode of life test in its entirety.

---

[53] N. 7 above
[54] N. 6 above.
[55] *Pony Hopkins* (n. 15 above) para 42.
[56] N.6 above.
[57] *Pony Hopkins* (n. 15 above) para 49.

Thipe

The first of these cases is *Thipe.*[58] This case concerned a dispute over the estate of a wealthy man who had died intestate. Contesting his estate was his two wives, both past and present. Justice Kirby had dealt with this case at the High Court in 2007. He had found the use of the mode of life test in *Letsholo*[59] *Mmereki*[60] and in *Samsam*[61] doubtful in law. His view was that the mode of life test, which was contained in the Dissolution of Marriages Subject to Customary Law (Disposal of Property) Act, had been repealed in the 1972 revision of the Administration of Estates Act. It was for parliament to reinstate the test should it wish to do so by revising both the Administration of Estates Act and the Dissolution of Marriages subject to Customary Law Act.

In *Thipe*[62]*,* Justice Kirby took the view that section 3 of the Administration of Estates Act was unambiguous and that there was not permissible in law to "recast or modify a statutory definition in the absence of clear ambiguity."[63] The decision in *Thipe* did not turn on a definition of a tribesman because the deceased had concluded a civil marriage wherein he had, through a statutory instrument concluded with his wife Seteng under section 7[64] of the Married Persons Property Act, excluded the application of customary law to the matrimonial property. This express exclusion of the customary law meant that the question whether the deceased was a tribesman or not never arose and no detailed analysis of that question was carried out in the judgment.[65]

To Judge President Kirby's mind, the underpinning for the decision in *Thipe*[66] was section 7 (as it then was) of the Married Persons Property Act and not section 3 of the Administration of Estates Act. *Thipe's* case was relatively straight forward because all needed to give effect to the deceased's choice of law though through the instrument signed at the conclusion of his civil marriage excluding customary law from matters regarding the disposal of his estate.[67]

---

[58] *Thipe* (n. 11 above).
[59] N. 4 above
[60] N. 6 above..
[61] N. 7 above.
[62] . 13 above.
[63] *Pony Hopkins* (n. 15 above) para 45.
[64] Now section 5.
[65] *Pony Hopkins* (n. 15 above) para 45– 46.
[66] N. 13 above.
[67] *Pony Hopkins* (n. 15 above) para 49. Judge President Kirby noted two further decisions in a similar vein. In *Ramantele v Mmusi and Others* 2013 2 BLR 658 CA the use of customary law rules to discriminate against women was rejected in favour of a more equitable outcome.

Sipo Sami

Discussing *Sipo Sami*[68] Judge President Kirby found that whilst the decision concluded that the estates of deceased tribesmen did not fall to be administered under section 3 of the Administration of Estates Act, the court did not address any arguments as to the mode of life of the deceased and therefore did not fully ventilate the issue of the interpretation of the relevant section.[69]

The Popego and Moaro Judgements

Judge President Kirby also mentioned the decisions in *Obopile*[70], *and Selato v Moaro.*[71] He stated that the *Obopile* and *Selato* decisions did not have much bearing in the interpretation of section 3 of the Administration of Estates Act.[72] In the *Obopile* decision, the customary law would have achieved a fairer outcome because the deceased had left informal instruction regarding the distribution of his estate using the tool of voluntary testamentation under customary law. These instructions would have to be respected.

Following a review of the above decisions, Judge President Kirby then set the stage for a thorough examination of the meaning of section 3 of the Administration of Estates Act. He began with a discussion of relevant principles of statutory interpretation.

Understanding section 3 through the lens of statutory interpretation

Judge President Kirby began this section of his judgment by pointing out that constitutional and statutory provisions should be interpreted by the words and grammar used – that is the literal interpretation, but also in their current

---

Customary law had to be responsive to societal change, and any rules incompatible with written law or contrary to morality, humanity or natural justice (per section 2 of the Customary Law Act) could not fall within the definition of customary law. One such evolution can be observed in Kealeboga *and Another v Kehumile and Another* (CACGB 045 – 13) unreported, in which Judge of Appeal Legwaila ruled that customary law recognised the right of children to inherit regardless of illegitimacy.

[68] N. 27 above.

[69] *Pony Hopkins* (n. 15 above) para 47.

[70] N.9 above.

[71] [2010] 3 BLR 565 (CA).

[72] *Pony Hopkins* (n. 15 above) paras 43 and 48.

social and political context.[73] In making this pronouncement, Judge President Kirby relied on the provisions of section 28 of the Interpretations Act[74] which provides that statutes couched in the present tense should be interpreted as always speaking to the circumstances as they occur in order to give effect to the true intent and spirit of the legislation. Applying these principles to sections 2 and 3 of the Administration of Estates Act, Judge President Kirby took the view that both the words "tribesman" and "tribesmen" appeared in provisions couched in the present tense and so had to be interpreted in the correct socio-political context. He noted the radical differences between Botswana in the sixties and seventies and modern-day Botswana. The court recognised that in the past, the most accessible system of administration of estates for ordinary Batswana would have been customary law. Fifty years later, the position was now fundamentally different. Batswana now lived modern lives, eschewing their customary identity in favour of national identity. The court, he said, should take judicial notice of these societal shifts in identity and norms when interpreting the relevant provisions of the Act.

Judge President Kirby noted that his decision in *Thipe's* case, in which he had held that the interpretation of section 3 of the Administration of Estates act was unambiguous, may have been too hasty.[75] He then found that the word "tribesman" had many nuances. It could mean the "practicing tribesman, a man living a rural life in his home village. But other factors could come into play, for example, his place of residence, his mode of life - where a choice of an urban or modern lifestyle would be a strong indicator that the subject was not a tribesman. Marrying outside one's tribe, race or religion, sometimes into a way of life or faith that had its own rules for disposition of property, would also be regarded as a strong indicator of having abandoned tribal norms and practices.[76]

The court found that the nature of the assets in the estate, whilst relevant, was now not definitive of the personal law of the deceased. Judge President Kirby found that customary law was flexible, fluid and constantly evolving to meet the changing situation of its subjects. With proper legal advice, he noted, customary law could now accommodate the distribution of most modern assets. The size of the estate was also a factor to be considered, although not a conclusive one. The court took the view that large estates could better devolve under the Administration of Estates Act where formal processes and proper record keeping meant that distribution of the

[73] *Pony Hopkins* (n. 15 above) para 52. See also *Botswana Democratic Party and Another v Umbrella for Democratic Change and Another* CACGB 114 – 14 (unreported) para 45.
[74] Laws of Botswana Chapter 01:04.
[75] *Pony Hopkins* (n. 15 above) para 59.
[76] *Pony Hopkins* (n. 15 above) para 59.

estate and any challenges arising therefrom could be easily resolved. The justices ruled that the Administration of Estates Act could still be used to distribute an estate in terms of customary law or any other recognised religious law.[77]

The court then ruled that it would be possible for estates of deceased's tribesmen to devolve under the Administration of Estates Act. Outlining the procedure that could be followed, the Court found that the party seeking devolution of an estate under the Administration of Estates Act would need to apply to the High Court for such an order. The High Court would then decide the law to apply, between common law or customary law, having regard to the particular circumstances of the case, the parties before it, the deceased's lifestyle and the nature and magnitude of the deceased's estate. The same application could be made by a beneficiary aggrieved with a distribution order of the Customary Court. Such a person would be required to make such an application to the appropriate Customary Court which may order that the estate be reported to the Master of the High Court and administered under the Administration of Estates Act.

The decision in the Pony Hopkins Case

In the particular circumstances of this case, the court found as follows. First, that the estate of the late Nkopo Phiri and his wife Ntuka Phiri was to devolve under customary law. They were Bakgatla tribespeople, living in their home village of Mochudi, and further, the issue before the court with regard to their estate was customary law dispositions of property made during their lifetimes.[78] Second, that the Master of the High Court does not have unlimited jurisdiction over the administration of all estates in Botswana. This is because the estates of deceased tribesmen who die intestate are governed by the customary law.[79] Third, estates reported to the Masters office should devolve under the Administration of Estates unless there was some dispute. In this regard, the Master would have the capacity to administer estates reported to his office even if the applicable law was customary law.[80] Fourth, the lifestyle of a deceased tribesman could exclude him from the operation of the Administration of Estates Act.[81] Fifth, the size of the estate or its value would be no bar to customary courts distributing such an estate. Further, distributions of customary estates are made by the

[77] *Pony Hopkins* (n. 15 above) paras 60– 63.
[78]Pony Hopkins (n. 15 above) para 66b.
[79] Pony Hopkins (n. 15 above) para 65a.
[80]Pony Hopkins (n. 15 above) para 66b.
[81]Pony Hopkins (n. 15 above) para 66b.

family in consultation with the elders in the first instance and not by the customary court.[82]

The next section considers the separate opinion of Judge of Appeal Lesetedi. Though he arrived at a similar conclusion, Judge of Appeal Lesetedi provided separate reasons for his finding which are edifying and serve to buttress the finding that the mode of life test is to be preferred over a strict interpretation of section 3 of the Administration of Estates Act. [83]

4. The Lesetedi Separate opinion

Judge of Appeal Lesetedi agreed with the findings Judge President Kirby in the main judgment on both reasoning and outcome.[84] However, he opted to write a separate opinion to specifically address the meaning of the words "member of a tribe or tribal community."[85]

The meaning of the word "member of a tribe or tribal community"

Judge of Appeal Lesetedi pointed out that two schools of thought had developed on the interpretation of was a member of a tribe means. On the one hand, the appellants argued that membership of a tribe did not make one a tribesman and in fact, mode of life was the determining factor. The Respondents argued the opposite. That one's personal law was customary law simply by the fact of belonging to a tribe. Mode of life was therefore irrelevant.[86] In order to arrive at the true meaning of the word "tribesman", Judge of Appeal Lesetedi sought to discover the purpose of the Administration of Estates At.

According to Judge of Appeal Lesetedi the best ways to discover the purpose of any statute is to consider the social, economic or legal mischief that parliament intended to resolve through legislation.[87] He also emphasised that the role of the courts was to give effect ascertain and give effect to the true intention of parliament. He found section 26 of the Interpretations Act instructive in their providing that all enactments must be given their fair and liberal construction best to attain their true spirit and intent. Section 27 of the Interpretations act was also helpful in interpreting

[82]Pony Hopkins (n. 15 above) para 66c.
[83] *Pony Hopkins* (n. 15 above) para 64– 65.
[84] *Pony Hopkins* (n. 15 above) Lesetedi opinion para 1.
[85] *Pony Hopkins* (n. 15 above) Lesetedi opinion para 6.
[86] *Pony Hopkins* (n. 15 above) Lesetedi opinion para 5.
[87] *Pony Hopkins* (n. 15 above) Lesetedi opinion at para 8. See also Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800 at 882.

statutes by providing that courts should lean toward interpretations that give effect to statues and not those that render statures ineffective.[88]

In applying the principles above, Judge of Appeal Lesetedi noted that the Administration of Estates Act came into force in 1972 at a time when Botswana was a least developed country with no road network to speak of, with a rudimentary and inaccessible Master's Office, and with 90 percent of the population living in the rural areas. To his mind, Parliament enacted section 3(a) of the Administration of Estates Act having had regard to the fact that the population had access to a reliable, simple inexpensive, convenient an accessible means of administration of deceased estates through the institution of customary law. Parliament recognised that the distribution of estates under statutory law would have been alien, expensive and inaccessible to most citizens. [89] The strictures of section 3 were not absolute though. The law still provided tribesmen a means to opt-out of the application of customary law to their deceased's estates. This was possible in two ways. First, through the "mode of life test". This test was created by the 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act. According to section 2(1) persons married according to the rites of Christian religion before 1 April 1917 and person married by a marriage officer under the Marriage Act on or after 1 April 1917 until July 1926 could, upon the death of either spouse, apply to the court to have the devolution of their property excluded from the customary law if the results of the devolution would not be just and equitable under customary law, having regard to the mode of life of the spouses. The second route to escape the application of section 3 of the Administration of Estates Act he noted was the Married Persons Property Act.[90] Section 5(1) as read with section 5(2) of the Married Persons Property Act provided that customary law would apply to the property of married persons, subject to the provisions of the 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act 1921 Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act. Section 5(1) was in effect reinforcing the status quo existing at the time that the law applicable to tribesmen was customary law unless specifically excluded through the application of the mode of life test or through execution of a valid will. However, section 5(2) took matters a little further and for the first time, and allowed persons, upon marriage. To specifically exclude customary law from the devolution of their property through a signature to that effect. The upshot of this development is that the mode of life test would no longer be

[88] *Pony Hopkins* (n. 15 above) Lesetedi opinion para 7.
[89] *Pony Hopkins* (n. 15 above) Lesetedi opinion paras 9 – 10.
[90] Act 69 of 1970 which was further amended in 2014.

necessary. A couple could, by signing a section 5(2) instrument, escape the bounds of customary law.[91]

Judge of Appeal Lesetedi noted that no one could have predicted the meteoric economic transformation that Botswana would experience, transforming itself from a least developed country with a negligible number of educated people to a middle-income country with an urban population of more than 60%.[92] The country transformed with massive infrastructural growth and a good road network. The courts became more accessible and as Lesetedi observes, many people now live a more modern life where the Master's Office is the more convenient and accessible route to resolve devolution matters. Judge of Appeal Lesetedi states as follows

> 'The mischief or object of section 3(a) no longer applies to the majority of the people. Without statistical data, one can still confidently believe, from divorce cases that come before the courts, that many people who marry under the Marriage Act, sign an instrument under the Married Persons Property Act to exclude the application of customary law. Many unmarried persons do not get to make the same deliberate choice because they have not gone into matrimony. Yet, some who had in their marriages consciously excluded the application of customary law and subsequently divorced have maintained the same mode of life pointing away from subscribing to a customary choice of law. It would be absurd and inconsistent with the intention of the legislature to have a law which they consider alien to them and of which they had previously derogated from, apply to the devolution of their estates'[93]

Judge of Appeal Lesetedi correctly noted that many tribesmen had nothing better than "tenuous links" to the tribal roots and that accessing the customary law processes was for them "cumbersome and expensive if not obscure" because their day to day lives had little or naught to do with customary rules, norms, and practices.[94] Whilst recognising that customary law was not static and that it continued to grow, Lesetedi found that the law, at this time, was not well equipped to deal with complex estate matters that may require the participation and protection of third parties, for instance, creditors. Judge of Appeal Lesetedi concluded that affording section 3(a) a restrictive meaning that is holding that it applied to persons solely by accident if birth, would lead to undue hardship and may create difficult unintended challenges.[95]

---

[91] *Pony Hopkins* (n. 15 above) Lesetedi Opinion para 11 to 13.
[92] 2011 Population and Housing Census Analytical Report Statistics Botswana 2014.
[93] *Pony Hopkins* (n. 15 above) Lesetedi opinion at para 15.
[94] *Pony Hopkins* (n. 15 above) Lesetedi opinion para 16.
[95] *Pony Hopkins* (n. 15 above) Lesetedi opinion paras 18 and 19.

5 Conclusion

In conclusion, the principles' elucidated, in this case, were long-awaited. The *Pony Hopkins* decision provided much-needed clarity on the meaning and scope of section 3 of the Administration of Estates Act. The strictures if the word tribesman, strictly interpreted in *Thipe*, have now been loosed. This judgment is now in lockstep with current societal norms surrounding cohabitation, marriage, children, life and death and distribution of estates after death. The law now stands as follows.

First, section 3 of the Administration of Estates Act is a choice of law section. Where there is no dispute that a person is a tribesman, his property should devolve under the customary law. Where an estate is reported to the Master under the Administration of Estates Act, then the Master must distribute the estate under the common law where the deceased is not a tribesman, and there is no allegation that he may be one, or where the deceased has specifically expressly excluded the operation of customary law through a will or signing the relevant instrument under section 5 of the Married Persons Property Act. Choice of personal law made by will or exclusion of the application of the customary law upon marriage under section 5 of the Married Persons Property Act should be respected and given effect

Second, where there is a dispute regarding the status of the accused as a tribesman, the mode of life of the deceased will determine the choice of law. The court will be bound to examine the life of the deceased, his assets, the size of his estate, his connections with rural and modern life to determine which law would best provide for the devolution of the estate.

Third, the Master may, where an estate is reported to his office, administer the estate under the proper law, including customary law. In other words, nothing precludes the Master of the High Court from administering an estate reported to his office according to customary law where this is the applicable law. Where a person has partially disposed of his property under a will but has made some indications of voluntary testamentation under customary law, a proper reading of section 3 of the Administration of Estates Act would require that the Master respect such dispositions and give effect to them.

Lastly, the master does not have jurisdiction over all estates of deceased persons in Botswana. Estates of deceased tribesmen who die intestate are governed by the customary law.

The *Pony Hopkins* judgment marks the end of a long debate regarding the meaning of the words tribesman under section 3 of the Administration of Estates Act. The conclusions reached by the court are satisfactory and responsive to societal change. No longer shall one have to pose the question - "who is a tribesman?"

BIBLIOGRAPHY

Literature

Macharia-Mokobi, E (2013) 'Who is a tribesman? An Examination of the Continued Utility of section 3 of Botswana's Administration of Estates Act' 17 *University of Botswana Law Journal* 1-26.

Cases

BHC v Letsholo Misca 399/93

Botswana Democratic Party and Another v Umbrella for Democratic Change and Another CACGB 114 – 14 (unreported)

Image Tongomani Khilane v The Registrar of the High Court and Another, Civil Appeal no F 171 of 2003.

Mmereki v Seleke and Another 2001 (2) BLR 601.

Phiri and 3 others Civil Appeal No. CACGB 087 – 17 (Unreported).

Pony Hopkins v The Representatives of the Estate of the Late Nkopo Phiri and Ntuka

Popego Obopile v the Attorney General, 2005 (1) BLR 86 (CA)

Samsam v. Seakarea 2004 (1) BLR 378

Selato v Moaro. [2010] 3 BLR 565 (CA).

Sipo Sami Engineering v Seipobi [2009] 2 BLR 196 CA.

Thipe v Thipe, 2007 (3) BLR 273).

Tshepo Mbenge Mosienyane v Lesetedinyana Lesetedi (N.O) and 15 others, Misca F 257/2005.

Foreign Cases

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800

Table of Legislation

African Divorce Proclamation No. 19 of 1926
Administration of Estates Act
Dissolution of Marriages of Persons Subject to Customary Law (Disposal of Property) Act Cap 29:05
Interpretations Act Laws of Botswana Chapter 01:04.
Marriage Act of 1917
Married Persons Property Act, No. 69 of 1970; Laws of Botswana Cap 29:03.

Chapter 2

Traditional dispute resolution mechanisms in the administration of justice in Kenya

Francis Kariuki*

Abstract

The Constitution of Kenya 2010 recognises customary law and the use of traditional dispute resolution mechanisms (hereinafter 'TDRMs'), which are informal and culturally-appropriate justice systems in resolving disputes. Whereas several African countries have promoted the use of customary law by establishing customary courts, Kenya retains a system where both customary law and state law are subject to interpretation by state courts. The Kenyan Constitution cements this position by stipulating that TDRMs are to be promoted and encouraged by the Judiciary. This chapter examines how Kenyan courts have treated decisions emanating from TDRMs highlighting attributes of citizenship such as urbanisation and equality. It notes that the constitutional position creates doubts as to the future development of customary law and TDRMs in Kenya owing to the divergent and conflicting approaches taken by the judiciary over the years in interpreting customary law.

Keywords: Traditional dispute resolution mechanisms (TDRMs), customary law, access to justice

1 Introduction and background

Before the introduction and establishment of formal judicial institutions by the British colonial administration in Kenya, conflicts and disputes were settled through the machinery of traditional/customary justice structures.[1] The traditional/customary justice structures that exist amongst various communities in Kenya have been described by the Constitution as traditional dispute

* *Faculty of Law Strathmore University, Kenya.* Kariukifrancis06@gmail.com. The author wishes to acknowledge Mr. Claude Kamau for research assistance in the course of writing this chapter.

[1] F Kariuki 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3. Available at https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20law.pdf (Accessed 23-06-2019)

resolution mechanisms (TDRMs)[2] and governed by customary laws of the various ethnic groups. TDRMs are justice processes based on cooperation, communitarianism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.[3] In most cases, TDRMs resolve disputes by the applicable customary law, or other relevant customs, practices or rules, and often on a case by case basis. They generally blend various options that would result in the most restorative outcome.[4] For instance, whenever conflicts arise amongst most African communities, parties often resort to direct negotiations. Where those negotiations fail, parties may resort to having the dispute resolved either at the household level, extended family level, by the council of elders (such as the *Njuri Njeke* among the Meru people), or by elderly men and women who act as third parties in the resolution of disputes. In most of them, decisions are community-oriented with the victims, offenders (wrongdoers) and the entire community being involved and participating in the definition of harm (wrongdoing) and the search for a solution acceptable to all stakeholders.[5]

TDRMs are commonly used in rural areas and within informal settlements where people lack the financial wherewithal to access justice informal justice systems. Within urban areas, TDRMs may not necessarily be governed by African customary law, but also by the prevailing practices and customs, especially where people come from different ethnicities. It is reported for instance that communities living in the informal settlements of Kibera and Mukuru slums in Nairobi have formed their justice mechanisms that are

---

[2] For a fuller discussion on the various tags and terminologies used to describe these justice structures, see generally F Kariuki 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' available at http://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file (Accessed 23-06-2019)

[3] See E Sherry & H Myers 'Traditional Environmental Knowledge in Practice' (2002) 15(4) *Society & Natural Resources* 345-358, 351; M Johnston 'Giriama Reconciliation' (1978) 16 *African Legal Studies* 92-131; K Stich 'Customary Justice Systems and Rule of Law' (2014) 221 *Military Law Review* 215-256.

[4] D Ngira 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' (2018) 8 *Ońati Socio-Legal Series* (online) Available at http://ssrn.com/abstract=3165522, (accessed 16 June 2018).

[5] O Elechi 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada. See also H Zehr *The Little Book of Restorative Justice* (PA, Good Books, 2002).

independent of the state's formal justice mechanisms.[6] This means that the concept of TDRMs extends to cases where a group of elders from different ethnic groups within an urban area settles a dispute (either following a customary law or based on common sense).

Some of the advantages of TDRMs are that: the proceedings are conducted in local languages and hence are understood by the people; they are locally acceptable and legitimate; compliance rate is high; they bring justice closer to the people; they apply customary law where panelists have special understanding; encourage participation of people in administration of justice; they are not expensive; and do not impose a heavy burden on the national budget.[7] Also, they promote restorative justice and are informal compared to the formal court system where rules of evidence and procedure are strictly adhered to.

They have remained resilient in most parts of Kenya, and continue to play a key role in the justice sector especially due to challenges faced by people in accessing justice within the formal justice system.[8] Ubink, in a Namibian study,[9] Davies and Dagbanja in a Ghanaian study,[10] and Chopra and Isser[11] in a Somali study, have all concluded that TDRMs are still very prevalent in most parts of Africa. They usually operate outside the domain of the state justice system and handle disputes that would conventionally be addressed by formal courts, hence playing a crucial role in enhancing access to justice. To this end, most African countries, including Kenya have enacted laws recognising traditional justice systems, in large part due to their contribution to enhancing

[6] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008) 4.

[7] E Nwogugu 'Abolition of customary courts – The Nigerian experiment' (1976) 20 *Journal of African Law* 1, 12.

[8] P Onyango *African Customary Law: An Introduction* (LawAfrica, Nairobi 2013) 149.

[9] J Ubink 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' (2018) 49 *Development and Change* 930-950.

[10] See JA Davies & D Dagbanja 'The role and future of customary tort law in Ghana: a cross-cultural perspective' (2009) 26 *Arizona Journal of International Law* 303-333.

[11] T Chopra & D Isser 'Women's access to justice, legal pluralism and fragile states' in P Albrecht, H Kyed, D Isser, & E Harper (eds) *Perspectives on involving non-State customary actors in justice and security reform* (International Development Law Organisation 2011) 23-28.

access to justice amongst the poor in rural areas and within informal settlements.[12]

However, unlike other jurisdictions (such as, Nigeria and Ghana) that have customary courts, Kenya recognises the amorphous TDRMs that are to be promoted by the Judiciary[13] thus creating enormous challenges in using them to enhance access to justice as discussed later in this chapter. Moreover, both customary law and state law are subject to interpretation by state courts,[14] and therefore there is a high likelihood of choice of law issues, and jurisdictional dilemmas between customary and statutory law with huge ramifications on the promotion of TDRMs.

Kenyan courts have been faced with choice of law conflicts when dealing with cases touching on customary law disputes. In the specific circumstances of Kenya, such conflicts are viewed as part of the legal problems arising in multi-ethnic societies, in cases where communities live under different laws. These problems may arise when members of different communities enter into legal relationships; where parties to a dispute are subjected to different personal laws and when the parties, whether members of the same community or not, choose to regulate their legal relations following another personal law.[15] In the aftermath of the 2010 Constitution, it is important to determine whether that Constitution has played a role in the resolution of choice of law conflicts.

This chapter is structured as follows. Part 1 offers this general introduction. Part 2 discusses the treatment of customary law in the colonial era by formal courts and native tribunals to lay out some context for TDRMs. Part 3 examines the treatment of customary law by formal courts from independence to 2010 when the Constitution was enacted. In Part 4, the treatment of TDRMs and their decisions by Kenyan courts in the post-2010 era is discussed. Part 5 highlights the challenges TDRMs are facing in Kenya while Part 6 offers a conclusion and way forward.

---

[12] J Ubink & B Rooij 'Towards customary legal empowerment: an Introduction' in J Ubink & T McInerney (eds) *Customary justice: Perspectives on legal empowerment* (International Development Law Organisation, 2011) 7-28.

[13] Article 159 (2) (c), *Constitution of Kenya* (2010).

[14] Sec 7(3), *Magistrates' Courts Act* (Act 26 of 2015).

[15] A Tier 'Techniques of choice of law in conflict of personal laws' (1986) 30(1) *Journal of African Law* 1-19.

2 African Customary law in Kenya in the colonial era up to 1967

During the colonial period, Kenya had a dual court system which was largely dependent on the race of the inhabitants.[16] The duality of courts was manifest in that, on one hand, there were native tribunals (which later became African courts) that primarily applied African customary law and resolved disputes among Africans.[17] On the other hand, there was the judicial, professional, English-orientated system of courts (Supreme court and subordinate courts) that applied English law and heard all cases involving foreigners and serious criminal cases involving Africans (such offences were heard by a magistrate and not an administrator).[18]

During the colonial period, identifying a court that would handle a case was determinative of the law that would govern the issue. Indeed, the choice of court was often conclusive of the choice of law, since if it was decided that a case was amenable to the jurisdiction of a native court, the result usually was that customary law would be applied to its determination. On the other hand, if a British court exercised jurisdiction, it would automatically apply its law to the resolution of the case.[19] The position was that each type of court had a primary law, by which is meant that in default of any special reason or circumstance, a court of a given type would apply a system of law of a given kind with exceptions. Generally, the primary law in native courts in British colonial territories was the African customary law existing in their respective jurisdictions.[20] However, the laws governing other courts, usually provided that the non-African courts could have the power to apply customary law in cases involving Africans, whilst many of the native or African courts had a limited jurisdiction, at least in the later colonial period, to apply non-customary law.[21] As will be shown shortly, this colonial legacy continued into the independence era and is the position

---

[16] B Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524, 512.

[17] Hertslet, Treaties, Vol. 20, 74, cited in Allott, n 13, 1970, 130. See also E Cotran 'The Development and Reform of the Law in Kenya' (1983) 27(1) *Journal of African Law* 42.

[18] A Allott 'Customary Law in East Africa' (1969) 4(3) *Africa Spectrum* 12-22, 13-14. See also RL Abel 'Customary Law of Wrongs in Kenya: An Essay in Research Method' (1969) 4013 *Yale Law School faculty Scholarship Series* 584.

[19] A Allott *New Essays in African Law* (Butterworths, London, 1970) 110.

[20] Articles 2(b), 3 & 4 of the Native Courts Regulations of 1897.

[21] Allott (n 19 above) 110.

obtaining in Kenya today, as formal courts can still apply customary law, while TDRMs can only apply relevant customary law, customs or practices.

Treatment of African customary law in native tribunals/courts

According to the Native Tribunals Ordinance of 1930, native tribunals were to apply native law and custom prevailing in the area of jurisdiction of the tribunal so far as it was not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony.[22] Appeals from the native tribunals went through the administration, district, and provincial commissioners, with no possibility of appeal to the judiciary.[23] However, the Chief Justice or the Attorney General had the power to review, revise, and/or quash any cases, whether heard in the tribunals or magistrates' courts.[24]

The jurisprudence from native tribunals, councils and courts show that they treated customary law with due regard in both civil and criminal matters. Firstly, native tribunals/courts applied to a distinct group of crimes, customary crimes and wrongs, to their respective ethnic groups. For instance, among the Luo, it was a customary crime to abuse another or to take a woman from her marital home. Additionally, one could successfully sue the accused for wrongfully taking away a woman from her husband's custody without permission contrary to Luo customs.[25] For example, in *Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango,*[26] the plaintiff sued the defendants for defamation under the Luo customs. Secondly, these courts, councils, and tribunals could punish for offences under statutes using African customary laws. In *Kosele African Court Criminal Case no 33 of 1966*, the accused was charged with indecent assault contrary to Section 144 of the Penal Code. The Court found that he was guilty of breaking the virginity of his victim. Instead of imprisoning him, the Court fined him a customary compensation of a heifer. Similarly, in *Bungoma District African Court Criminal Case No. 493 of 1967*, the accused was charged with common assault contrary to section 250 of the then Penal Code. The court found him guilty and imposed a customary fine of a

[22] Section 13(a) *Native Tribunal Ordinance, (*1930*).*

[23] Shadle (n 16 above) 512.

[24] Shadle (n 16 above) 512.

[25] Maseno African Court Criminal Case 454 of 1966.

[26] Kisumu District African Court, Criminal Case No. 299/1966.

sheep. Although section 176 of the current Penal Code provides for compensation, no method for determining the amount exists and this may explain why courts imposed customary compensation.

In the colonial period, it was also common for settlers to sit alongside elderly natives and 'employ some version of customary law, keep farm disputes within the farm, and allow the lord/settler his voice in manorial/community affairs.'[27] Shadle gives accounts of how settlers such as Karen Blixen could preside over intra-African disputes on their farms even though they 'knew nothing about African customary law.'[28] Moreover, Doorly writes that in the municipalities and non-tribal areas mixed tribunals: [29]

> found themselves faced with situations requiring decisions which either are not referable to native law or custom or to which the native law or custom is no longer properly applied in the opinion of the Tribunals. In these circumstances, the Tribunals have not hesitated to give decisions which are tantamount to the recognition of new custom.

Treatment of African customary law in formal courts

The treatment of African customary law in the formal courts was not consistent. Whereas there are judges who appreciated the role of customary law in the resolution of disputes, others treated customary law with utter contempt. For example, in *Benjawa Jembe v Priscilla Nyondo,*[30] Barth J held that African Customary law applied to the estate of an African who had become a Christian and had abandoned African customs. In *Isaka Wainaina v Murito*,[31] the same judge held that all native land rights whatever they were had disappeared upon the enactment of the 1915 Crown Land Ordinance, and that natives in the occupation of Crown land had become tenants at the will of the Crown. In 1917, just 5 years after the *Jembe* case, Hamilton C.J. was faced with the question of the recognition of customary marriages in *R v, Amkeyo.*[32] In this case, the question that arose during the trial was whether a woman married under African

[27] Shadle (n 16 above) 518.

[28] Shadle (n 16 above) 518.

[29] AN Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34, 29.

[30] [1912] 4 EALR 160.

[31] [1923] 9(2) KLR 102.

[32] [1917] 7 EALR 14.

customary law could testify against her husband. The common law deemed a husband and wife as one person and neither could be compelled to give evidence against the other. Hamilton C. J. held that a wife married under African customary law was not a legal wife, and consequently compelled her to give evidence against her husband. The decisions in the *Isaka Wainaina and Jembe case* highlights colonial courts' attitude towards customary law where it was either disregarded as not being law or as being inferior to the Crown Ordinances and common law in force at the time.

At times, European judges would rely on the institution of assessors to understand the customs of local tribes when resolving cases and thus ensure that justice was contextualised to indigenous people. However, judges were not bound by the opinion of assessors and they could disregard such opinions with reasons. For instance, Thacker J in *R v Ogende s/o Omungi* [33] stated that he deplored the opinions of assessors because they were based on intertribal prejudice and resulted from pervasiveness and stupidity.

Furthermore, European judges and formal courts treated native tribunals and African courts with opprobrium. In *Lolkilite Ole Ndinoni v. Netwala ole Nebele,*[34] the East African Court of Appeal dealt with two matters relating to the Maasai customary practice of blood money and the ability of Native Tribunals to apply the Limitation Ordinance of 1934. The appellant's father, who was deceased at the time of the case, had allegedly committed homicide and the matter was taken to the Native Tribunal. However, the claim for blood money was made at the native tribunal thirty-five years after the alleged homicide. The Tribunal dismissed the suit but the Supreme Court awarded the claim. The Appellant appealed to the East African Court of Appeal. The East African Court of appeal dismissed the claim on the ground that it was repugnant to justice and morality to bring a matter for hearing after 35 years. It is clear that the East African Court of Appeal considered claims for blood money valid but rejected bringing the matter after a long period. Despite the ruling that indirectly supported the claim for blood money, Sir Edward C.J. (Uganda) held that the Native Tribunals were not courts in the proper sense and therefore the Limitation Ordinance of 1934 did not apply to them. The finding that the Native Tribunals were not proper courts, illustrates the Europeans attitude towards customary dispute resolution methods as inferior to formal courts.

[33] [1914] 19 KLR 25.
[34] [1952] 19 EACA.

3 Treatment of African customary law by courts from 1963 to 2010

After independence, the dual court system was abolished and a unitary court system established.[35] The 1967 Magistrates' Courts Act converted the African Courts into formal Magistrates' courts. However, the limitations imposed on the application of customary law in the colonial era were still sustained. Most of the cases touching on customary law after independence revolved around section 2 of the Magistrates' Court Act[36] and section 3(2) of the Judicature Act. Section 2 of the Magistrates' Court Act limited the customary claims under the law to matters of land, intestacy, family, seduction of unmarried women and girls, enticement of married women to adultery and status of women and children. The High Court in *Kamanza s/o Chiwaya v. Manza w/o Tsuma*, held that the above list of claims under section 2 of the Magistrates' Courts Act was exhaustive, and excluded customary law claims based on tort or contract.[37]

Likewise, section 3(2) of the Judicature Act limited (and still does) the application of customary law by stating that it is only to guide courts in civil cases. One common thing in the treatment of customary law by courts in independence Kenya is the continuation of the colonial inconsistencies and lack of coherence in treating customary law, with the effect that statutory law still ranked higher than customary law. For instance, in *Ernest Kinyanjui Kimani v Muiru Gikanga and Another*[38] it was held that '... where African customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it'. Compared to the Constitution, statutes, common law and equity, which the courts take judicial notice of, customary law has to be proved. The main reason why common law and equity are not proved in courts is that the courts assume they have attained public notoriety.[39] Since customary law is specific to particular communities, it is rare for it to be taught in schools, and hence difficult for it to gain public notoriety to allow for its usage in dispute resolution. However, in cases where customary

[35] Cotran (n 17 above) 42-44.

[36] Now section 7(3), Magistrates' Courts Act, 2015.

[37] Unreported High Court Civil Appeal No.6 of 1970.

[38] [1965] E.A. 735. See also *Atemo v Imujaro* [2003] KLR 435.

[39] Kariuki (n 1 above).

laws have become notorious, courts have taken judicial notice of those customs.[40]

The application of customary law in civil cases was also limited through the imposition of a repugnancy clause in the Judicature Act which states that: [41]

> 'The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality…'

The provision that the courts are to be 'guided' by customary law is ambiguous as there are several possible interpretations of 'guided'. First, it could mean that courts have an unfettered discretion to apply customary law or not, and, if they decide to apply customary law, the rules to apply and with whatever qualifications they think fit. Second, it could mean that courts have no discretion whether to apply customary law or not (subject to any discretion imported by the word 'applicable'); but in applying customary law they need not apply it in all its rigour and detail. The use of the word 'shall' before 'guided' rather than 'may' is treated as significant. Third, it may also mean that there is no discretion; and courts must apply customary law in cases between Africans, and they must apply it in its full detail, except where excluded by the repugnancy clause.[42] Moreover, and despite the purported application to all cases and all courts, the words 'to which natives are parties' are ambiguous. Do they intend to deal only with cases in which all the parties are Africans, or do they cover also disputes in which at least one of the parties is an African?[43]

Kenyan courts have been confronted with choice of law issues between statutory and customary law several times, especially in burial, land, family and succession disputes. In the cases of *Re Ruenji*[44] and *Re Ogola*[45] estates, the respective testators drew wills that did not cater to their customary law wives and the courts held that these wives were not wives for purposes of succession.

---

[40] See generally, *Wambugi w/o Gatimu v Stephen Nyaga Kimani* [1992] 2 KAR 292, where the Court of Appeal held that the Kikuyu custom that a married woman does not inherit her father's land was notorious, and thus took judicial notice of it.

[41] Sec 3(2), *Judicature Act,* Act 16 of 1967.

[42] Hertslet, Treaties, Vol. 20, 74, cited in Allott,, n. 13 132.

[43] Hertslet, Treaties, Vol. 20, 74, cited in Allott, n.13 132.

[44] [1977]KLR.

[45] [1978]KLR.

However, the position of customary law wives in succession was later codified in section 3(5) of the Law of Succession Act which stated that a woman married to a man under a system that allows polygamy is a wife for succession purposes under Sections 26 and 40 of the Act despite the fact that the husband may have procured prior or subsequent monogamous marriage. Consequently, in *Irene Njeri Macharia v. Margaret Wairimu Njomo and Anor*,[46] the Court of Appeal held that a wife married under customary law could claim through section 3(5) of the Law of Succession Act.

In the case of burial disputes, the lack of a legal framework has created a legal conundrum especially in determining who should bury the deceased person. In *James Apeli and Enoka Olasi v Prisca Buluka*[47] it was argued that the will of the deceased cannot be respected if it contravenes customary law. Likewise, in *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi*,[48] the Court dismissed the provisions of a will of the deceased, which stated the manner of disposal of his body and applied Kamba customary law. The Court held that the wishes in the will could only be given effect to where the executor proved that customary law was repugnant to justice and morality.

The case of *Virginia Wambui Otieno v Joash Ochieng Ougo & Another,*[49] popularly known as the SM Otieno case, gave an authoritative pronouncement on the application of customary law on a personal law matter, where there was a jurisdictional conflict between customary law and statutory law. In the case, the deceased had been born and bred as a Luo, and as such under Luo customary law, his wife (a Kikuyu) on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children were also Luo as well as members of their deceased father's clan. On the death of a married Luo man, the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family are concerned. However, the wife contested the application of Luo burial customs. Three positions emerged in the case regarding the law applicable to the deceased. First, the wife posited that the husband had evidently distanced himself from the Luo customary laws by embracing a 'Western' life, and therefore the narrative of his life was all that was needed to demonstrate the

[46] Civil Appeal No. 139 of 1994.
[47] Civil Appeal No. 12 of 1979 (Kisumu).
[48] Civil Appeal No. 66 of 1984.
[49] [1987] eKLR.

applicable law.[50] Second, there was the position that an individual cannot choose the law applicable to their matters and that it is only judicial reason that can establish the appropriate law where different laws overlap and contradict each other. In this sense, it is not the lifestyle of a person that determines the governing personal law, but the nature of his laws and their interpretation. And third, that as a Luo, the deceased husband was throughout his entire life subject to the authority of 'customary law' and that no issues other than the manner of his birth and the facts concerning the ritual establishment of his 'name' have any relevance whatsoever.

As with other African communities, the Court observed that an *'*African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal' and that a 'different formal education and urban life style cannot affect one's adherence to his law.' [51] According to the Court, upon marriage, the wife was bound by Luo custom and had no right to bury her husband, and she did not become the head of the family upon the death of her husband. Thus, the Court of Appeal was of the view that where there was a conflict between a deceased person's wishes and customs, the latter takes precedence. Although the *SM Otieno* decision, may be seen as a victory for African customary law, it failed to deal with the dichotomy between formal law and customary law but rather reified this dichotomy. As such, it is viewed as '…a missed opportunity for the court to demonstrate the potential of customary law as a relevant and dynamic force in the face of changing social circumstances.'[52]

An interesting point emerging from the *SM Otieno* case is what the outcome would have been if there was legislation governing burial disputes in Kenya. Would the matter have been determined using statutory law on burial or customary law? According to Murungi, who has proffered a spirited defence of the Court's decision in SM Otieno, the wife ignored or failed to see that being 'christianised', 'educated' or 'urbanized' in the context of contemporary African history amounts, for the most part, to just being 'Europeanised'.[53] Essentially,

---

[50] See generally, *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*, Civil Appeal Number 31 of 1987 [1987] eKLR.

[51] See *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*, Civil Appeal Number 31 of 1987 [1987] eKLR.

[52] W Kamau 'SM Otieno Revisited: A View through Legal Pluralist Lenses' (2009) 5(1) *Law Society of Kenya Journal* 73.

[53] J Murungi 'The question of an African jurisprudence: some hermeneutic reflections' in K Wiredu (ed*) A companion to African philosophy* (Blackwell, Oxford, 2004) 524.

an African by his/her ontological origins remains, radically, the juridical subject of African customary law. As such, if a Kenyan subject to customary law, makes a unilateral and individual decision to detach himself/herself from customary law, this does not say anything about whether a judicial body might exercise African customary law concerning their affairs or not.

A similar finding was reached by Justice Philomena Mwilu in *Salina Soote Rotich v Caroline Cheptoo & 2 Others*[54] where she opined that:

> For the above reasons, I come to the conclusion that the deceased Benard Kiprotich was a Keiyo who subjected himself to the customs of his father and forefathers and who became incapable of divesting himself from the customs of his people. He was for all practical purposes bound by those customs.

Although customary law has been heavily relied upon in determining burial disputes, there are times when courts have applied other tests. For instance, in *Eunice Moraa Mabeche v Grace Akinyi*,[55] the High court allowed the burial of the deceased in a Muslim cemetery according to his expressed wishes and rejected the deceased's mother's attempt to have him buried in Kisii. Similarly, in *Charles Onyango Oduke & Anor v Onindo Wambi*[56] the High Court held that 'courts ought to give effect to the wishes of the deceased as far as possible.' Allowing a deceased testator to be buried according to his expressed intentions, further limits the role of customary law in burial disputes. In other cases, the relationship between the deceased and litigants is also a key indicia in determining the applicable law in burial disputes.[57] For instance, in *Edward Otieno Ombaja v Odera Okumu* [1996], the Court of Appeal pointed out that:

> We wish to observe here that customary law, like all other laws, is dynamic. Because it is not codified, its application is left to the good sense of the judge or judges who are called upon to apply it. That is why, as stated earlier S. 3(2), above, is worded the way it is to allow for the consideration of the individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here.

[54] [2010] eKLR.
[55] High Court Civil Case No.2777 of 1994.
[56] [2010]eKLR.
[57] Ngira (n 4 above).

A similar approach was taken by Justice Jackton Ojwang (then of the High Court) in *Ruth Wanjiru Njoroge v Njeri Njoroge & Anor* [2004] where the second wife sought to stop the first wife and the mother-in-law from burying her husband in their ancestral land and have him buried in their matrimonial home. Although Justice Ojwang allowed the deceased man to be buried in his ancestral land, he introduced a new doctrine in burial disputes; that of *legal proximity*. The doctrine is based on the assumption that the decision as to the determination of the place of burial is based upon proof by the parties in the dispute of their proximity to the deceased. Ngira correctly argues that the fact that a person with whom the deceased had a sour relationship cannot be allowed to bury him/her regardless of the position of customary law, is an attempt by courts to develop customary law rather than interpret it.[58]

4 Treatment of TDRMs and their decisions by Kenyan courts in the post-2010 era

The Constitution of Kenya 2010 requires courts and tribunals to promote the use of TDRMs while exercising judicial authority.[59] However, TDRMs are not to be used in a way that-contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with this Constitution or any written law.[60] However, the Constitution does not limit the application of TDRMs to any area of the law. The 2010 Constitution even allows for the use of TDRMs in the resolution of land and environmental disputes.[61] Besides, the 2010 Constitution has recognised customary law, as a source of law in Kenya.[62]

Other laws provide for the use of TDRMs including the Community Land Act,[63] Environment and Land Court Act,[64] Marriage Act,[65] and the Land Act.[66]

---

[58] Ngira (n. 4 above).
[59] Article 159(2)(c), *Constitution of Kenya*, 2010.
[60] Article 159(3), *Constitution of Kenya*, 2010.
[61] Article 159(2)(c), 60(f), 67(2)(f), Constitution of Kenya 2010. See also ss 18 and 20(1) of the Environment and Land Court Act No. 19 of 2011 allowing the Environment and Land Court to adopt and implement Article 159 of the Constitution.
[62] Article 2(4), *Constitution of Kenya*, 2010.
[63] Act 27 of 2016.
[64] Act 19 of 2011.
[65] Act 4 of 2014.
[66] Act 6 of 2012.

For instance, under the Marriage Act, parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage.[67] The customary dispute resolution process 'shall conform to the principles of the Constitution.'[68] Again, it is noteworthy that divorce proceedings under the Act are to be heard and determined in the state courts and not under TDRMs.[69] Since a customary marriage under the Act is one 'celebrated by the customs of the communities of one or both of the parties to the intended marriage,'[70] it follows that if the parties to the marriage are from different ethnicities, they can choose the customary law that will apply to their marriage. Consequently, if they are to go through a customary dispute resolution process before petitioning for divorce, it appears that that process would be governed by the chosen custom, and the adjudicating body could assume jurisdiction over a spouse who is not from the ethnic group whose customary law is being applied.

The Magistrates' Courts Act contains a specific provision on jurisdiction exercisable by the courts concerning African customary law. Under Section 7(3), Magistrates' courts have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law:[71] land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of, or adultery with a married person; matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as they are not governed by any written law. Magistrates' courts may call for and hear evidence of the customary law applicable to any case before it.[72] The Act confers jurisdiction that would ordinarily vest on TDRMs under customary law on magistrates' courts, a clear effort towards the suffocation of TDRMs in Kenya. The said jurisdiction was previously exercised by native courts before the introduction of magistrates' courts in Kenya.[73] The Act does not contain specific provisions on the exercise of the attendant customary law jurisdiction.

---

[67] A customary marriage under the Act is one that is 'celebrated by the customs of the communities of one or both of the parties to the intended marriage'- Section 43(1), *Marriage Act.*

[68] Sec 68, *Marriage Act*.

[69] See sec 69, *Marriage Act*.

[70] Sec 43(1), *Marriage Act.*

[71] Sec7 (3), *Magistrates' Courts Act*, 26 of 2015.

[72] Sec 16, *Magistrates' Courts Act.*

[73] Ngira (n 4 above).

For example, customary law issues have to go through the technical court procedures and rules of evidence as applied in non-customary law matters thus presenting difficulties to parties relying on customs, which are not codified. The uncodified nature of customary law poses a challenge to magistrates in deciding cases as they are not experts in customary law. Since TDRMs are not bound by such technical procedures and rules of evidence, they would be most appropriate in handling customary law disputes. Additionally, the Act does not offer guidance on how to deal with jurisdictional conflicts in customary law matters, for example, where parties are subject to different personal laws or where conflicts exist between customary law and statutory law. The following section discusses how Kenyan courts have handled several cases dealing with TDRMs.

The constitutional and repugnancy tests

Whereas in the previous constitutional dispensation, the application of African customary law was subjected to the repugnancy clause only, the use of TDRMs under the 2010 Constitution is subject to a more extensive constitutional test. The constitutional test requires TDRMs to be used in a way that-does not contravene the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.[74]

TDRMs are facing other human rights-related concerns, for instance regarding gender discrimination, inhumane treatment, and violation of the right to a fair hearing. Since most TDRMs are male dominated, and they may be biased against women in inheritance, children disputes, sexual offences such as defilement and property disputes. Moreover, TDRMs have been accused of occasioning inhumane treatment, for instance, where the process takes the form of a trial by ordeal or trial based on evidence derived from spiritual rituals or other types of inherently unreliable evidence such as dipping a hand in boiling water or putting hot metal against the skin.[75] Additionally, where parties have unequal bargaining power, TDRMS may undermine fairness in the process, and reinforce preexisting social inequalities, especially along gender lines. While retention of the repugnancy clause is on the basis that TDRMs are at times offensive to human rights, it is contended that this thinking is premised on a

[74] Article 159(3), *Constitution of Kenya*, 2010.

[75] United Nations 'Human rights and traditional justice systems in Africa' (2016), 47-55.

wrong assumption that pre-colonial Kenya did not have a concept of human rights.[76] he retention of the repugnancy clause in article 159(2)(c) of the 2010 Constitution is also seen as a backdoor attempt at curtailing the promotion of TDRMs in a legal pluralistic society,[77] yet as correctly observed by Elechi, there are greater opportunities for the achievement of justice within TDRMs than with the African state criminal justice systems because the former aims at the restoration of rights, dignity, interests, and wellbeing of victims, offenders, and the entire community.[78]

Courts will play a critical supervisory role over TDRMs to ensure compliance with the constitutional and repugnancy tests. A more extensive constitutional test for the application of TDRMs seems to have been informed by the need to ensure conformity with the constitutional requirement for stronger protection of human rights. While, this is an interesting development, seeing that the application of customary law, which is the normative framework within most TDRMs, is subject to the Constitution only.[79] Additionally, whereas TDRMs are subject to the double test, there are other constitutional provisions under the principles of the land policy requiring communities to be encouraged to settle land disputes through 'local community initiatives consistent with this Constitution'[80] suggesting that the local community justice processes might be different from TDRMs.

In the Kenyan context, one can argue that if TDRMs comply with Article 159(3) of the Constitution and written laws, there should be no bar to their applicability in matters where the parties have consented to their use because judicial authority emanates from the people of Kenya. This position had received judicial imprimatur earlier in *Ndeto Kimomo v Kavoi Musumba* Law V.P stated as follows: [81]

> In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties

[76] F Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' (2014) 2(1) *Alternative Dispute Resolution* 217.
[77] Ibid.
[78] Elechi (n 5 above).
[79] Article 2(4), *Constitution of Kenya*, 2010.
[80] Article 60(1)(g), *Constitution of Kenya*, 2010.
[81] [1977] KLR 170.

> were of course entitled to have their case decided in any lawful way they wished, by consent.

The court went on to give an example of what would happen in such an instance:

> '…For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the Judge "we have decided that this appeal is to be decided by the toss of a coin." The Judge would surely say: "In that case, you must either withdraw this appeal or come before me in due course with a consent order that the appeal is allowed or dismissed." It would be wrong in principle, in my view, for the Judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis.'

Therefore, if the court is satisfied that the process and decision of the TDRMs have met the constitutional test, the decision is adopted as a court order. However, it is doubtful as to whether court orders based on TDRMs' decisions have precedential value in determining similar disputes in court in the future. For example, in the case of *Lubaru M'imanyara v Daniel Murungi,*[82] parties filed a consent seeking to have the dispute referred to the *Njuri Ncheke* Council of Laare Division, Meru County for resolution. Citing Articles 60(1) (g) and 159(2) (c) of the Constitution, the court referred the dispute to the *Njuri Ncheke* noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court.

However, in *Dancan Ouma Ojenge v P.N. Mashru Limited*[83] the Employment and Labour Relations Court in Mombasa noted that although superstition played a great role in dispute resolution especially in seeking and finding the truth, the use of TDRMs was repugnant to justice and morality, inconsistent with the Constitution and the Law. In this case, the Respondent Company alleged the Claimant had stolen a computer box and resorted to terminate his contract unfairly and unlawfully upon receiving the opinion of a witchdoctor about the employee's guilt. The Respondent conducted an investigation and disciplinary proceedings by ordeal which was conducted as follows: [84]

---

[82] Miscellaneous Application No. 77 of 2012. [2013] eKLR.
[83] Cause No. 167 of 2015 [2017] eKLR.
[84] Per James Rika J in Cause No. 167 of 2015 [2017] eKLR.

> '…The witchdoctor carried some sticks. He held the sticks on one end, while the General Manager held the other end. The Employees were asked in turns, to place their hands between the sticks. If the witchdoctor declared the grip on the particular hand of an Employee, in between the sticks was strong, it was concluded the individual was guilty of stealing Respondent's computer box. The grip of the witchdoctor's sticks, on the hands of the Claimant, and on the hands of 3 other Employees, was declared to be strong. Consequently, the Respondent found them guilty of an employment offence.'

Subjecting TDRMs to the repugnancy clause shows that even in this post-democratisation Constitution, where the status of customary law is constitutionally protected, TDRMs and customary law are inferior to the formal justice mechanisms and statutory law respectively. The repugnancy clause has not only relegated customary law to an inferior status but has also provided a firm basis for its disqualification.[85] Courts have relied heavily on the repugnancy clause to declare African customary law as repugnant to justice and morality, with one glaring deficiency in this application being that Kenyan law is yet to define exactly what is meant by 'repugnant'. In exercising their discretion to discern its meaning, judges have even relied on foreign laws to determine what actions are repugnant to justice and morality, which are invariably out of context.[86] For example, in *Katet Nchoe and Nalangu Sekut v. R,*[87] the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The court disregarded the customs and practices of the Maasai and adopted the definition of repugnancy to justice and morality under the Ghanaian Constitution that defines a repugnant custom as that which is harmful to both the social and physical well-being of a citizen. The Court held that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition. The Judicature Act states that, [88]

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which *one or more of the parties is subject to it or affected by it*, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and

[85] Kariuki (n 1 above) 13.

[86] Most notably the stance adopted in *Katet Nchoe and Nalagu Sekut v R* (Criminal Appeal No. 115 of 2010).

[87] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

[88] Sec 3(2), Judicature Act, Cap. 8, Laws of Kenya.

> shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.

TDRMs in criminal matters

The 2010 Constitution is not explicit on whether TDRMs apply to criminal matters. Whereas some judges have recognised the role of TDRMs in enhancing access to criminal justice, others have asserted that TDRMs are not applicable in criminal cases. One of the reasons why TDRMs are said to be inappropriate to criminal cases is the difficulty they present in the fulfillment of the right to a fair hearing. Whereas the right to a fair hearing affords every person the right to have any dispute 'decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body',[89] at times the application of TDRMs may be at variance with this constitutional guarantee. Moreover, there are concerns as to whether TDRMs can engender impartiality and independence (from the State and from traditional leaders who may play a key role in dispute resolution) owing to lack of legal training and lack of understanding of written law.[90] In addition, TDRMs may violate the following rights which are components of the right to a fair hearing: the right to have adequate time and facilities to prepare a defence; to a public trial before a court established under this Constitution (since TDRMs are not courts); to legal representation; to adduce and challenge evidence; to be tried without undue delay; protection against being tried again for an offence for which a person has been finally convicted or acquitted; or to appeal to, or apply for review by, a higher court.

Some of the sentences meted out under TDRMs are offensive to a fair criminal trial such as curses, oaths, beatings, being exorcised, etc. currently, Kenyan courts have tended to apply the double test discussed above, the constitutionality and repugnancy tests, in evaluating whether the application of TDRMs offends the bill of rights, that for that matter the right to a fair hearing.

Due to the ambiguity surrounding the application of TDRMs in criminal matters, courts have treated the decisions of TDRMs differently, occasioning jurisprudential confusion in terms of whether they are applicable, when, how and under what circumstances.[91] For instance, in *Republic v Mohamed Abdow*

[89] Article 50, *Constitution of Kenya*, 2010.
[90] United Nations 'Human rights and traditional justice systems in Africa' (2016), 47-55.
[91] Kariuki (n 76 above) 223.

Mohamed[92] the High Court in Kenya upheld the application of TDRMs following Islamic law and customs) and discharged an accused person who had been charged with murder. This was after the families of the accused and the deceased person had met and agreed on some form of compensation 'wherein camels, goats and other traditional ornaments were paid to the aggrieved family' including a ritual that was performed to pay for the blood of the deceased to his family as provided for under the Islamic Law and customs.[93] The deceased's family informed the prosecution by a letter that they did not wish to pursue the matter. Consequently, the prosecution made an oral application to have the matter marked as settled citing Article 159 of the 2010 Constitution and the Affidavit of the deceased's father. Subsequently, the court allowed the application for withdrawal, citing the powers of the Director of Public Prosecutions to discontinue proceedings. However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[94] Lesiit J disagreed with how the matter was determined stating that '…the parties ought to have reduced the settlement into a plea agreement and presented to the court.'

Likewise, in *Republic v Juliana Mwikali Kiteme & 3 others*,[95] the High Court sought to promote reconciliation as envisaged in Article 159(2)(c) of the Constitution in a murder case. From the affidavits filed by the mother and brother of the deceased person, traditional compensation in the form of livestock had been paid in line with Kamba customs and traditions. Therefore, the prosecution on behalf of the Director of Public Prosecutions requested the court to discontinue the criminal proceedings since the concerned families had been reconciled. The request for discontinuation of the proceedings was not opposed by the defence counsel and as a consequence, the court discontinued the criminal proceedings and discharged all the accused persons under Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecutions Act 2013. The decisions in the two cases depict the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.

In *Republic v Musili Ivia & another*[96] the High Court was informed by the Principal Prosecuting Counsel that clan members of the deceased and the accused had pursued an amicable resolution on the issue of the death and

[92] Per Lagat-Korir J in Criminal Case No. 86 of 2011 [2013] eKLR.
[93] Ibid.
[94] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[95] Criminal Case No. 10 of 2015 [2017]eKLR.
[96] [2017] eKLR.

requested the termination of the criminal proceedings. Written minutes of inter-clan discussions held and agreements signed between relatives of the deceased and relatives of the accused persons were tendered to court evidencing agreement for payment for blood money under customs of the Kamba community, in the form of cows and bulls. The prosecution counsel informed the court that in the circumstances it would be impossible to get relevant witnesses to come to court to testify in support of the prosecution case. In upholding the settlement reached through TDRMs, the Judge outlined the following guidelines,

> 'A court has to consider the provisions of the Constitution, the written law and international conventions. If any of these prohibit such a settlement then the request has to be declined. Secondly, the court has to consider the effect such a proposed settlement will have on the interests of the victim, relatives of the victim, local community and the public at large. In the circumstances of this case, I do not find the settlement agreement to be inconsistent with the spirit and purpose of Article 159(2) (c) and (3) of the Constitution of Kenya 2010…'

However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[97] the accused was charged with murder but the court urged that the charge against the accused was a felony and 'as such reconciliation as a form of settling the proceedings is prohibited.' This was after the accused's advocate submission that the two families had signed an agreement out of court following the Somali culture, law, and religion and reconciled their minds and felt that the agreement ensured justice for them and the community. In reaching its finding, the court opined that:[98] "The Judicature Act only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that are subject to the particular customary law."

Moreover, the court in the *Abdulahi* case opined that the application of TDRMs in criminal cases was intended to be 'very limited' to civil cases according to section 3(2) of the Judicature Act[99] and to misdemeanors only as per section 176 of the Criminal Procedure Code.[100] Also, the court rejected the

---

[97] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[98] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[99] Sec 3(2), Judicature Act.
[100] Sec 176, Criminal Procedure Code provides that: *'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony,*

adoption of reconciliation, since the request was 'being made too late in the day when the case has been heard to its conclusion.' This restrictive approach to the remit of TDRMs in criminal cases had been adopted earlier by Maraga J in *Juma Faraji Serenge alias Juma Hamisi v R*[101] where he opined as follows:

> To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176…. of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case, the real complainant in all criminal cases, and especially felonies is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code or enter a *nolle prosequi* when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn. To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.

In *R v Lenaas Lenchura*[102] Emukule J sentenced Lenaas Lenchura using customary laws on conviction of manslaughter. Lenchura, a World War II veteran, stabbed the deceased, Lotiyan Lekapana, at a Lerata trading center after a dispute arose between the two on who would fetch water first. The deceased was 55 years while the accused was 89 years at the time of the fight and stabbing. After a plea bargain, the accused charge of murder was reduced to manslaughter and he pleaded guilty. As such, the only question that remained was on sentencing. The prosecution argued that the court should take into account the fact that the accused was a first offender and the circumstances under which he killed the deceased. The accused counsel submitted that water was a scarce resource in Samburu, a resource that carried the importance of life and death, and that the court should consider this. Due to the accused's advanced age and the inability of the government to provide water, a duty imposed on it by the Constitution, Emukule J resorted to the customary laws of

---

and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'

[101] [2007] eKLR.

[102] Criminal Case No. 19 of 2011.

the accused. He sentenced the accused to five years suspended sentence and required him to pay compensation of one female camel to the family of the deceased according to their customs.

Apart from diverting cases from the criminal justice system by the use of TDRMs, an emerging jurisprudence from the court entails awarding compensation for offences based on customary law. Promoting TDRMs would imply that courts adopt the decisions made by traditional dispute systems while in customary compensation; the court itself applies the customs of a community, clan or tribe in punishing those found guilty under the criminal justice system. Customary compensation may be based on section 176 of the Criminal Procedure Code that allows for compensation of victims, although customary laws are not expressly provided for in the text of the Code.

In *Stephen Kipruto Cheboi & 2 others v R*[103] five (5) appellants were convicted of offences emanating from their conduct when they assaulted three (3) complainants over a land dispute. However, the conviction of two of the appellants was quashed on 10th May 2012 on the basis that TDRMs applied to misdemeanors and not felonies. This is why it is only 3 Appellants who appealed against conviction in the present case. One of the complainants filed an affidavit detailing the circumstances that necessitated the resolution. In the affidavit, the complainant deponed, amongst other things that, one of the complainants had since died and that he was filing the affidavit on behalf of the surviving complainant. He also deponed that all the appellants and complainants were brothers and that they had attended family meetings (attended by 89 persons from *Nerkwo-Katee* village) that culminated in a resolution that the brothers should reconcile, in an endeavour to voluntarily enhance family cohesion and reconciliation. Further, the affidavit indicated that the appellants, the complainants, the other members of their family and all those who attended the meeting had unanimously resolved to withdraw the case. The minutes of the meeting were presented to the High Court. Based on the resolutions passed at the meeting, the appellants asked the court to allow the appeal, so that the convictions could be quashed. In light of the appellants' request, the Respondent conceded the appeal. While upholding the conviction of the appellants, the High Court observed that:

> '…whereas a complainant and the person who had committed an offence against him can reconcile even after there had been a conviction, such a

[103] [2014] eKLR.

> reconciliation cannot, of itself, have any effect on the conviction. The conviction would stand even though there had been a reconciliation. A conviction can only be upset through either an appeal or a revision. In this case, the appellants did not advance any arguments to challenge the legitimacy of the convictions against them.'

Regarding the sentence, the judge directed that a probation officer's report be filed in court to enable it to make an informed decision as to whether or not to sustain the custodial sentence on the basis that if the "reconciliation within the family was real, the court may well play its role in cementing it, through an appropriate sentence."

TDRMs in civil matters

Apart from criminal matters, most of the disputes that have come before Kenyan courts on the application of TDRMs touch on land and environmental matters. In *Joseph Kalenyan Cheboi & Others v William Suter & another*[104] the Environment and Land Court had referred a community land dispute to a panel of traditional elders known as the Osis (or Asis) for resolution. One of the issues that the elders were to determine was a boundary between the Kamitei and Kalenyang clans. The Judge relied on the decision of the Osis that the boundary between the two clans was a seasonal stream. Justice Munyao Sila observed as follows: [105]

> I see no problem with the determination of the Osis elders. I think they thought through the matter before arriving at their decision. I will borrow from their wisdom. I have seen that the Kamitei family has now settled well on the western side of the seasonal stream. I see no reason why I should disturb their occupation and have the Kalenyang have this side as well.

He further stated that: [106]

> My judgment, therefore, is that the Kalenyang ought to remain on the western side of the seasonal stream and the Kamitei to remain and occupy the eastern side of the seasonal stream. The boundary between the two shall be the

[104] [2014] eKLR.
[105] Para 24.
[106] Para 25.

> seasonal stream. No person from the one clan should interfere with the occupation or use of the other's clan land unless with their permission.

Similarly in *Seth Michael Kaseme v Selina K. Ade,*[107] the High Court recognised the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.

In *Lubaru M'Imanyara v Daniel Murungi,*[108] the High Court at Meru referred a land dispute to the *Njuri Ncheke* for resolution based on Article 159(2)(c) of the Constitution. In *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others,*[109] a man of Christian faith was summoned before the Maua Division of *Njuri Ncheke*. He was threatened with curses and forced to pay a certain fee for the adjudication of a dispute regarding his parcel of land in Maua division. The Court ruled in his favour claiming that the Council only had jurisdiction over those who submitted to it, regardless of the territory.

Courts have also recognised that TDRMs can be used in the resolution of other civil disputes such as succession[110] and employment and labour.[111] The law also provides for the use of TDRMs the dissolution of customary law marriages.[112] Although the law allows for the use of TDRMs in the dissolution of customary marriages, there are no reported cases before the courts dealing with TDRMs in that regard. In view of rising urbanisation and inter-ethnic marriages, it will be interesting to see how TDRMs and courts will deal with such matters.

Currently, there is no guidance either in law or from courts regarding who can appear before a particular TDRMs. Moreover, there is lack of clarity as to whether a TDRM such as the *Njuri Ncheke,* constituted following Meru customary law, can only adjudicate on matters within counties where the Ameru people are found (i.e. Meru and Tharaka-Nithi); between Meru people in another county or by strangers. As things stand, the various TDRMs guided by the relevant customary laws and practices, seem to be determining who can appear before them. Additionally, it also appears that anyone willing to submit to the jurisdiction of the *Njuri Ncheke* may do so. But where one party is unwilling, the council may refer the complainant to the formal courts. This is an area that

---

[107] [2013]eKLR,
[108] [2013] eKLR.
[109] [2012] eKLR.
[110] *Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR.
[111] See in *Dancan Ouma Ojenge v P.N. Mashru Limited,* Cause No. 167 of 2015 [2017] eKLR.
[112] Sec 68, Marriage Act 2014.

requires policy and legal direction. Owing to the challenges that Kenyans are currently experiencing in accessing justice within the formal justice system, an open jurisdiction where citizens can go before the relevant TDRMs in appropriate cases, could help reduce the huge backlog of cases in courts and significantly enhance access to justice since most disputes will be resolved locally.

Some challenges for TDRMs in Kenya

Like countries such as Nigeria and Ghana with customary courts, Kenya retains a unified system where both customary law and statutory law are subject to interpretation by state courts. The 2010 Constitution cements this unified approach as it confers on the judiciary the mandate to promote and encourage TDRMs. Mandating state courts with the role of promoting TDRMs, presents jurisprudential and practical challenges, and casts doubts into the future development of customary law and TDRMs in Kenya. This is so because the methodological approaches of the formal justice systems are generally unsuitable for interpreting customary law whose success and enforcement in dispute resolution is largely based on moral, psychological and social-cultural validity as opposed to state coercion.[113] Moreover, since judges are not experts in customary law (which is unwritten), there is jurisprudential confusion in the treatment of TDRMs by Kenyan courts reminiscent of the divergent and conflicting approaches taken by courts over the years in interpreting customary law. This casts doubts on the ability of state courts to promote TDRMs and customary law, especially if the latter is applied unfairly or unevenly by judges.

Moreover, unlike customary courts that are established in law, with *inter alia*, clear jurisdiction, appeal avenues, and composition, Kenyan law recognises the amorphous TDRMs creating enormous uncertainty as to their remit in enhancing access to justice. Whereas some judicial officers have upheld the decisions arrived at vide TDRMs, others have held that they are not applicable in criminal cases. As a result, there is confusion, in terms of whether they are applicable, when, how and under what circumstances, which will ultimately undermine the development and growth of customary law in Kenya.

As illustrated above, TDRMs present numerous jurisdictional challenges forcing courts to render conflicting decisions regarding their jurisdiction. First, the precise jurisdiction of TDRMs is not clear from the law. On the one hand,

[113] Onyango (n 8 above).

the 2010 Constitution and laws enacted thereunder expressly vest TDRMs with substantive jurisdiction on diverse matters. On the other hand, the Magistrates' Courts Act vests magistrates' courts with jurisdiction on customary law matters that are ordinarily within the competence of TDRMs in most communities. Second, there is ambiguity as to whether TDRMs can be used in all civil and criminal matters. Whereas within state law, there is a clear distinction between criminal and civil matters, within traditional governance systems, such a distinction is lacking as there are overlaps between civil and criminal matters.[114] Third, with rising urbanisation and increased cases of inter-communal marriages, inter-tribal conflicts of law are bound to arise. Moreover, it is unclear whether TDRMs have jurisdiction over a party who hails from an area outside the territory governed by a particular traditional authority. Therefore, the recognition of TDRMs presents a practical challenge in determining their personal, and territorial jurisdiction, especially in inter-communal legal relationships. The jurisdictional confusion attending TDRMs, is likely to also occasion conflicts between formal courts and TDRMs and thus create ambiguities to parties in identifying appropriate forum for dispute resolution and impede access to justice.

TDRMs are regarded as inferior in comparison to formal justice systems. This inferiority is as a result of the subjugation of African customary law, the undergirding normative framework providing the norms, values, and beliefs that underlie TDRMs. Just like other African countries, in Kenya laws proscribe certain traditional African practices despite their complementary role in dispute resolution.[115] However, there is a need to ensure that the application of those cultural practices does not occasion human rights violations.

As mentioned earlier, TDRMs are also facing human rights related criticisms, for instance regarding gender discrimination, inhuman treatment, and violation of the right to a fair trial.

---

[114] R Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in J Ubink & T Mclnerney (eds.) *Customary Justice: Perspectives on Legal Empowerment* (IDLO 2011) 53.

[115] F Kariuki 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' (2015) 3(2) *Alternative Dispute Resolution* 30-53, 50. See also F Kariuki, 'African Traditional Justice Systems' Available at *kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf* (Accessed 23-06-2019)

6 Conclusions and way forward

This chapter sought to examine how Kenyan courts have treated decisions emanating from TDRMs and incorporated attributes of citizenship such as urbanisation and equality. By looking at how courts have dealt with customary law issues before, the chapter sought to evaluate the approaches being taken by courts in promoting and encouraging the use of TDRMs.

This chapter has established that unlike other jurisdictions with customary courts, in Kenya TDRMs are integrated within the court system. Effectively, courts are playing a major role in promoting TDRMs, which is yielding immense jurisprudential and practical dilemmas. As shown, in the work, the application of customary law by Kenyan courts has not been consistent and has largely not helped in the development of a relevant customary law jurisprudence. From the cases that have been analyzed, the fate that has befallen customary law before Kenyan courts is likely to encumber the promotion of TDRMs.

This chapter shows that there ambiguity in the law regarding the place of TDRMs in the judicial architecture in Kenya, which has created practical and legal challenges. One of the challenges relates to the ambiguity surrounding the jurisdiction of TDRMs. There is a need to clearly define the jurisdiction of TDRMs, and when they can be seised of the jurisdiction in different scenarios. This way there will be certainty and claimants will know where to seek justice, ensure oversight and monitoring and thus avoid abuse of power.[116] Section 7 of the Magistrates' Courts Act which vests extensive substantive jurisdiction on customary law matters on Magistrates' Courts, and review it so that it can recognise the place and jurisdiction of TDRMs in customary law matters. Crucial to the effective integration of TDRMs into formal legal systems are clearly and simply defined Jurisdiction. This is a key requirement for effective oversight and prevention of abuses of power. Where uncertainty exists, inefficiency has been instituted, claimants may be unclear where to seek justice services, record-keeping issues are exacerbated, and monitoring becomes more complicated.[117]

Most importantly, there is a need to recognise the plurality of TDRMs, and their evolution including the possibility of mixed TDRMs. Fortunately, progress in this regard has been made and a Taskforce on Traditional, Informal and other Mechanisms used to Access Justice in Kenya (Alternative Justice

[116] Clarke (n 116 above) 53.

[117] Clarke (n 116 above).

Systems)gazetted by retired Chief Justice Dr. Willy Mutunga in 2016.[118] The terms of reference of the Taskforce are to *inter alia*: map out and understand the prevalence of use of Alternative Justice System, its intersection with the Judicial System and the progress made in infusing it with national and constitutional values; undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming Alternative Justice System; pilot and bench-mark existing models of Court-Annexed Alternative Justice System, to capacitate them, observing them and document their functioning to glean best practices to be used to develop potential national model; highlight challenges and effects of inter-linkage between traditional justice systems and the formal justice system; develop a strategic plan to implement the policy; and develop a National Model for Court-annexed traditional justice resolution mechanism for possible adoption. Unfortunately, from the composition of the Taskforce, and the consultants were engaged in the process, there is very minimal participation of customary law and TDRMs scholars and non-state actors who can infuse enormous contribution in the development of an appropriate policy and legal framework on TDRMs.

Lastly, with rising urbanisation and increased cases of inter-communal marriages, inter-tribal conflicts of law are bound to arise in the application of TDRMs. Some policy directions in this regard will be required to govern the remit of TDRMs to wit:

(a) the need to develop an enforcement mechanism for traditional dispute resolution mechanisms by elders;
(b) The need to define and clarify the jurisdiction (that is personal, territorial, substantive or pecuniary) of TDRMs in law vis-à-vis formal courts;
(c) The need to have a framework for appeal, revision or review of the decisions emanating from TDRMs;
(d) Evaluation as to whether there is need for dispute resolvers within TDRMs to be remunerated to prevent chances and opportunity for corruption;
(e) The need to emphasize TDRMs as the first port of call in all cases where they are applicable and relevant; and,

[118] Gazette Notice No. 1339 dated 29 February 2016 available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTI5MQ--/Vol.CXVIII-No.21.

(f) The need to sensitise and educate TDRMs practitioners on due process requirements, and the importance of upholding human rights standards in their processes.

BIBLIOGRAPHY

Literature

Allott, A (1970) New *Essays in African Law* (Butterworths, London,).

Onyango, P (2013) *African Customary Law: An Introduction* (LawAfrica, Nairobi).

Chopra, T & Isser D (2011) 'Women's access to justice, legal pluralism and fragile states' in Albrecht P, Kyed K, Isser D, & Harper E(eds) *Perspectives on involving non-State customary actors in justice and security reform* (International Development Law Organisation) 23-38.

Clarke R (2011) 'Customary Legal Empowerment: Towards a More Critical Approach' in Ubink, J & Mclnerney, T (eds.) *Customary Justice: Perspectives on Legal Empowerment* (IDLO) 43-66.

Murungi, J (2004) 'The question of an African jurisprudence: some hermeneutic reflections' in Wiredu, K (ed*) A companion to African philosophy* (Blackwell, Oxford) 519-526.

Ubink, J & Rooij, B (2011) 'Towards customary legal empowerment: an Introduction' in Ubink, J & McInerney, T (eds) *Customary justice: Perspectives on legal empowerment* (International Development Law Organisation, 2011) 7-28.

Abel, RL (1969) 'Customary Law of Wrongs in Kenya: An Essay in Research Method' 13 *Yale Law School faculty Scholarship Series*

Allott, A (1969) 'Customary Law in East Africa' 4(3) *Africa Spectrum* 12-22.

Cotran, E (1983) 'The Development and Reform of the Law in Kenya' 27(1) *Journal of African Law* 42-61.

Davies, JA & Dagbanja, D (2009) 'The role and future of customary tort law in Ghana: a cross-cultural perspective' 26 *Arizona Journal of International Law* 303-333.

Doorly, AN (1946) 'Native Tribunals' 28(3/4) *Journal of Comparative Legislation and International Law* 25-34.

Johnston, M (1978) 'Giriama Reconciliation' 16 *African Legal Studies* 92-131.

Kamau, W (2009) 'SM Otieno Revisited: A View through Legal Pluralist Lenses' 5(1) *Law Society of Kenya Journal* 59-73.

Kariuki, F (2014) 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' 2(1) *Alternative Dispute Resolution* 202-228.

Kariuki, F (2015) 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' 3(2) *Alternative Dispute Resolution* 30-53.

Nwogugu, E (1976) 'Abolition of customary courts – The Nigerian experiment' 20 *Journal of African Law* 1-19.

Shadle, B (2010) 'White settlers and the law in early colonial Kenya' 4(3) *Journal of Eastern African Studies* 510-524.

Sherry, E & Myers, (2002) H 'Traditional Environmental Knowledge in Practice' 15(4) *Society & Natural Resources* 345-358.

Stich, K (2014) 'Customary Justice Systems and Rule of Law' 221 *Military Law Review* 215-256.

Tier, A (1986) 'Techniques of choice of law in conflict of personal laws' 30(1) *Journal of African Law* 1-19.

Ubink, J (2018) 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' 49 *Development and Change* 930-950.

Cases

Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango, Criminal Case No. 299/1966.
Benjawa Jembe v Priscilla Nyondo [1912] 4 EALR 160.
Isaka Wainaina v Murito[1923] 9(2) KLR 102.
R v Ogende s/o Omungi[1914] 19 KLR 25.
Lolkilite Ole Ndinoni v. Netwala ole Nebele[1952] 19 EACA.
Kamanza s/o Chiwaya v. Manza w/o Tsuma, High Court Civil Appeal No.6 of 1970.
Ernest Kinyanjui Kimani v Muiru Gikanga and Another [1965] E.A. 735.
Atemo v Imujaro [2003] KLR 435.
Re Ruenji [1977] KLR.
Re Ogola [1978] KLR.
Irene Njeri Macharia v. Margaret Wairimu Njomo and Anor, Civil Appeal No. 139 of 1994.
James Apeli and Enoka Olasi v Prisca Buluka, Civil Appeal No. 12 of 1979 (Kisumu).
Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi, Civil Appeal No. 66 of 1984.
Virginia Wambui Otieno v Joash Ochieng Ougo & Another [1987] eKLR.
Salina Soote Rotich v Caroline Cheptoo & 2 Others [2010] eKLR.
Eunice Moraa Mabeche v Grace Akinyi, High Court Civil Case No. 2777 of 1994.
Charles Onyango Oduke & Anor v Onindo Wambi[2010]eKLR.
Ndeto Kimomo v Kavoi Musumba[1977] KLR 170.
Lubaru M'imanyara v Daniel Murungi, Miscellaneous Application No. 77 of 2012. [2013] eKLR.
Dancan Ouma Ojenge v P.N. Mashru Limited, Cause No. 167 of 2015 [2017] eKLR.

Katet Nchoe and Nalangu Sekut v. R, Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.
Republic v Mohamed Abdow Mohamed, Criminal Case No. 86 of 2011 [2013] eKLR.
Republic v Abdulahi Noor Mohamed (alias Arab), Criminal Case No. 90 of 2013 [2016] eKLR.
Republic v Juliana Mwikali Kiteme & 3 others, Criminal Case No. 10 of 2015 [2017]eKLR.
Republic v Musili Ivia & another [2017] eKLR.
Republic v Abdulahi Noor Mohamed (alias Arab) Criminal Case No. 90 of 2013 [2016] eKLR.
Juma Faraji Serenge alias Juma Hamisi v R [2007] eKLR.
R v Lenaas Lenchura, Criminal Case No. 19 of 2011.
Stephen Kipruto Cheboi & 2 others v R [2014] eKLR.
Joseph Kalenyan Cheboi & Others v William Suter & another [2014] eKLR.
Seth Michael Kaseme v Selina K. Ade [2013]eKLR.
Lubaru M'Imanyara v Daniel Murungi[2013] eKLR.
Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others [2012] eKLR.
Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR.

Legislation

Constitution of Kenya (2010).
Magistrates' Courts Act (Act 26 of 2015).
Native Courts Regulations (1897).
Marriage Act (Act 4 of 2014).
Environment and Land Court Act (Act 19 of 2011).
Community Land Act (Act 27 of 2016).
Land Act (Act 6 of 2012).
Judicature Act (Cap. 8, Laws of Kenya).

Internet Sources

Kariuki, F 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' available at http://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file (Accessed 23-06-2019).

Kariuki, F 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3. Available at https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20law.pdf (Accessed 23-06-2019).

Ngira, D 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' (2018) 8 *Ońati Socio-Legal Series* (online) Available at http://ssrn.com/abstract=3165522, (accessed 16 June 2018).

Chapter 3

A customary law of the Afrikaner people of South Africa

ES Nwauche*

Abstract

This chapter considers the plausibility of an Afrikaans customary law as part of the multiple customary laws in South Africa based on the provisions of section 30 and 31 of the South African Constitution, which recognizes the rights of South Africans to enjoy their culture and participate in their religious cultural and linguistic communities. To contextualize the plausibility of an Afrikaner customary law, this chapter, considers recent decisions of the South African Constitutional Court such as, *City of Tshwane Metropolitan Municipality v Afriforum* [2016 (6) SA 279] (CC) and *Salem Party Club v Salem Community* [2018 (3) SA 1 (CC)], to argue that an Afrikaner Customary Law in South Africa, is important if South Africans are to truly exercise their citizenship rights which are entitlements that flow from the Bill of Rights. This chapter argues that the recognition of multiple customary laws is an affirmation that South Africans are entitled to a culture of their choice.

Keywords: Citizenship; customary law; Afrikaner; South Africa

1. Introduction

This chapter considers the plausibility of multiple customary laws in South Africa in general and an Afrikaner customary law in particular, based on the provisions of sections 30[1] and 31[2] of the South African Constitution, which recognize the rights of South Africans to enjoy their culture and participate in their religious cultural and linguistic communities. To contextualize, the plausibility of an Afrikaner customary law in South Africa, this chapter considers two recent decisions of the South African Constitutional Court, which are *City of Tshwane Metropolitan Municipality v Afriforum*[3]; and *Salem*

* *Professor, Nelson Mandela School of Law, University of Fort Hare South Africa* enwauche@ufh.ac.za

[1] Section 30 of the Constitution provides that " Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights

[2] Section 31 of the Constitution provides that (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practise their religion and use their language; and (h) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

[3] 2016 (6) SA 279 (CC). Hereafter *Tshwane Metro.*

Party Club v Salem Community[4]. This chapter argues that the recognition of an Afrikaner customary law is important if South Africans are to realise their citizenship rights as part of the entitlements that flow from the Bill of Rights of the Constitution of the Republic of South Africa 1996 (1996 Constitution). An Afrikaner customary law is a manifestation that all South Africans are entitled to a culture of their choice.

A previous intervention of mine foresaw this chapter.[5] In that intervention, I examined the possibility and plausibility of acquiring a new customary law in post-Apartheid South Africa. That intervention assumed the possibility of multiple customary laws in South Africa and was grounded in the provisions of sections 30 and 31 of the Constitution of the Republic of South Africa. I argued in that paper that the widespread assumption that only Black South Africans are entitled to customary law is mistaken. To the extent that the Afrikaner people can be taken to be a cultural linguistic or religious community as envisaged by the Constitution, their culture is protected by the Constitution which includes their normative system. It is of less consequence, it is contended if this normative framework is described as 'customary law' – a term which has been socialized to refer exclusively to Black South Africans- or any other term. In this chapter, I use the term 'customary law' in spite of its popular meaning because it appropriately designates the normative framework of South African communities.

It is important before proceeding to engage in a brief overview of the Afrikaner people. The Afrikaners are an ethnic group of Dutch, German, French and non-European ancestry in South Africa. They are descended predominantly from Dutch settlers who began to arrive in the Cape Area of South Africa in the Seventeenth century. The 2011 South African Census puts the number of white South Africans who speak Afrikaans as a first language as 5.2% of the population. The Afrikaner people dominated South African public life until the demise of Apartheid in 1994 and developed a unique identity which is aptly described by Mads Vestergaad :

> …based on the values of God-fearing Calvinism, structure of patriarchal authority (husband and father, priest, school principal, political leaders-all of whom were representing God on Earth); adherence to the traditions invented by the nationalist movement, conservative values as the

[4] 2018 (3) SA 1 (CC). Hereafter *Salem Party Club.*

[5] See ES Nwauche " Acquiring a New Customary Law in Post-Apartheid South Africa" 2015(3) 18 *PER* 569

> fundamental importance of the nuclear family, heterosexuality and, above all the importance of whiteness.'[6]

Afrikaner identity received considerable state support from the Apartheid regime because as Mads Vestergad puts it: 'After 1948, the South African States was used to promote Christian nationalist morals and values, and a normative understanding of Afrikaner identity became entrenched'.[7] Even though the normative understanding of the Afrikaner people, did not, as argued above automatically become the South African common law but existed largely because of state support it provided inspiration and potential for different aspects of the South African legal system. The Afrikaner identity suffered considerable dislocation with the advent of constitutional rule in 1994. Whatever normative status was achieved before this constitutional epoch merged with the Roman-Dutch/ English common law. All references to 'customary law' post-1994 is to 'Black' customary law. This chapter engages with the lack of recognition of the customary law of the Afrikaner people of South Africa. As stated above to recognise such a customary law is a constitutional requirement and affirms South Africa's legal plurality.

South Africa like most plural states is in a constant articulation of the nature and extent to which it recognises certain cultural peculiarities and differences. Customary law challenges the content of the civic citizenship of a State because customary law challenges the extent to which a State recognises that its civic citizens are also cultural citizens. Customary law represents the cultural dimensions of citizenship and members of a state are at once civic and cultural citizens. One of the legacies of a proper understanding of legal pluralism is that the normative framework of communities exists outside State law even if this is not frequently or recognized at all. The existence of independent legal orders within a legal system challenges the willingness and capacity of the latter to recognize these legal orders and the entitlements of persons who feel obligated to these legal orders and are also citizens of the state. The ethic of pluralism enjoins modern liberal democratic States to attempt within reasonable bounds to recognize all normative frameworks. This process is not antithetical to the centrist unifying pull of nation-building, an objective, that is constructed on the equality of all persons before the law irrespective of their race class or other consciousness. Since no legal system is, completely uniform in its application to all citizens, the recognition of cultural differences is often a path towards fairness and justice. The recognition of difference based on social facts such as age gender religion is important to achieve

[6] M Vestergad " Who's got the Map? The Negotiation of Afrikaner Identities in Post –Apartheid South Africa" 2001 130 Daedelus 19, 20-21.
[7] N.6, p. 21

justice in a legal system because it allows such legal systems to recognize peculiar facts that determine rights privileges responsibility and liability. Without such recognition, the dignity of citizens is imperiled and their civic citizenship could be diminished. It is therefore of considerable importance that legal systems recognise different customary laws. This point is important because normative orders continue in existence even if the state legal system does not recognise them. Often in many legal system, similar to the South African legal system, there is a continuous struggle by different legal orders for the recognition of their values principles usages and institutions. The fact that the norms of a cultural community is not recognized demands further interrogation rather than supine acceptance and orthodoxy. It is in this context that the rest of the chapter advances a framework for the recognition of Afrikaner customary law.

This chapter is organized, as follows. The next section considers the relationship between and manifestations of civic and cultural identities in South Africa. The following section considers the nature of Afrikaner customary law followed by concluding observations.

2. Citizenship cultural identities and customary communities in South Africa

In this section, I sketch the relationship between citizenship sub-national identities and customary communities in South Africa to justify the recognition of Afrikaner customary law. The first step is to articulate a relationship between South Africa's civic and cultural citizenship and demonstrate how this relationship is one that Afrikaner customary law naturally fits. Section 3 of the South African Constitution provides an understanding of the nature and extent of citizenship in South Africa by declaring, a common South African citizenship; an equal entitlement of all citizens to the rights, privileges, and benefits of citizenship; and equal obligations to the duties and responsibilities of citizenship. Equality is, therefore, the hallmark of South Africa's civic citizenship because a homogenous conception of civic citizenship is important for state-building and the rule of law. The Bill of rights in the South African Constitution is an important framework that defines the rights privileges and benefits for South African citizens. As stated above, the provisions of sections 30 and 31 of the Constitution which are cumulatively regarded as the right to culture, are the foundation of cultural citizenship. Thus South Africans are at once civic and cultural citizens because of the recognition of citizen's right to pursue their cultural orientation and to belong to 'cultural religious and linguistic communities'. Accordingly, South Africans are citizens and possibly members of one or all of the three types of constitutionally recognised

communities. At first blush, a tension between a civic national and cultural sub-national citizenship seems to exist because of potentially conflicting loyalties to the South African state and the constitutionally sanctioned communities. Such tensions are real but surmountable. States recognise that members of cultural communities forge an identity similar to the national identity forged by citizenship and seek to manage such tension by the alignment of diverse cultural tendencies with national civic citizenship. Thus States filter the extent to which persons who can prove a connection to constitutionally sanctioned communities can take advantage of the shared understandings rules values and institutions of their communities. Norms are a key part of the cultural communities whose members feel an obligation to observe. The obligation of the state to respect and recognise customary law which encompasses the norms of a cultural community is an entitlement of cultural citizenship.

The Afrikaner community is a linguistic community because Afrikaans is a significant language[8] of the Afrikaner people. It is not surprising that the protection of the language rights of the Afrikaner community has been of paramount interest given South Africa's peculiar history. The Afrikaner community have individually and collectively litigated aspects of this right in terms of street names[9], medium of instruction in tertiary[10] and secondary schools.[11] However since many other people from other racial group speak Afrikaans, language is not an exclusive identity which the Afrikaner community would claim. The Afrikaner community is also a cultural community because of a common identity significantly forged by consanguinity and the Afrikaans language. The Afrikaner people as a distinct cultural and linguistic community are a constitutionally protected community and therefore entitled to the enjoyment of and protection offered by their normative framework. To deny this constitutional entitlement fosters a sense of indignity. In addition to their right to culture, the dignity of Afrikaner South Africans recognised as a right and value in the South African constitution is in issue in the recognition of the normative framework they identify with and in appropriate circumstances feel obligated to obey. The fact that historical antecedents and contemporary developments have obscured their customary law does not make Afrikaners less entitled. It is a matter of widespread belief that Afrikaners and other races in South Africa are not entitled to a customary law but to the Roman-Dutch/English common

[8] Afrikaans is a constitutionally recognized language in terms of s.6 of the constitution.
[9] See *Tshwane Metro,* note 2.
[10] See for example *Afriforum v University of the Free State* 2018(2) SA 185(CC).
[11] See *Head of Department, Mpumalanga Dept of Education v Hoerskool Ermelo* 2010 2 SA 415(CC).

law. To imagine that certain cultural communities are incapable of relying on their own normative framework is to scrub them of their identity.

The legacy of Apartheid which defined the pre-1994 Afrikaner people is a significant obstacle to the recognition of post-1994 Afrikaner identity and community. It is because of the discrimination hardship and hurt systematically and institutionally nurtured by the Apartheid system that race is anathema in South African jurisprudence and to a recognition of the normative framework of the Afrikaner people. The intuitive association of Afrikaner people with Apartheid suggests a fundamental flaw in Afrikaner culture and identity. It stands to reason therefore that aspects of Afrikaner culture that are not linked to Apartheid should be welcome and protected. There is evidence of Afrikaner communities that are organised on racial lines in the post-1994 constitutional republic. A good example is the Orania community in the Free State province which is established to foster Afrikaner culture and ethnicity. With a 2018 population estimate of 1600 made up of Afrikaner people (over 98%), Orania is a symbol of the salience of Afrikaner culture and a need to cater for the norms which Afrikaner people feel obligated to obey even if these norms cannot be asserted within the South African legal system.

The recognition and application of customary law in post-Apartheid South Africa have demonstrated that normative frameworks based on race are not harmful per se. The [continued] and exclusive association of customary law with 'Black' South Africans emphasises the racial basis of such a law[12] yet no one would credibly suggest that 'Black' customary law should be abolished because of its racial foundations. As stated above, customary law is associated with 'Black' South Africans because of South Africa's historical realities. The arrival of Europeans in the Cape in 1652 brought with it aspects of Roman/Dutch law and a concomitant imperative to respond to the rights privileges and entitlements of black South Africans who were organized around a normative framework that has over the years been described as customary law. The recognition of Afrikaner customary law does not belittle 'Black' customary law. In fact, it may well be argued that the recognition of Afrikaner customary law will greatly assist the recognition and development of 'black' customary law in South Africa because 'black' customary law and 'Afrikaner' customary law would be recognized as *different* but equal to the South African common law. For centuries, the Apartheid South African State half-heartedly recognized the norms of the

[12] See M Pietersee " It's a 'Black Thing": Upholding culture and customary law in a society founded on non-racialism" (2001) 17 South African Journal of Human Rights 364. See also TW Bennett Customary Law in South Africa (Juta Cape Town) 40.

majority 'Black' population and in some cases rewrote customary law through codification amongst other mechanisms.[13]

The recognition of Afrikaner customary law will affirm South Africa's plural legal heritage. There is considerable evidence of the recognition of the norms of numerous religious and cultural communities in South Africa[14] which demonstrates the willingness of the South African State to recognise diverse cultural communities. Even though it is settled that customary law applies to 'Black' South Africans, there continue to be contestations of the peoples and communities that are entitled to be so recognised. For example in the recent case of *Lurhani v Premier Eastern Cape*[15] the Eastern Cape High Court recognized the Mpondo people in the Eastern Cape as a cultural community and entitled to enjoy their culture and determine their traditional leadership succession. Concerning the significance of the Mpondo as a cultural community, the Court stated that the Mpondo's rights predate the Constitution which simply recognized these rights. To argue that the Afrikaner community is different from the Mpondo community would stretch constitutional interpretation to an absurd length.

To sum up this part, it is clear that Afrikaner customary law is constitutionally compliant because it is the normative framework of a cultural community. I now turn to sketch the outlines of Afrikaner customary law.

3. The Nature of Afrikaner Customary Law

In this section, I explore the nature of Afrikaner customary law within the parameters of the constitutional framework within which customary law is defined[16] recognized[17] and understood.[18] The experience of 'Black'

[13] The distinction between 'official' and living customary law in South African customary law can be partly traced to the efforts of the Apartheid South African State to influence the growth of customary law.

[14] See for example *De Lange v The Presiding Bishop of the Methodist Church of Southern Africa* 2015 (1) SA 106 (SCA)*; MEC for Education KwaZulu-Natal v Pillay* 2008(1) SA 474 (CC); *Taylor v Kurstag NO* 2005 (1) SA 362 (W)

[15] [2018] All SA 836 (ECM)

[16] See the Recognition of Customary Marriages Act 11 of 2009 which defines customary law as 'The customs and usages traditionally observed among indigenous African Peoples of South Africa and which form part of the culture of those peoples.'

[17] See S. 211(3) of the Constitution which provides that " The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[18] See for example Moseneke DCJ in *Gumede v President of the Republic* [2009] 3 SA 152 (CC). Para 34: 'Difficult questions may surface about the reach of customary law, whom it binds and, in particular, whether people other than indigenous African people may be bound by customary law."

customary law will greatly assist the sketch of the nature and extent of Afrikaner customary law.

It would appear that Afrikaner customary law could largely be applicable in the private sphere because this is what is applicable in respect of 'black' customary law. The development and articulation of 'black' customary law in the private law domain is directly traceable to the colonial and Apartheid nation-building efforts. As Roman/Dutch/English law developed to cope with the exigencies of the South African nation-state, customary public law was sidelined or outlawed. By the time the 1996 Constitution recognized customary law as an independent source of legal norms, it was orthodoxy that customary law is relevant only in respect of private law affairs such as marriages[19] matters of succession;[20] inheritance; real[21] and personal property;[22] as well as traditional leadership.[23] Even though the recognition of traditional leadership is an outlier in the reality of customary law as private law for black people because of the imperative of indirect rule, there is conceptually no intrinsic normative restriction of the contemplation of customary law. The development of traditional leadership structures suggests that customary public law is still relevant.

In this regard, there are two examples of the relevance of norms of customary public law that is instructive of how to conceive customary law. The first example is traditional religious beliefs and practices intimately connected to governance such as the Zulu First fruits festival commemorated through a ritual killing of a bull that signifies appeasement of the Gods and renewal that is considered important for the good of the Zulu nation.[24] A second example is 'Ubuntu' recognized as a governance ethic and which has been used by South African courts to redefine the parameters of human rights such as the right to life;[25] the horizontal application of human rights to private law such as contracts;[26] and common law principles such as the remedies for defamation.[27] These two examples

[19] See for example the Recognition of Customary Marriages Act, note 16.
[20] See for example the case of *Bhe v Magistrate Khayelistsha*, 2005 (1) SA 580(CC);
[21] See for example the Communal Property Associations Act 1996 which declares that it is an Act to enable communities to form juristic persons to be known as communal property associations in order to acquire hold and manage property on a basis agreed to by members of a community
[22] See for example the recognition of the customary law of fishing rights. See the recent decision of the Supreme Court of Appeal in *Gongqoose v Minister of Agriculture* 2018(5) SA 104. See also L. Ferris " A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights" 2013 16 (5) PER 555.
[23] See the Traditional Leadership and Governance Framework Act (41 of 2003)
[24] See for example *Smit NO v King Goodwill Zwelithini* [2009} ZAKZPHC 75.
[25] See the case of *S v Makwanyane* 1995 (3) SA 391(CC).
[26] See the cases of *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[27] See the case of *Dikoko v Matlala* 2006 (6) SA 235(CC).

illustrate how customary public law has become part of South Africa's public law. Accordingly, it will not be difficult to imagine that aspects of Afrikaner norms of public life would be welcome as part of South African public law.
Generally Afrikaner customary law exists without official recognition except to the extent, it has in some ways infiltrated the South African Common law through judges who in one way or the other have translated aspects of Afrikaner communal norms in the localization of' principles of Roman-Dutch and English law. It is, however, doubtful that there is a widespread agreement of a normative framework that approximates to Afrikaner customary law. It is, therefore, open to imagination how an application to recognize and protect principles of Afrikaner customary law would fare. The inquiry could delve deeper to ask if Afrikaners have had the benefit of their personal laws determined with respect to norms of the Afrikaner people. The answer to that question appears largely in the negative because Afrikaners like other South Africans except black people have been exclusive subjects of the Roman/Dutch/English law forged out of political considerations economic imperatives and social realities. One such reality is the colonial history of South Africa. The introduction of Roman-Dutch law by Dutch settlers in the nineteenth century was in a sense the introduction of the customary law of Afrikaner people applicable in medieval Europe. The British occupation of the Cape in 1806 lead to the introduction of principles of English common law to the legal system applicable in the Cape. Many commentators rightly describe what emerged and has become the South African common law, after the British occupation of the Cape as a mixed system.[28] When principles of English common law became part of the South African common law[29] or legislation[30] many Afrikaner norms disappeared until some of them resurfaced through judicial fiat and legislation. Generally, it would appear that few Afrikaner norms have survived the battle of dominance between English common law and Roman/Dutch law. It is not in doubt that the belief convictions and understandings of the Afrikaner nation has influenced the development of Roman-Dutch/English law which makes it important to discuss the nature and extent of Afrikaner customary law which in the recent past has been greatly facilitated by *Tshwane Metro* and *Salem Party Club.* While these cases dwell on heritage and land rights respectively, other cases have sought to promote the Afrikaans language such as *Afriforum v University of*

[28] See for example R. Zimmermann & D. Visser, 'Introduction: South African Law as a Mixed Legal System', in: R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, Kenwyn: Juta 1996, p. 2-30.
[29] See for example *Greenberg v Greenberg* 1955 (3) SA 361(A).
[30] See for example the following pieces of legislation that introduced aspects of the English common law into South African law:

the Free State[31] that confirm Afrikaner as a constitutional language and the basis of a linguistic community as envisaged by section 31 of the Constitution.

Tshwane Metro and *Salem Party Club* demonstrate how the issues of identity such as heritage language and land foreground and amplify the framework of Afrikaner customary law. Even though these areas of normative concern do not advance or articulate a comprehensive notion of Afrikaner customary law the fact that these cases concern notions of communal identity of the Afrikaner nation and community strongly indicate them as signposts of the normative framework of the Afrikaner nation. The first of these cases is *Tshwane Metro*[32] where the Constitutional Court addressed the nature of Afrikaner heritage in a post-Apartheid South Africa. In that case, the court evaluated the complaint of the Afrikaner community that the substitution of Afrikaner names with names of black people by the City of Tshwane Metropolitan Authority was unconstitutional. According to Afriforum, the substitutions were unconstitutional because "The old street names are an historical treasure and a heritage so intimate to the very being of the Afrikaner people that their removal would constitute an infringement of their right to enjoy their culture as envisaged by section 31 of the Constitution."[33] A restraining order granted against the City of Tshwane Metropolitan Authority ordered the Authority to replace and stop removing old street names. The majority of the Constitutional Court discharged the interim interdict for reasons connected with the fact that Afriforum representing the Afrikaner nation did not satisfy the requirement for the issuance of interim interdicts. Several conclusions of the court are important for this chapter. First, the Court affirmed that section 31 of the Constitution, "basically affirms the enjoyment of a cultural, linguistic or religious right of a community and its members provided that right is exercised consistently with all the other provisions of the Bill of Rights."[34] Even though the Court wondered how s. 31 'finds application to street names'[35] other parts of the judgment sought to answer that question in terms relevant to our discussion. Secondly, Froneman and Cameron JJ, agree with the thrust of the majority judgment but disagree in respect of how to treat colonial racist and apartheid cultural heritage. The dissenting judgment is important for the objectives of this chapter in the manner in which it sets out and discusses an articulation of the framework of Afrikaner customary law. According to the dissenting judgment

---

[31] Note 10.
[32] Note 3
[33] Ibid, para 27.
[34] Para 50. See for example T Bennett *Customary law in South Africa* (2004) 34, 78.
[35] Tshwane Metro, note 3.

> " On a general principle we think that the Constitution creates scope for recognizing an interest or right based on a sense of belonging to the place one lives, rooted in its particular history, and to be involved in decisions affecting that sense of place and belonging. Whether that strictly falls within the cultural, environmental or citizenship rights in the Bill of Rights or a combination of them still needs to be explored."[36]

Thirdly, all three judgments, in that case, agree that Afrikaner cultural rights are not absolute. While the first judgment by Mogoeng CJ justified the name changes by Tshwane Metropolitan Authority as an exercise to accommodate other racial groups who deserve to have their Pretoria streets named after their cultural icons[37] the second judgment acknowledges that Afrikaners have a limited right of cultural or historical belonging.[38] The third opinion, in *Tshwane Metro,* by Jafta J, points out that following section 31(2) of the Constitution cultural rights, are to be exercised, in a manner consistent with the Bill of Rights. This would rule out ' ... recognition of cultural traditions or interests " based on a sense of belonging to the place one lives" if those interests are rooted in the shameful racist past."[39] Jafta J gave an example of this 'shameful racist past' by specifically mentioning certain names as an offensive name that cannot be justified by the exercise of cultural rights.[40] Other parts of the judgment of Jafta J characterize the entire Afrikaner history as 'racist' and therefore disentitling Afrikaners to cultural rights. For example, Jafta J declares that an interpretation of our Constitution advanced in the second judgment that " [t]he Constitution creates scope for recognizing an interest or right based on a sense of belonging to the place one lives' rooted in oppression is untenable'[41]

While Jafta J is correct that the internal limitations that define the scope of sections 30 and 31 of the Constitution, requires that 'these rights may not be exercised in a manner that discriminates unfairly or demeans the dignity of other people'[42] , it seems implausible that the 'entire' culture of Afrikaner people during Apartheid is unconstitutional. This is the thrust of the second judgment by Cameron and Froneman JJ. Rather, what is outlawed by the Constitution are 'racist and oppressive cultural traditions'[43] This point is recognized in the third judgment where Jafta J states further that: ' in

---

[36] As above, note 3, para 125
[37] As above, note 3, para 64.
[38] As above, note 3, paras 155-157.
[39] As above, note 3, para 169.
[40] *Tshwane Metro*, note 3, para 170.
[41] *Tshwane Metro*, note 3, para 176. See also JM Modiri " Race, history, irresolution: Reflections on City of Tshwane Metropolitan Municipality v Afriforum" 2019 De Jure 27.
[42] *Tshwane Metro,* note 3, para 174
[43] *Tshwane Metro*, note 3, para 170

unmistaken terms the Constitution commits our nation to reject all disgraceful and shameful practices and traditions of the apartheid era.'[44] It is therefore plausible that some cultural practice and tradition during the Apartheid era could pass this test. Therefore, Afrikaner cultural traditions and practices must undergo constitutional scrutiny to determine whether it passes constitutional muster. It appears obvious that given the scope and meaning of culture that some traditions and practices will qualify as constitutional. Furthermore, the individual sense of culture requires an attenuated interpretation of cultural rights in the peculiar circumstances of each case reviewed against the Bill of Rights in its general or specific tenor. The dissenting judgment wondered at least twice whether the general right 'falls within the cultural, environmental or citizenship rights'[45] Assuming we are to imagine that such a general principle is relevant to cultural and citizenship rights we could proceed to imagine what this means for Afrikaans people on a communal and individual level. *Tshwane Metro* concerns the communal aspects of the general right. The implications of a recognition of a general right based on a sense of belonging to a place one lives rooted in a particular history were recognized an entitling South Africans to a right to be ' involved in a decision involving that sense of place and belonging'[46]. Of course, if such a person lies in an Afrikaner community, the entitlement to be involved in decision making would be more pronounced. If such decisions are norms routinely obeyed by Afrikaners, there is little doubt that these would qualify as customary law.

The second case that appears to have reaffirmed the framework of Afrikaner customary law is *Salem Party Club*[47] where the Constitutional Court grappled with entitlements of Black and White Communities to a piece of land pursuant to the Restitution of Land Rights Act[48]. Cameron J who wrote the unanimous judgment of the Court recognized that a Black Community had formed at the Salem commonage 'lived at and on the Salem Commonage …in accordance with its traditional rules and conventions. That usage was in accordance with customary law…'[49] Even though the Court also recognised that a White Community was founded and existed at the Salem Commonage for over two centuries, there is no reference in the judgment to the rules by which that community was governed at least concerning the land. Of course, being a creation of and under the control of the colonial government, White settler communities were governed by the

[44] *Tshwane Metro*, note 3, para 176
[45] *Tshwane Metro*, note 3, para 124 and para 128.
[46] Tshwane Metro, note 3, para 128.
[47] Note 4.
[48] 22 of 1994.
[49] *Salem party Club*, note 4, Para 146.

colonial legal system which would apply principles of the South African common law to issues of ownership possession and transfer of the land. If any rules practice conventions and understandings were developed by the Salem community their value would only not be social but are very likely to be enforced by South African courts. For example, if such conventions understandings are reflected in transfer documents

Tshwane Metro and *Salem Party Club* can be read as affirmations of Afrikaner norms which point unmistakably to a normative framework. Accordingly, the rights of Afrikaner people to urge aspects of their cultural heritage as their customary law would involve different aspects of their personal lives for example in the areas of succession inheritance marriage. There is no evidence that South African courts have been urged to enforce Afrikaner Customary law in this personal respect. It would appear that these principles in the course of the development of principles of South African common law, these principles have supplanted if at all, they were recognized of understandings of Afrikaner communal life.

There is a need for considerable ethnographic work to determine the norms of the Afrikaner community which will not be an easy task. One good place to look would be the norms that may have been created by how Afrikaans speaking churches during the Apartheid years aligned with governments of that period[50] in the public sphere. In that period, it would appear that Afrikaans speaking churches who were in support of the Apartheid government were instrumental in the lives of Afrikaans speaking people through the norms that were developed and promoted to guide the conduct of the lives of ordinary citizens. Whether these norms will survive constitutional scrutiny is a different matter and should not detain us.

5. The Recognition of Afrikaner Customary Law and the 'New' South African Common Law

In this section, I address albeit briefly a broader reason why the recognition of Afrikaner customary law is important for the South Afrikaner legal system. That reason is the contribution that the recognition and application of Afrikaner customary law can make to the development of a 'new' South African common law. The idea of a 'new' South African common law flows from the organic development of a common law that evolves from the interpretation of principles and rules of a post-1994 constitutional legal system. For example, the interpretation of the fidelity of all law to the Bill of Rights mandated by section 8(1) of the Constitution; the development of customary and common law as required by s. 39 (2) of the Constitution

[50] See generally Oliver, E., 2010, 'Afrikaner Christianity and the concept of empire ', *Verbum et Ecclesia* 31(1), Art. #393, 7 pages. DOI: 10.4102/ve.v31i1.393

suggests that a 'new' common law is envisaged in the Post-Apartheid constitutional era. The principles and standards that evolve from judicial review yield a 'new' common law. Arguably, all legal orders in South Africa should be in the contemplation of the South African judiciary in the task of fashioning a 'new' common law. This contribution can only arise by adequate recognition that these legal orders are potentially applicable. There is no imperative that all the principles and rules of these legal orders are applicable and enforceable. The standards set out in the Bill of Rights and other constitutional provisions ensure that the principles and rules of different legal orders that do not pass constitutional muster are inapplicable. Evidence of the interaction of the South African legal system and independent legal orders, can be found in the effect of the recognition that 'Black' customary law is equal to the common law[51] as amplified by the South African judiciary.[52] Even though there is a considerable opinion that the development of customary law is stunted interpreted and legislated in the image of the common law[53] it is incontrovertible that 'Black' customary law has influenced the development of the South African common law. A good example is how the cross over ethic of 'Ubuntu' has developed principles of South African Common law as outlined above. Ubuntu has become a significant foundation of the 'new' South African common law and may not have become so if 'Black' customary law did not receive constitutional imprimatur. Put in another way, there is a possibility that cogent principles of Afrikaner customary law would be useful in the articulation of the 'new' common law. An Afrikaner customary law normalizes the idea that the South African legal system recognizes legal orders alongside centrist national normative frameworks such as the common law. The 'new' South African common law can be meaningful if different legal orders such as Afrikaner customary law continuously nourish and interact with her.

6. Concluding Remarks

One of the fundamental challenges of legal pluralism in any State is the nature and extent of interaction of the normative systems that are directly and indirectly recognized by that system. The issue is not whether South

[51] See for example section 211(3) of the Constitution: " The Courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. See also *Alexkhor v Richtersveld Community* 2003 (5) SA 460(CC).

[52] See for example the cases of *Bhe v Magistrate Khayelitsha*, note 20; *Shilubana v Nwamtiwa* 2008 9 BCLR 914(CC) and *Ngweyama v Mayelane* 2013 (4) SA 415 (CC).

[53] See for example C Himonga and A Pope " Mayelane v Ngweyama and Minister of Home Affairs: A reflection on wider implications" 2013 *Acta Juridica* 318.

Africa is a plural state as much as it is how far it is willing to go. Two opposing forces underlie the constitutional interaction of state law and other normative systems in South African jurisprudence. On one hand, is a desire for uniformity evident in the centralizing legacy of the common law that is institutionalized through constitutional design through which non State law is recognized and interpreted through the lens of state law. An opposing principle speaks to an understanding and recognition of normative difference expressed by non- State law and such recognition within state law. South African jurisprudence exhibits both tendencies. An Afrikaner customary law challenges the South African legal system as to its willingness to recognize normative orders that equally deserving. The idea that customary law is not restricted to Black South Africans is already a matter of reality. Recently, the applicant's sought unsuccessfully in *Women's Legal Centre Trust v President of the Republic of South Africa*,[54] to expand the meaning of 'customary law' in the Recognition of Customary Marriages Act to include 'and customs and usages of Islam traditionally observed among Muslim peoples of South Africa and which form part of the religion and culture of those peoples'.[55] It is clear that similar readings of the meaning of customary law will not abate.

The recognition and promotion of Afrikaner customary law is a challenge of a plural South Africa where membership of a cultural community is concurrent with South African citizenship. If South African citizens are entitled to be governed by the common law designed to apply to all citizens, they are also entitled to their customary law that is a recognition of their cultural difference. Plural legal systems have to contend with this diversity through all manners of intervention. The first step is to acknowledge this plurality.

[54] [2018] 4 All SA 511 (WCC).

[55] See para 273. 1.1 of founding affidavit of Women's Legal Centre Trust v President of the Republic of South Africa, Available at http://wlce.co.za/wp-content/uploads/2017/8/Muslim-Marriages-Founding-Aff-Part-2-.pdf (Accessed 19th January 2019)

Bibliography

Literature

Bennett TW (1984) *Customary Law in South Africa* (Juta Cape Town)

Ferris L (2013) 'A customary right to fish when fish are sparse: Managing conflicting claims between customary rights and environmental rights' 16 (5) *PER* 555-614

Himonga C & A Pope (2013) " Mayelane v Ngweyama and Minister of Home Affairs: A reflection on wider implications" *Acta Juridica* 318-338

Nwauche ES (2015) " Acquiring a New Customary Law in Post-Apartheid South Africa" 2015(3) 18 *PER* 569-592.

Oliver, E., (2010) 'Afrikaner Christianity and the concept of empire ', *Verbum et Ecclesia* 31(1), Art. #393, 7 pages. DOI: 10.4102/ve.v31i1.393

Pietersee M (2001) ' It's a 'Black Thing": Upholding culture and customary law in a society founded on non-racialism' 17 *South African Journal of Human Rights* 364-403.

Vestergad M" Who's got the Map? The Negotiation of Afrikaner Identities in Post –Apartheid South Africa" 2001 130 *Daedelus* 19-44.

Zimmermann R & Visser, D (1996) 'Introduction: South African Law as a Mixed Legal System' in: R. Zimmermann & D. Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, Kenwyn: Juta Cape Town 1-30.

Cases

Alexkhor v Richtersveld Community 2003 (5) SA 460(CC)
Afriforum v University of the Free State 2018(2) SA 185(CC).
Barkhuizen v Napier 2007 (5) SA 323 (CC).
Bhe v Magistrate Khayelistsha 2005 (1) SA 580(CC);
City of Tshwane Metropolitan Municipality v Afriforum 2016 (6) SA 279 (CC)
Dikoko v Matlala 2006 (6) SA 235(CC)

De Lange v The Presiding Bishop of the Methodist Church of Southern Africa 2015 (!) SA 106 (SCA)
Gongqoose v Minister of Agriculture 2018(5) SA 104
Greenberg v Greenberg 1955 (3) SA 361(A).
Gumede v President of the Republic [2009] 3 SA 152 (CC).
Head of Department, Mpumalanga Dept of Education v Hoerskool Ermelo 2010 2 SA 415(CC).
Lurhani v Premier Eastern Cape [2018] All SA 836 (ECM
MEC for Education KwaZulu-Natal v Pillay 2008(1) SA 474 (CC)
Ngweyama v Mayelane 2013 (4) SA 415 (CC).
S v Makwanyane 1995 (3) SA 391(CC
Salem Party Club v Salem Community 2018 (3) SA 1 (CC)
Shilubana v Nwamtiwa 2008 9 BCLR 914(CC)
Taylor v Kurstag NO 2005 (1) SA 362 (W)
Women's Legal Centre Trust v President of the Republic of South Africa, [2018] 4 All SA 511 (WCC)

Legislation

Recognition of Customary Marriages Act 11 of 2009
Restitution of Land Rights Act 22 of 1994

Chapter 4

Factors determining unregistered customary Marriages and the distribution of property on their dissolution in Zimbabwe

Nqobizitha Ndlovu*

Abstract

Zimbabwean courts consider the 'surrounding circumstances' of the parties as per the provisions of Section 3 of the Customary Law and Local Courts Act (Chapter 7:05) and the 2013 Constitution of the Republic of Zimbabwe in determining whether a union between two persons is an unregistered customary marriage and reallocating matrimonial property rights on the dissolution of the marriage. This chapter addresses the difficulty in determining unregistered customary marriages and the inadequacy of remedies in the distribution of property on the dissolution of such marriages which is a significant problem generated by Zimbabwe's plural legal system by turning to the common law and the right to equality in the Zimbabwe Constitution which is an attribute of citizenship.

Key Words: Customary law, choice of law, unregistered customary marriages, remedies, Zimbabwe

1. Introduction

Zimbabwean courts consider the 'surrounding circumstances' of the parties as per the provisions of Section 3 of the Customary Law and Local Courts Act (Chapter 7:05) and the 2013 Constitution of the Republic of Zimbabwe in determining whether a union between two persons is an unregistered customary marriage and reallocating matrimonial property rights on the dissolution of the marriage. This chapter addresses the difficulty in determining unregistered customary marriages and the inadequacy of remedies in the distribution of property on the dissolution of such marriages which is a significant problem generated by Zimbabwe's plural legal system[1] by turning to the

* Doctoral Candidate, Nelson Mandela School of Law, University of Fort Hare. Ndlovu6@gmail.com

common law and the right to equality in the Zimbabwe Constitution which is an attribute of citizenship.

Unregistered customary marriages are one of the three types of marriage that are recognised by the law. The others are the civil marriage which is monogamous, and the registered customary law marriage which is potentially polygamous. Unregistered customary law marriages are recognised in certain circumstances and are problematic because of the difficulty in determining when the union of two persons is a customary marriage[2] and the unfair and inequitable reallocation of matrimonial property rights at the dissolution of marriages.[3]

This chapter is organized as follows. The next section considers the nature of unregistered customary law unions and its proprietary consequences. Part three examines the choice of law process and the 'surrounding circumstances' consideration in the determination of unregistered customary marriages, while the fourth section considers how the proviso of 'the justice of the case' has become a dominant feature of the surrounding circumstances principle. In the fifth section, the development of effective remedies for the distribution of matrimonial property at the dissolution of unregistered customary marriages as a component of the proviso 'justice of the case' is considered. Concluding remarks follow in the sixth section of the chapter.

---

[1]G Swenson (2018) 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 438. See s.192 of the 2013 Constitution of Zimbabwe sanctions the plural legal system of the country because it provides that the law to be administered in the country is the law in force on the effective date of the Constitution. The law in force was provided for in s 89 of the Lancaster House Constitution that provided that the law applicable in Zimbabwe is Roman-Dutch Law and African Customary Law, as modified by subsequent legislation. See also L Madhuku *An introduction to Zimbabwean Law* (2012) 26. See also L Benton *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002): 'legal pluralism became a defining feature of colonial administrations that sought to harness local dispute resolution mechanisms to help legitimize and institutionalize their rule.'

[2] AS Tsanga 'A Critical Analysis of the Women's Constitutional and Legal Rights in Zimbabwe in Relation to the Convention of the Elimination of All Forms of Discrimination Against Women' (2002) 54 *Maine Law Review* 247.

[3] W Ncube 'Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' (1990) *Journal of African Law* 1; F Banda 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe' in Bainham, A (eds) *The International Survey of Family Law* (2002) 471. Tsanga (n 2 above) 249 notes that a key problem with unregistered customary marriages, which impacts on women's right to equality within marriage, relates to the proprietary consequences emanating from such unions upon its dissolution

2. Unregistered customary law marriages in Zimbabwe

As stated above, Zimbabwe has a triadic marriage regime. There is a marriage under the Marriages Act[4] exclusively governed by general law. Then there is the customary marriage under the Customary Marriages Act[5]. The third type of marriage is the unregistered customary law union which meets all the requirements of a customary law marriage except for solemnization. Section 3(1)(a) of the Customary Marriages Act expressly specifies that no marriage entered into in terms of customary law shall be regarded as valid unless it is solemnized. However, the union is recognised as a valid marriage for limited purposes of customary law in relation to the status, guardianship, custody and succession rights of children.[6] The courts have extended the limited recognition of unregistered customary marriages for purposes for loss of support[7] and adultery damages.[8] To determine that the union between two persons is an unregistered customary marriage begins from the conclusion that a union is a customary marriage. The status of unregistered customary marriages is compounded by the fact that the effects of section 3 (1) of the Customary Marriages Act on the distribution of matrimonial property on the dissolution of an unregistered customary marriage have been far-reaching in two respects. The parties to an unregistered customary law union are unable to enjoy the benefits of registered customary marriages because of the absence of the principle of equitable distribution of matrimonial property, which applies to registered marriages in terms of the Matrimonial Causes Act.[9] Justice Makarau in the case of *Marange v Chiroodza*[10] recognized this point:

> In my view, the unregistered customary union is an institution that will be with us for a long time. It is an institution sustained by tradition and custom, graced by social acceptance, and favoured by the majority of the people in the country

[4] Chapter 5:11.
[5] Chapter 5:07.
[6] Section 3(5) of the Act provides that 'A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody, and rights of succession of the children of such marriage, be regarded as a valid marriage'.
[7] *Chawanda v Zimnat* 1989 (2) ZLR 352.
[8] *Carmichael v Moyo* 1994 (2) ZLR 176.
[9] Chapter 5:13.
[10] 2002 ZLR 171 (H).

> . . . Thus, the law becomes incomprehensible in the eyes of society by failing to provide the same remedy to the same people, married under the same traditions but differentiated simply by the registration of their unions. In my view, in such an instance when it fails to provide the remedy to correct an obvious injustice, the law then removes itself from the people and fails to be a reflection of the mores and values of the society it seeks to serve. It risks being ignored as alien.[11]

A fundamental challenge of unregistered customary marriages is the potential for the discrimination of female partners of these marriages. According to Ncube, unregistered customary law unions, being invalid marriages by virtue of their non-registration, have no proprietary regime.[12] In the eyes of the general law, the parties are unmarried and hence their property is treated as the property of unmarried individuals. At separation, each party takes with him or her the property, which he or she acquired during the marriage. This position perpetuates discrimination against a majority of women who are not able to acquire much during the marriage.[13] It is even worse in terms of customary law, because 'property acquired during the marriage becomes the husband's property whether acquired by him or his wife'.[14] At the dissolution of the marriage, the husband is entitled to all the property except *inkomo yohlanga*[15] and *impahla zezandla* [16] which are regarded as exclusively belonging to the wife. Ncube observes that in practice, this property often comes to little more than a handful of kitchen utensils, one or two goats and one or two cows.[17] As a result, if a union is recognized as an unregistered customary marriage, it is obvious that customary law works 'untold hardships on countless wives who had to leave their marriages without any meaningful property'.[18] While it is generally, agreed that the discrimination suffered by wives of unregistered customary marriages is inconsistent with the right to equal protection before the

---

[11] Page 174F-G.
[12] W Ncube *Family Law in Zimbabwe* (1989) 167.
[13] According to ZIMSTATS around 60% of marriages in Zimbabwe are unregistered customary law unions.
[14] See for example *Jenah v Nyemba* SC4/86.
[15] This property is made up of a cow and its offspring given to the wife as her share from the *lobolo*/brideprice when her daughter is being married.
[16] Property acquired by the woman through the use of specialized skills such as midwifery, knitting, and pottery.
[17] Ncube (n 12 above) 2.
[18] Ncube (n 12 above) 2.

law and non-discrimination[19], the solution to the problem has dogged both the legislature and the judiciary for a long time.[20]

It is, therefore, a determination that a union is an unregistered customary marriage that is crucial in the issue of fair and equitable remedies in the distribution of matrimonial property on the dissolution of such marriages. This chapter focuses on the factors, which the courts take into account in determining that the union of two persons is an unregistered customary marriage before it considers the effectiveness of remedies.

3. The choice of law process and the 'surrounding circumstances' consideration in the determination of unregistered customary marriages: A constitutional inquiry

In this section, we inquire deeper into the factors that would assist the determination that the union of two persons is an unregistered customary marriage. Since solemnization is the difference between an unregistered and a customary marriage, our primary concern is a consideration of choice of law rules[21] that assist a determination of when a customary marriage is in existence. In Zimbabwe, the choice of law process is governed by the 2013 Constitution[22] and section 3 of the Customary Law and Local Courts Act. Section 3 is the principal provision that governs the choice of law process between customary law and general law.[23] It is suggested that the wording of section 3 provides two

[19] Section 56 of the Constitution.

[20] The dilemma facing the judiciary at the dissolution of unregistered customary law unions was aptly expressed by Justice Chitakunye J in *Mautsa* HH 106/2017 thus,

'…the distribution of property at the dissolution of an unregistered customary law union has dogged these courts for many years. Despite the call for legislative intervention to protect the interests of women who stand to be left destitute after having given a portion of their life to a man who has advanced financially as a direct result of the union, no legislative intervention has been effected. I wish to add my voice to the call for legislative intervention, just as happened with the situation of surviving spouses at the demise of their husbands in terms of the Administration of Estates Act, [*Chapter 6:01*]'.

[21] See CMV Clarkson & J Hill *The Conflict of Laws* (2011) 23. See also TW Bennett 'Conflict of Laws- The Application of Customary Law and the common law in Zimbabwe' (1981) 30 *International and Comparative Law Quarterly* 60; *Feremba v Matika* HH 33/07.

[22] Section 192 provides that 'The law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified". As of 2013, the law that was in force in Zimbabwe was general law and customary law'.

[23] 3 Application of customary law

broad considerations that regulate the application of customary law. Firstly, customary law applies where the provisions of a relevant statute say so. Secondly, in the absence of a relevant statute, customary law applies by applying the choice of law formula in section 3 of the Customary Law and Local Courts Act. According to this section, a union of two persons is a customary marriage where the parties have expressly or impliedly agreed that it shall apply. The express or implied agreement by the parties is manifested by the fulfillment of the customs and usages of different Zimbabwean ethnic communities.

Whereas Galen has adopted the view that where there is an express agreement, the court has no discretion but to apply the legal system expressly chosen by the parties to the dispute,[24] Madhuku's view is that even when there is an express agreement, the general law will apply if customary law would attain an unjust resolution of the matter.[25] It is doubtful if Madhuku's view can withstand a constitutional challenge based on the right to participate in the cultural life of one's choice as enshrined in section 63 of the Constitution. Commenting on section 31 of the Constitution of South Africa [a provision similar with section 63 of Constitution of Zimbabwe], Nwauche rightly argues that the use of the word 'participate' connotes a legal consequence as opposed to a sense of non-obligatory and everyday engagement in popular culture, such

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
(a) customary law shall apply in any civil case where—
(i) the parties have expressly agreed that it should apply; or
(ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
(iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
(b) the general law of Zimbabwe shall apply in all other cases.
(2) For the purposes of paragraph (a) of subsection (1)—
"surrounding circumstances", in relation to a case, shall, without limiting the expression, include—
(a) the mode of life of the parties;
(b) the subject matter of the case;
(c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;
(d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.

[24] DP Galen 'Internal Conflicts Between Customary Law and general Law in Zimbabwe: Family Law as Case Study' (1983-1984) *Zimbabwe Law Review* 11.

[25] L Madhuku *An introduction to Zimbabwean Law* (2012) 28.

as listening to music, reading a book or watching a film.[26] A choice to be bound by a certain set of normative order should thus be respected by the courts. The implied agreement is inferred where it is reasonable to assume that the parties agreed considering the nature of the case and the surrounding circumstances. Where there is no express or implied agreement, section 3 of the Customary Law and Local Courts Act provides that the courts may impose the application of customary law on the basis that it is 'just and proper'. In deciding this, the court considers the 'surrounding circumstances' which are defined as including (i) the mode of life of the parties, (ii) the subject matter of the case, (iii) the parties' knowledge of customary law and/or general law, and (iv) the closeness of the case to general law or customary law. After weighing up the four factors, the court makes an overall judgment of whether it is 'just and proper' to apply customary law.

The following discussion examines the four factors that the courts take into consideration when determining the surrounding circumstances to reach the conclusion that the union of two persons is governed by customary law.

Mode of life of the parties

As Bennett notes, initially when the colonial powers imposed legal dualism, there was no problem in determining when customary law should apply.[27] The mode of life of the Africans and Europeans was distinct. Africans lived according to the traditional culture, customs and values whereas the Europeans had a distinct European mode of life. Race was thus the defining factor. Customary law applied to Africans and general law to Europeans. However, such a simple, racial distinction could not be indefinitely maintained. As Europeans had more and more dealings with the local population, as Africans elected to regulate their legal relationships according to the common law, and as Africans came to change their style and adapt to the Western European cultural pattern, this distinction became blurred.[28] However, in cases involving status, for instance, marriage, the mode of life may be a reliable indicator of the system of law applicable. For example, in *Mautsa v Kurebgaseka*[29] , the mode of life was the

[26]ES Nwauche 'Affiliation to a new customary law in post-apartheid South Africa' (2015) 3 *Potchefstroom Electronic Law Journal* 580.
[27] TW Bennett 'Conflict of Laws- The Application of Customary Law and the common law in Zimbabwe' (1981) 30 *International and Comparative Law Quarterly* 59.
[28] Bennett (n 27 above) 60.
[29] HH 106/2017.

determining factor. In reaching a conclusion that the parties maintained a western lifestyle, the court considered five factors which are the fact that the parties live in the low-density suburb of Mandara; the plaintiff's business of farming; the defendant's work at the family farm; the private educational establishment of the children. The fifth factor is the holidays and shopping trips during the weekends and holidays.[30] Accordingly, Zimbabweans who are regarded as having maintained a western lifestyle may be regarded as having elected not to be bound by customary law.

The mode of life factor poses little problems where both parties have either adopted a western lifestyle or retained a traditional African lifestyle. General law will apply in the former and customary law in the latter scenario. The problem becomes complex where one of the parties follows a western mode of living while the other party has retained the traditional African lifestyle. In such circumstances, the mode of life factor may be of little assistance to the court in determining the applicable legal system. Another complication arises where one or both parties have adopted a western lifestyle while also retaining a traditional African mode of life. As noted, residence is one of the significant indicators of the party's general mode of life. *Prima facie*, residence in urban areas denotes a western lifestyle and residence in rural areas denotes a traditional lifestyle. However, such a distinction is too simplistic. One of the effects of urbanization is rural-urban migration in search of employment. As people migrate to urban areas, they retain their traditional customs and beliefs while also adopting a western lifestyle. Urbanization, education and the attendant cross-pollination of culture has made the application of these factors in resolving the choice of law disputes difficult. In this regard, it is worthy to quote verbatim the articulation by Justice Cheda JA and Ndou JA in the case of *Ntini v Masuku*[31] chronicling the effects of urbanization on the choice of law process and the inadequacy of residence as a determining factor in the surrounding circumstances of the parties. The court said:

It is a fact that the majority of marriages in Zimbabwe are unregistered and are therefore governed by customary law. For a number of decades, there has been a significant inflow of the African population from the rural areas to the urban centres. As a result of this migration, a sizeable number of people find themselves caught between a web of customary practices on one hand and urban demands on the other which require them to lead western lifestyles. This

[30] *Mautsa v Kurebgaseka* 4.
[31] HB 69/2004.

has ushered in confused and confusing matrimonial scenarios in people's daily lives. It is in this confusion that African married women by virtue of their customary and religious background still find themselves being shifted to backward and meaningless positions in society, even where they now commercially contribute to their households. Gauging by the number of claims coming before these courts, brought by the impoverished and desperate women against their husbands, the time has come, in my view, for the courts to take a positive and progressive approach in addressing the inequities in our legal system in order to where practically possible assist women in their endeavour to find justice. The increased number of cases coming before these courts is a clarion call by these members of our society for judicial intervention.

The subject matter of the case

The nature of the property in dispute may also assist the court to determine which system of law to apply. Galen gives an example of a dispute involving a negotiable instrument and one involving *lobolo*.[32] General law will likely apply to the former while customary law to the later. However, due to urbanization, this factor should apply with great circumspection. For instance, although *lobolo* is a traditional customary principle which lies at the foundation of a customary marriage, its applicability has raised two major challenges. Firstly, the payment of lobola is a contentious issue especially since the Supreme Court declared in the case of *Katekwe v Muchabaiwa*[33] that *lobola* is not a legal requirement. Thirty-one years after the *Katekwe* decision, the High Court in the *Hosho v Hasisi*[34] noted that despite concerns about payment of lobola and its inherent contradiction with the right to equality, payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered.[35] Secondly, the principle of *lobola* has been infused into general law through the law of contract. Where parties enter into a written agreement for payment of *lobola* and the terms are expressly provided for, a breach of the agreement entitles an innocent party to contractual remedies.[36] Thus, although the payment of *lobola* is not a

[32] Galen (n 23 above) 16.
[33] SC 87/1984.
[34] HH 491/2015.
[35] *Hosho v Hasisi*.(n. 34 above).
[36] See the case of *Orient Jani v Noel Mucheche* where the Plaintiff successfully sued his father in law for the return of the lobola after his unregistered customary law wife cheated on him and

requirement for the recognition of a marriage, it may well be that payment of lobolo is an indication that the union is a customary marriage.

The understanding by the parties of the provisions of customary law or the general law of Zimbabwe which apply to the case

A case that illustrates the application of customary law based on the parties' understanding of customary law and the general law of Zimbabwe is *Lopez v Nxumalo*.[37] Lopez, a white Portuguese male was sued for seduction damages by the mother of a black African woman under customary law. Lopez contended that he knew no African custom and was not acquainted with African customary law. He argued that general law should apply instead of customary law. The Supreme Court dismissed this line of reasoning on the basis that the woman and her daughter also did not understand general law and lived a life guided by customary law. In this case, the Supreme Court reasoned that customary law was applicable even though the defendant was not acquainted with it. Race was the determining factor in considering the parties' understanding of either customary law or general law. Black Africans are presumed to understand the provisions of customary law and whites are presumed to understand the provisions of general law. It would appear that racial presumptions may not stand the test of time and may not survive an equality challenge. Furthermore, this factor is challenged by urbanization because several aspects of urban life like employment and education suggest that many Africans have a fused culture. It is argued that this factor may be of little assistance to the court.[38]

The relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be

It is argued, that this factor is sufficiently covered by the mode of life factor. Galen views this factor as referring to law as part of culture.[39] She is of the view that this factor provides more latitude to the courts.[40] Bennett refers to this factor as the "proper law" approach in that it allows the court to apply the law which is

got pregnant before their wedding. https://www.herald.co.zw/man-wins-lobola-case/ (Accessed on 31 October 2019).

[37] SC 115/85.

[38] See Justice Tsanga in the *Madzara v Stanbic Bank Zimbabwe Ltd and Others* HH546/2015.

[39] Galen (n 24 above) 15.

[40] Galen (n 24 above) 17.

closest to the nature of the case and the parties.[41] A case will have a relative closeness to that body of law and to the related culture to which the case and the parties have the closest connection.[42] Urbanization however once again has blurred this simple link between law and culture. Many people have dual cultures, that is, the African culture and the western culture. Thus the "relative closeness" test becomes problematic in its application. Galen identifies four factors bearing on the "relative closeness" test.[43] These are the place where the cause of action arose, the nature of the case, residence of the parties and the language of transaction. It is argued that these factors are the very same factors that are considered in the parties' mode of life factor. The effects of urbanization have once again blurred the 'relative closeness' test. The advent of urbanization has seen rapid rural-urban migration and rapid exchange of ideas, culture, lifestyle and a fusion of traditional and western cultures such that the 'relative closeness' test may be an exercise in futility.

To sum up the discussion in this part, it is clear that in determining the 'surrounding circumstances' of the case, the court must cumulatively consider several factors. None appears decisive and conclusive by itself. At the back of its mind, the court must always remember that both customary law and general law constitute equal systems of law in the Zimbabwean legal system. Urbanization has blurred the factors and it is obvious that the principle has not responded to the changing times and social conditions.

4. Surrounding circumstances and justice of the case

To sidestep the apparent distortions and results of the "surrounding circumstances" concept, the courts have heavily relied on the "justice of the case" provisio to hold that general law should be applied even if the weighing of the factors favour the application of customary law. As stated above the 'justice of the case' is a proviso to the determination of the application of customary law in section 3 of the Customary and Local Courts Act. The provision seems to suggest that where there is no statute expressly providing for the application of customary law, the court has the discretion to apply general law if the justice of the case requires. According to Madhuku, the "justice of the case" provision means that even though there is a determination that customary law is

[41] Bennett (n 27 above) 80.
[42] Galen (n 24 above) 15.
[43] Galen (n 24 above) 16.

applicable, the general law is applicable if it is established that the content of customary law would result in an unjust resolution of the matter.[44] This position was articulated by Chatikobo J in *Matibiri v Kumire*[45] thus:

> In my view, the only logical construction to place on the phrase "unless the justice of the case otherwise requires" is that if the application of customary law does not conduce to the attainment of justice then common law should apply …. The phrase, "unless the justice of the case otherwise requires", has remained in all Acts passed by Parliament, including the current one…. What emerges is that for the one hundred years during which customary law has co-existed with Roman-Dutch law, it has always been provided through legislation that where the customary choice of law rules were found to be inapplicable to the just decision of any matter in controversy, then in that event, resort should be had to the common law principles.[46]

The Supreme Court endorsed this approach in the case of *Chapeyama v Matende and Another*.[47] In this case, the parties had been in an unregistered customary law union for seven years. During the subsistence of the marriage, the parties accumulated property which included an immovable property that was jointly registered. At the termination of the unregistered customary law union, the husband sought an order to delete the wife's name from the title deeds of the house and the wife counterclaimed for a fair distribution of the property. The court was of the view that, in general, where parties are married according to customary law, their rights and duties are governed by customary law. According to customary law, the wife is not entitled to a fair distribution of property. Her only entitlement was *umai* or *mawoko* property. While acknowledging that the facts of the case pointed to the application of customary law, the court proceeded to consider the remedies available to the parties under customary law. The court refused to apply customary law holding that this was a proper case to resort to the 'justice of the case' because applying customary law would result in an injustice and effectively leave the wife without a remedy. The court's approach of what constitutes a remedy suggests that the effectiveness of the remedy and justice considerations are critical in determining whether a party has a remedy or not. The court refused to regard the wife's

[44] Madhuku (n 25 above) 28.
[45] 2000 (1) ZLR 492 (H).
[46] Pp 497-498.
[47] 1999(1) ZLR 534(H).

entitlement to *amai* or *mawoko* property as a remedy rather than holding that the wife was left without a remedy.

While in the *Chapeyama* case the existence of an unregistered customary law union was not in dispute, in *Muringaniza v Munyikwa*[48] the main thrust of the dispute was whether there was in existence a customary marriage between the parties. The parties lived together from 1990, soon after the birth of their first child who died two years later in 1992. While the parties agreed that a meeting between the families held after the burial of the child, the purpose of the meeting was in dispute. The wife alleged that the meeting was to do with marriage negotiations while the husband alleged that the agenda of the meeting was to discuss damages for staying with her without the customary rites. The court had to determine whether there was a customary marriage and when it commenced. It was common cause that the husband had made some payments to the wife's family, through bank deposits. To bolster his argument that there was no customary union, and that the money was not roora/*lobola* but appeasement fee, the husband argued that the payment of money through a bank deposit was not consistent with the Shona customary way of paying *roora/lobola*. Justice Ndou (as he was then), dismissed the husband's contention by holding that if the innocent party is under the impression that the parties were conducting a customary marriage, failure to comply with one of the requirements is not necessarily fatal. While it was common cause, that depositing money into a bank account was not consistent with the Shona custom on *roora,* the court held that such deviation is not fatal because customary law is flexible and pragmatic.

The court did not, however, resolve when the customary union came into being even though there were a number of possibilities. Did it commence when the parties started living together as wife and husband in 1990? Or did the marriage come into being in 1992 at the meeting held between the families after the burial of the child? Or did it commence when a *Munyai* (go-between) subsequently was dispatched to the wife's family in their rural home in Gutu? Or rather when the husband deposited a sum of $2 500,00, as a payment to the wife's father? The court skirted around this issue, simply making a finding that the parties were in an unregistered customary law union without addressing the question of when the marriage came into being. A reading of the judgment suggests that equality equity and justice were at the back of the court's mind. Holding that there was no customary marriage meant that the parties were

[48] 2003 (2) ZLR 342(H).

cohabiting without proprietary advantage that it considered as unjust. The court opted to apply general law stating that in the distribution of property at the dissolution of unregistered customary law unions:

In terms of section 3, if customary law were to apply, then it would not be possible to extend any relief to a woman in the defendant's position beyond her traditional entitlements of *umai* or *mawoko* property. In the circumstances, this would have been unjust. The justice of this case requires that the matter be dealt with otherwise than in accordance with customary law

Galen has argued that the 'justice of the case' provision should be resorted to rarely to justify the application of general law to a case where relevant factors such as mode of life of the parties indicate that customary law should be applied.[49] It, however, seems that Galen's approach has not found resonance with the courts which have liberally interpreted the 'justice of the case' provision. The courts' reasoning as enunciated in *Matibiri v Kumire* was to the effect that the court considers the remedies under customary law. If it considers that the remedies under customary law lead to injustice, then it resorts to the general law on the premise that the wife is left without a remedy.

5. The justice of the case and effective remedies in the distribution of property on the dissolution of an unregistered customary marriage

The determination of whether a union between two persons is a registered customary marriage or an unregistered customary marriage has consequences. The attitude of Zimbabwean courts appears to be to use the surrounding circumstances principle in general as a basis of determining that the union is an unregistered customary marriage and the 'justice of the case' principle to sidestep applying customary law, rather resorting to the remedies of the general law. For example, in *Mautsa v Kurebgaseka*[50] the parties had been in an unregistered customary law union for 14 years. They had acquired property during the subsistence of the customary marriage. The husband argued that customary law was applicable to the parties since they intended to be governed by customary law. He contended that the wife was only entitled to that which customary law dictates *umai/mawoko* property. The court dismissed the husband's argument on the basis that although the parties were in a customary law union, the surrounding circumstances, particularly their mode of life, was

[49] Galen (n 24 above) 11.
[50] HH 106/17.

indicative that the parties lived a modern lifestyle governed by general law. In any event the court was of the view that to award *umai*/*mawoko* property to the wife in terms of customary law would be unjust and an affront to a 'modern-day democratic society where both locally and internationally calls have been made for equal rights and opportunities.' It is argued that the constitutional imperative of equality before the law has been the major driving principle behind the Zimbabwean courts' resort to the justice of the case provision.

Since customary law unfairly treats women parties to unregistered customary marriages, there appears to be the need to craft effective remedies by legislation and the development of customary law to protect female partners of unregistered marriages. This section considers the nature and extent of these effective remedies. The development of customary law is as Madhuku notes, a question of how the courts view customary law.[51] The Constitutional Court, the Supreme Court, and the High Court have inherent powers to develop customary law, taking into account the interests of justice and the Constitution.[52] Rather than developing remedies under customary law, the courts have resorted to applying general law where they consider that the available remedies under customary law lead to an injustice. This renders the equality of the two legal orders a myth. It also relegates customary law into a rigid body of law that cannot fashion new remedies to meet the justice of the case. It is in this regard that Bennett asks a pertinent question expressed thus: 'Should customary law be changed and developed to cater for situations unknown in traditional African society or should it be excluded in favour of the more developed system of common?'[53]

It is argued that the courts have a constitutional imperative to develop customary law to keep pace with the dynamics of the society and situations which traditional African customary law does not contemplate like urbanization and equality. As noted above, the judiciary has found the solution to the choice of law problem by relegating the application of customary law in favour of general law. The judiciary's position has been to circumvent the application of customary law through the justice of the case clause and application of general law to otherwise customary law cases. In this regard, the courts have applied the general law principles of (i) tacit universal partnership, (ii) joint ownership and (iii) unjust enrichment to achieve equality, justice, and equity at the

[51] Madhuku (n 25 above) 31.
[52] Section 176 of the Constitution.
[53] Bennett (n 27 above) 61.

dissolution of customary law marriages. While these principles have developed under common law, an appropriate question is whether these remedies should become part of customary law. The following section considers an argument whether such an approach should be adopted by the courts in extending and infusing the principles of joint ownership, unjust enrichment, and universal partnership into customary law. It is important to sketch an overview of these remedies.

The requirements of unjust enrichment are that (i) The defendant must be enriched (ii) The enrichment must be at the expense of the plaintiff, (iii) The enrichment must be unjustified, (iv) None of the classical enrichment actions must be applicable, and (v) No rule of law refuses an action to the impoverished party.[54] In *Mtuda* v *Ndudzo*[55], Garwe J summarised the requirements of a tacit universal partnership in these terms: (a) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill; (b) the business to be carried out should be for the joint benefit of the parties; (c) the object of the business should be to make a profit and (d) the agreement should be a legitimate one. In addition, the intention of the parties to operate a partnership is also an important consideration. With regard to joint ownership, the Supreme Court in the case of *Kwedza v Kwedza*[56] held that registration in joint names is *prima facie* proof of equal ownership in the property. It is contended that these general law principles can be developed and shaped into customary law remedies. Even though the court's judicial activism in providing relief to women in unregistered customary law unions is commendable, it is argued that the development of customary law remedies is a more decisive and definitive solution to the problem of lack of effective remedies under customary law because this would bolster the customary law system. Unfortunately, the courts, however, have expressly shied away from their constitutional obligation to develop customary law.

It can, however, be argued that the courts have already developed customary law by recognising, [albeit without expressing it], joint and female ownership of property. The underlying reasoning for invoking the justice of the case provision has been a realisation by the courts that women in unregistered customary law unions also contribute to the acquisition of the parties' property.

---

[54] *Gamanje (Pvt) Ltd v City of Bulawayo* SC94/04.
[55] 2000(1) ZLR 710(H) 716 E-G.
[56] SC 73/14.

The courts have recognised the value of the contributions, both tangible and intangible, a spouse in an unregistered customary law union would have made during the subsistence of the marriage.[57] The courts seem to simply divide the properties of parties in an unregistered customary law union at dissolution where in effect they consider the matrimonial property as joint property even though they do not express this point. As a result, one could argue that the courts have already ruled that the customary law principle that only males could own immovable property is unconstitutional on the basis of discrimination. Likewise, the customary law principle that women are entitled to *impahla yezandla/mawoko* property which only includes kitchen utensils at the dissolution of customary law unions. Without express say so, it is argued that in the guise of justice of the case provision, the courts have already developed customary law by infusing into it the concept of female ownership of immovable property and joint ownership. It is thus contended that the answer to the problem of inequalities in marriage law lies in developing customary law rather than relegating it in favour of general law. The courts must be willing and flexible enough to examine the applicability of customary law in the concrete setting of social conditions presented by each particular case.

The courts, while acknowledging the lack of effective remedies under customary law, have opted to make calls for legislative changes in the law pertaining to the rights of parties at the termination of such unions. In *Mautsa* the court argued that it was imperative that appropriate legislative measures be taken to eliminate discrimination based on the type of marriage parties' contract. The general view of the courts has been that a proven unregistered customary union should be treated like any other marriage when it comes to dissolution and the division of assets jointly acquired by the parties during the subsistence of the marriage. Such recognition would place the unregistered customary law union within the ambit of the Matrimonial Causes Act. It is in line with the judiciary's clarion call for legislative interventions that family law scholars like W Ncube[58] and S Chirawu[59] have argued for harmonization of Zimbabwe's marriage laws. According to Chirawu, harmonization of marriage laws seeks to combat the glaring disparities among women due to the plural marital regime

[57] Maware v Chiware HMA 01-19.
[58] Ncube (n 12 above) 18.
[59] S Chirawu 'Challenges faced by women in unregistered customary law unions' (2014). Available at National Research Database of Zimbabwe. http://www.researchdatabase.ac.zw (Accessed 25 June 2018).

with different proprietary consequences at dissolution.[60] However, Chirawu is quick to caution that in a pluralist legal system like Zimbabwe, harmonization brings more complexity since having one marriage law regime may not be practical.[61] The objective of harmonization is to bring equality between marriage regimes. It is argued that rather than harmonizing marriage regimes, the recognition of unregistered customary law unions as valid marriages, and the consequent development of effective customary law remedies in the spirit of the constitutional values of equality is a more decisive and definitive solution.

The submission that the right to equality and non-discrimination should guide legislative and judicial development of effective remedies in customary law, guided by equality of marriages, finds resonance in domestic, sub-regional, regional, and international human rights systems and instruments. Domestically, section 3 of the Constitution provides a list of founding values and principles. Zimbabwe is founded on respect for the listed values and principles, which include recognition of the equality of all human beings and gender quality. Section 56 of the Constitution prohibits discrimination, among other grounds on custom, culture, gender, marital status, and social status. The rights of women are further recognised by section 80 of the Constitution. Equality is at the heart of the Constitution of Zimbabwe. Despite the constitutional provisions on equality, Zimbabwe's current marital regime is characterized by inequalities and discrimination based on the type of marriage. Sub-regionally, article 8(1) the SADC Protocol on Gender and Development recognises equality in marriage. Section 8 (2) advocates for the recognition and registration of all marriages including customary law or traditional marriages. Within the regional human rights system, the African Charter on Human and Peoples Rights recognises the right to equality and non-discrimination.[62] The specific instrument which deals with women, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa also recognises equality in marriage[63] and also promotes and protects women in customary marriages.[64] The Convention on the Elimination of Discrimination Against Women is the principal instrument in the global human rights system. Article 16 of CEDAW explicitly provides that 'States parties shall take all appropriate measures to eliminate against women in in relation to marriage…'and Article 16 (c) states that women

[60] Chirawu (n 58 above).
[61] Chirawu (n 58 above).
[62] Articles 3 & 19.
[63] Article 6.
[64] Article 6(c).

and men shall have 'the same rights and responsibilities during marriage and at its dissolution'. Harmonization of marriage laws seeks to ensure that all women regardless of the type of marriage receive the equal protection of the law.

Conclusion

Our Constitution recognises customary law as part of our law. Thus section 3 of the Customary Law and Local Courts Act enjoins the courts to apply customary law in civil cases unless the justice of the case requires the application of general law. The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop customary law so as to bring it in line with the rights in the Bill of Rights. Customary law can no longer be viewed through the common-law lens, but must now be seen as part of our law and must be considered on its own terms and 'not through the prism of the common law'.[65] Like all laws, customary law now derives its force from the Constitution and its validity must now be determined by reference not to common law but to the Constitution. Since it is apparent that customary law will remain part of Zimbabwean law, it is argued that rather than relegating it to the doldrums, it must be developed in line with the Bill of Rights. The right to equality is the cornerstone of Zimbabwean constitutionalism. It is therefore imperative that a legal framework dealing with the problem of unregistered customary law unions be affected. The choice of law process, as provided in section 3 of the Customary Law and Local Courts Act, needs to be developed in line with the changing social contexts and human rights principles. While the choice of law criteria is inevitable in a plural legal system, it was argued that the factors must be divorced from their racial and segregationist basis. It has been argued that fairness, equity, and justice should be the basis for determining the applicable system of law to a case where there is no express agreement of the parties. The inadequacy of the current choice of law framework is brought to the fore in the distribution of property at the dissolution of unregistered customary law unions. Noting that the concept of surrounding circumstances and residence will lead to injustice against women and perpetuate inequalities, the judiciary has marginalized customary law by relegating it in favour of general law. It has been argued that the choice of law process must be flexible enough to enable the continuous development of customary law.

[65] *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) SA 605.

BIBLIOGRAPHY

Literature

Banda, F (2002) 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe' in Bainham, A (eds), *The International Survey of Family Law* (Bristol Family Law: Bristol) 471-487.

Bennett, TW (1981) 'Conflict of Laws- The Application of Customary Law and the common law in Zimbabwe' 30 *International and Comparative Law Quarterly* 59-103.

Bennett, T.W. (2004) *Customary Law in South Africa* (Juta & Company Limited: Cape Town)

Chirawu, S Makaza, D Manhema, P & Kurima P (2013) 'Position paper on recognition of unregistered customary law unions in Zimbabwe Women and Law in Southern Africa' *Research and Education Trust* 1-8.

Clarkson, CMV & Hill, J (2011) *The Conflict of Laws* (Oxford Press: New York).

Galen, DP (1983-1984) 'Internal Conflicts Between Customary Law and general Law in Zimbabwe: Family Law as Case Study' (1983-1984) *Zimbabwe Law Review* 3-42.

Madhuku L (2010) *An introduction to Zimbabwean Law* (Weaver Press: Harare).

Ncube, W (1990) 'Re-Allocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' 34(1) *Journal of African Law* 1-8.

Ncube W (1989) *Family law in Zimbabwe* (Legal Resources Foundation: Harare).

Nwauche, ES (2015) 'Affiliation to a new customary law in post-apartheid South Africa' 18 *Potchefstroom Electronic Law Journal* 569-592.

Swenson, G (2018) 'Legal Pluralism in Theory and Practice' 20 *International Studies Review* pp. 438-462.

Tsanga, AS (2002) 'A Critical Analysis of the Women's Constitutional and Legal Rights in Zimbabwe in Relation to the Convention of the Elimination of All Forms of Discrimination Against Women' 54 *Maine Law Review* 218-250.

Cases

Zimbabwe

Carmichael v Moyo 1994 (2) ZLR 176.
Chapeyama v Matende and Another 1999(1) ZLR 534(H).
Chawanda v ZIMNAT 1989 (2) ZLR 352.
Feremba v Matika HH 33/2007.
Gamanje (Pvt) Ltd v City of Bulawayo SC94/04.
Hosho v Hasisi HH 491/15
Katekwe v Muchabaiwa SC 87/84.
Lopez v Nxumalo S 115/85.
Madzara v Stanbic Bank Zimbabwe Ltd and Others HH546/2015.
Marange v Chiroodza 2002 ZLR 171 (H).
Matibiri v Kumire 2000 (1) ZLR 492 (H).
Mautsa v Kurebgaseka HH 106/17.
Maware v Chiware HMA 01-19.
Mtuda v Ndudzo 2000(1) ZLR 710(H).
Muringaniza v Munyikwa 2003 (2) ZLR 342(H).
Ntini v Masuku HB 69/2004.

South Africa

Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa 2005 1 SA 580 (CC).

Legislation

Zimbabwe

Administration of Estates Act [Chapter 6:01].
African Marriages Act [Chapter 238].
Constitution of Zimbabwe (Amendment) No 20 of 2013.
Constitution of Zimbabwe 1980
Customary Law and Local Courts Act [Chapter 7:05].
Customary Marriages Act [Chapter 5:07].
Matrimonial Causes Act [Chapter 5:13].

International Instruments

African Charter on Human and Peoples Rights.
SADC Protocol on Gender and Development.
Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa.
Convention on the Elimination of Discrimination Against Women.

Internet Sources

Chirawu, S 'Challenges faced by women in unregistered customary law unions' (2014) *National Research Database of Zimbabwe* http://www.researchdatabase.ac.zw (accessed 01 November 2019).

CHAPTER 5

'*EZE NDI IGBO*' Customary law and associational ethnicity in a federal Nigeria

ES Nwauche*

Abstract

This chapter examines the freedom of movement and association as an attribute of citizenship in Nigeria and the attendant desire of ethnic groups to 'carry' 'practice' and 'observe' their customary norms in their new 'domain' as well as the reaction of their 'host' communities who accept tolerate or oppose such norms. This chapter examines the claim of Nigerian ethnic groups to the promotion and protection of their chieftaincy institutions in foreign domains in and outside Nigeria. One of such chieftaincy institution is the 'Eze Ndi Igbo' of the Igbo ethnic group who have achieved varying degrees of success in replicating their chieftaincy institutions and attendant customary norms within and outside their traditional domain. This chapter engages with the normative framework of sub-national belonging within the context of the rights which citizenship endow on citizens to tease out the nuances contradictions and tensions of an ethnically diverse Nigeria. The core of this chapter interrogates the extent to which Nigerians are able to enjoy their right to live by their customary law in spaces that are 'foreign' within Nigeria in the exercise of the right to freedom of movement and association.

Keywords: Ethnicity, Customary Law, Nigeria, Freedom of Association, Freedom of Movement

1. Introduction

This chapter examines the freedom of movement and association as an attribute of citizenship in Nigeria and the attendant desire of ethnic groups to 'carry' 'practice' and 'observe' their customary norms in their new 'domain' as well as the reaction of their 'host' communities who accept tolerate or oppose such norms. This chapter examines the claim of Nigerian ethnic groups to the promotion and protection of their chieftaincy institutions in foreign domains in and outside Nigeria. One of such chieftaincy institution is the '*Eze Ndi Igbo'* of the Igbo ethnic group[1] who have achieved varying

*Professor Nelson R Mandela School of Law University of Fort Hare, South Africa enwauche@ufh.ac.za

[1] The *Eze Ndi Igbo* represents a chieftaincy institution of ethnic Igbos outside their traditional domain. The Igbo are Nigeria's third largest ethnic group and are found principally in South Eastern Nigeria. Commonly regarded as made up of acephalous communities, diasporic

degrees of success in replicating their chieftaincy institutions and attendant customary norms within and outside their traditional domain. This chapter engages with the normative framework of sub-national belonging within the context of the rights which citizenship endow on citizens to tease out the nuances contradictions and tensions of an ethnically diverse Nigeria. The core of this chapter interrogates the extent to which Nigerians are able to enjoy their right to live by their customary law in spaces that are 'foreign' within Nigeria in the exercise of the right to freedom of movement and association.

Chieftancy Institutions in Nigeria are emblematic of the culture and identity of an ethnic group[2] and is, therefore, a manifest means of representing a community outside her traditional domain. When members of an ethnic group live outside their traditional domain, it appears natural that they carry their culture with them including the institutions that manage and represent their communal identity. Such institutions perform intra communal governance[3]; cultural functions and external relations. As Africa urbanized principally in the colonial era, migrant workers found ethnic identities and communities a source of comfort support sustenance and protection. It is the contestation for resources in heterogeneous communities of colonial and post-colonial Africa that is credited with the rise of ethnic consciousness and ethnic communal organization.[4] An example of such an ethnic institution is the *Eze Ndi Igbo* of diasporic ethnic Igbos outside their traditional domain in Southeastern Nigeria. The *Eze Ndigbo* controversy has arisen from the desire and demand of Igbo ethnic groups Nigeria within and outside Nigeria to choose a traditional ruler emblematic of Igbo identity and a manifestation of ethnic associational impulses.[5]

The choice installation and provisioning of the *Eze Ndi Igbo* chieftaincy are in furtherance of customary normative frameworks imported as it were, from the 'homeland'. What the *Igbo* desire and demand is not out of place in Nigeria because other ethnic groups such as the *Yoruba*[6] and the

---

ethnic Igbo within and outside Nigeria have coalesced around chieftaincy institutions for reasons of identity culture and survival.

[2] See for example A Harneit-Sievers " Igbo 'Traditional Rulers": Chieftaincy and the State in Southeastern Nigeria" 33(1) *Africa Spectrum* 57-79;

[3] Such governance functions would include the settlement of disputes. See for example

[4] See for example O Nnoli Ethnic Politics in Nigeria (Fourth Dimension Publishers 1978)

[5] See EE Osaghae *Trends of Migrant Political Organisation in Nigeria: The Igbo in Kano* (IFRA-Nigeria, 2013)

[6] See for example R *Olaniyi Approaching the Study of Yoruba Diaspora in Northern Nigeria in the 20th Century*' in T Falola & A Genova (eds) Yoruba Identity and Power Politics University of Rochester Press 2006 231 -250 ; " Aare Gani Adams Condemns Installation of obas in diaspora by Olugbo" The Guardian (Nigeria). Available at

Hausa[7] have organised themselves around their customary ordering in Nigeria and in the diaspora.[8] Indeed, it appears logical that individual ethnic consciousness would coalesce into group dynamics in different forms and configurations especially in the diaspora where their identity is a vehicle of consciousness mobilisation struggle and survival.[9] What sets the *Igbo* ethnic group apart in respect of diasporic chieftaincy institutions is their relentless and concerted efforts to enthrone an *Eze Ndigbo* in foreign domains and the crisis generated amongst them[10] and with their hosts.[11]

It is the reluctance and even downright opposition of hosts of ethnic chieftaincy institutions that throw up conceptual issues of the nature of the exercise of citizenship and customary law in a federal Nigeria. In an ethnicised polity such as Nigeria, it is important to examine whether diasporic Nigerians are entitled as Nigerian citizens to their customary law in general and their chieftaincy institutions? One question that will be addressed later in this chapter is whether the opposition of hosts of diasporic chieftaincy institutions is rooted in law practice or reality? One of the arguments that this chapter makes is that such opposition to diasporic chieftaincy institutions in Nigeria is rooted in the emergent principle of indigeneity in the Nigerian political and cultural space. Along this line this chapter demonstrates that the distinction between 'indigenes' and 'non-indigenes' has led to an attenuated application of customary law and chieftaincy institutions in foreign domains despite the rights of diasporic Nigerian citizens. Nigeria's ethnoreligious violent conflicts are traceable to

https://guardian.ng/news/aare-gani-adams-condemns-installation-of-obas-in-diaspora-by-olugbo (accessed 19-06-2019)

[7] See for example A Tijani " The Hausa Community in Agege, Nigeria 1960-1967' 17(2) 2008 *Journal of Social Sciences* 173; Albert IO " The Growth of an Urban Migrant Community: The Hausa Settlement in Ibadan, c. 1830 to 1979' 4 IFE: Annals of the Institute of Cultural Studies 1.

[8] See for example ' Suddarkasa, N 'From Stranger to Alien: The Socio-Political History of the Nigerian Yoruba in Ghana 1900-1970; in W A Shack & EP Skinner (eds) *Strangers in African Societies*, University of California Press Berkeley 143.

[9] See O Nnoli, note 4.

[10] See for example D Johnson " How Market Leadership Tussle Demotes Akure's Eze Ndigbo" Available at www.vanguardngr.com/2015/10/how-market-leadership-tussle-demotes-akures-eze-ndigbo (Accessed 23.10.2015); O. Ajayi " Three Factions contesting Eze Ndigbo Title in Oyo" Available at www.vanguardngr.com/2015/thr,ee-factions-contesting-ezendigbo-title-in-oyo Accessed 23.10.2015; D Olatunji " Mixed Reactions trail Eze Ndigbo Title in Ogun" Available at www.vanguardngr/2015/10/mixed-reactions-trail-ezendigbo-title-in-ogun (Accessed 23.10.2015)

[11] See J Sowole " Akure Traditional Ruler, Igbo Leaders Crisis Resolved" Available at www.thisdaylive.com/articles/akure-traditional-ruler-igboleaders-crisis-resolved/223562 (Accessed 23.10.2015).

the dichotomy between 'Indigenes' and 'non-indigenes' making it compelling to interrogate the relationship between citizenship and customary law.

Nigerian citizens are entitled by the 1999 Constitution to associate as they see fit in any part of Nigeria in all forms and manner including their engagement in practices rooted in their customary ordering such as their chieftaincy institutions. When the hosts of diasporic Nigerians oppose the manifestation of their customary ordering, often because of their customary law, this is often a message that they do not 'belong' in their 'foreign' domain because they are not indigenes. Indigeneity fosters a sense of diminished citizenship if non-indigenes are not able to enjoy their constitutionally endowed rights.

Customary law is crucial for citizenship because it partly constitutes the latter. Customary law represents cultural peculiarities that help to define a citizen. When citizens are allowed to practise their customary law in any part of Nigeria, customary law facilitates citizenship. Where however customary law reinforces indigeneity because the hosts of diasporic Nigerians regard the latter as non-indigenes and unable to enjoy their customary laws, customary law impedes citizenship rights. Here lie the contradiction and tension which this chapter addresses. To what extent it can be asked does customary law impede or facilitate citizenship rights in Nigeria.

This chapter is organized as follows. The next chapter interrogates the theoretical perspectives of customary law and citizenship in Nigeria. The third section explores how residence affects the judicial mediation of the challenges of associational ethnicity. Concluding remarks follow.

2. Customary law and citizenship in Nigeria: Theoretical perspectives

This section of the chapter addresses the relationship between citizenship and customary law and argues that this relationship can be complementary or contradictory. A theoretical construct of this relationship is that they are complementary because customary law constitutes citizenship since it addresses the cultural peculiarities values and practices that are part of the content of citizenship. Customary law, therefore, enables full enjoyment of citizenship rights which includes the rights recognised in the 1999 Constitution. Citizenship entitles citizens to certain human rights which can be enjoyed because of customary law. Human rights such as the freedom of association and movement allow citizens to be able to move and reside in any part of the country. Customary law defines the cultural peculiarities that breathe life and define the content of the freedom of movement and association.

An alternative theoretical construct is that the relationship between customary law and citizenship can be contradictory if customary law becomes the basis of discrimination of citizens by determining those who are 'indigenes' and 'non-indigenes'. While a constitutionally defined citizenship is homogenous and is based on the values of freedom and equality since all citizens have equal rights within the nation-state; customary law is heterogeneous parochial and organised principally around consanguinity. Customary law is thus inherently discriminatory. Customary law thus operates like citizenship on an international plane. Customary law can be described in relation to citizenship as 'domestic discrimination'[12] especially if it leads to a distinction between 'indigenes' and 'non-indigenes'. 'Indigenes' are members of an ethnic group and entitling them to political and economic participation within the territory of the ethnic group. Non-Indigenes are the other Nigerians who even though they are Nigerian citizens are in practice, not able to fully enjoy the benefits of citizenship outside their ethnic area. In their 'foreign' domain, non-indigenes are unlikely to fully participate in the social economic and cultural life of host communities. Where this is true, indigeneity encourages the exclusionary potential of customary law to deprive Nigerian citizens the enjoyment of cultural peculiarities. Indigeneity is, therefore, a confounding variable in the relationship between customary law and citizenship. Were it not to exist in Nigeria, it is plausible that customary law would be largely complementary to citizenship.

To appreciate how indigeneity is a confounding variable in the relationship between customary law and citizenship, one crucial question to address is the nature of citizenship contemplated by the Nigerian constitution. In short, the nature of Nigeria's citizenship is a product of the interaction tension contradiction and complementarity of civic and cultural citizenship. This is evident in different constitutional provisions that reinforce citizenship and customary law. First, the 1999 Constitution of the Federal Republic of Nigeria contemplates citizenship in terms of belonging to a community indigenous to Nigeria.[13] While the term 'community indigenous to Nigeria' may seem ambiguous, it would appear to refer to communities organized around consanguinity. Accordingly, a Nigerian citizen is contemplated as an ethnic Nigerian. Along this line, the indirect recognition

[12] See L Fourchard " Bureaucrats and Indigenes: Producing and Bypassing Certificates of Origin in Nigeria" 2015 85(1) *Africa* 37.

[13] See the provisions of section 25(1)(a) defines citizens by birth as including every person born in Nigeria before the date of independence, either of whose parents or any of whose grandparents belongs or belonged to a community indigenous to Nigeria.

of customary law in the Nigerian constitution[14] reinforces a cultural belonging since the normative framework of ethnic Nigerians is constitutionally protected. It can, therefore, be said that ethnic Nigerian communities are the basis of Nigerian citizenship. It is, therefore, true that Nigerian citizens are at the same time civic, 'liberal'[15] as they are 'cultural' citizens. It is therefore not surprising that there are manifestations of the tension and contradiction between citizenship and customary law which can be found in different parts of the Constitution including the Fundamental Objectives and Directive Principles of State Policy found in chapter 2 of the Constitution. Even though chapter 2 is non-justiciable,[16] it is a significant philosophical ethos of the Nigerian State. In sections 14(3) and (4) of this chapter, the 1999 Constitution speaks to national unity, within the concept of federal character developed to ensure that different parts of the country are recognized in the public sphere. Federal Character as a principle reinforces ethnic identity and solidarity since it highlights how ethnic groups are performing and participating in federal Nigeria. Furthermore, sections 15(2) and (3) of chapter 2 seek to manage the discriminatory tension between citizenship and customary law by requiring the Nigerian State to promote national integration by providing adequate facilities for and encouragement of free mobility of people goods and services across Nigeria and securing 'full residence rights for every citizen in all parts of the federation'. What would a full residence right mean it can be asked? One answer within the contemplation of this chapter is the ability to observe and practice one's customary law in any part of the country where one resides and which should include the ability of a community of these residents to practice their chieftaincy institutions. While the obligation to realise full residence rights fosters a civic/cultural citizenship the differentiation between indigenes and non-indigenes emphasizes attenuated citizenship of which Nigerians are unable to realise their full residence rights. Indigeneity is, therefore, a crucial variable especially when it is facilitated by customary law It is important to determine if there can are alternative interpretations of customary law first that encourages a distinction between 'indigenes' and 'non-indigenes' and another interpretation that makes no such distinction.

Customary Law must necessarily be organized on a territorial basis because it is the system of law based on a cultural community that has an

[14] There is no express recognition of customary law even though numerous provisions of the 1999 Constitution recognise the judicial structures for the enforcement of customary law. See for example section 280 of the 1999 Constitution.

[15] See I Nwachukwu "The Challenge of Local Citizenship for Human Rights in Nigeria" 2005 (13) *African Journal of International and Comparative Law* 235, who regards this type of citizenship as 'civic'.

[16] See section 6(6)(C) of the 1999 Constitution.

identifiable physical domain. This is important in many respects for the land on which the community exists for persons from that community who remain in that community and for people outside that community who live and reside there. This association of customary law to a physical space is manifest in a number of ways including the jurisdiction of Nigerian customary courts where land is not involved.[17] The appropriate question to ask is how a Nigerian's personal law is determined and whether this personal law can be changed since a Nigerians personal law is her customary law.

At birth, a Nigerian acquires a personal law which is that of his/her parents. Through this connection, a Nigerian becomes attached to customary law as appropriate. An important question is whether this customary law attached to a Nigerian for life or whether it can be changed. For long it was thought that a personal law at birth continued for life. Thus in *Osuagwu v Soldier*[18] the Northern Nigerian Court decided to apply Ibo Customary Law to a dispute between two Ibo men living in Northern Nigeria. It was open to the Court to apply rather Islamic law which is the law applying in the area where the Court was situated. The Court said:

> We suggest that where the law of the Court is the law prevailing in the area but a different law binds the parties, as were two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will- in the interests of justice- be reluctant to administer the law prevailing in the area and if it tries the case at all, it will-in the interests of justice- choose to administer the law binding between the parties.[19]

In *Tapa v Kuka*[20], a Nupe Moslem from the Northern part of Nigeria died intestate in Lagos in the Western part of the country. It was held that his personal law as a Moslem was applicable to distribution of his property and not the law that applied in Lagos where he died. In *Zaidan v Zaidan*[21]the personal law of a Lebanese who lived and died in Nigeria was used to

[17] Everybody has an audience before a customary court even though the appropriate customary law that will apply varies. Thus section 7 of the Customary Courts Law of Rivers State 2014 provides that ' Any person who (i) is an indigene of a place in which customary law is in force; (ii) being in a place where customary law is I force does an act in violation of that customary Law; (iii) makes a claim in respect of property or estate of a deceased person under a customary law of inheritance in force in the area of jurisdiction of a Customary Court and the deceased was an indigene of the place in which the customary law is in force; (iv) institutes proceedings in any Customary Court or has by his conduct submitted to the jurisdiction of the Court.

[18] 1959 NRNLR 39

[19] As above at 41.

[20] (1945) 18 NLR 5.

[21] (1974) UILR 283.

distribute his property which included immovable property situated in the then Mid-Western part of Nigeria where he lived and did business.

There are many circumstances by which the personal law of a Nigerian may be changed. They may be summarized as first by contracting a Christian marriage, and secondly by the process of acculturation. With respect to the effect of contracting a Christian marriage *Cole v Cole*[22] is a locus classicus. In that case, a deceased person who lived most of his life in Lagos contracted a Christian marriage. On his death, the question was whether customary law or English Law governed the distribution of his estate. The Court held that the applicable law was English Common Law and this was because by contracting a Christian marriage he had changed law applicable to the distribution of his estate from customary Law to English Law. Following the decision in Olowu v Olowu[23] it is now possible that a person may shed his personal law at birth and acquire a new one in certain circumstances. In that case, a deceased intestate from the Yoruba ethnic group lived all his life outside in Benin Mid-Western Nigeria. He married Benin Women and even successfully applied to the traditional ruler of Benin to be 'naturalised' as a Benin citizen. The Supreme Court held that although the deceased was from a Yoruba extraction, he had by his actions acquired Benin personal Law and had shed his personal law of origin. The applicable customary law for the distribution of his estate was, therefore, Benin Native Law and Custom. The euphoria in the wake of *Olowu* was short-lived and over the years the immutability of customary law continues as orthodoxy. Had *Olowu* wrought large scale changes in Nigeria's cultural fabric, it may have been possible to witness and promote acculturation by non-indigenes involved in large scale migration in a federal Nigeria. Such acculturation would largely render the distinction between indigenes and non-indigenes meaningless.

Indigeneity as a variable transforms customary law into a challenge of Nigeria's citizenship because it enables a juridical resistance to the incidents of citizenship. The point which is examined fully in the next section is that if citizens are regarded as 'non-indigenes' in 'host' communities, their claim to exercise their rights of citizenship could be severely attenuated. If customary law were mutable and can be changed on a number of grounds, it could mean that residence in addition to other factors would determine the personal laws of a citizen whose estate, for example, would be governed by the cultural choices that a citizen makes through facts such as residence.

---

[22] (1898) 1 NLR 15.

[23] (1985) 3 NWLR (Pt 13) 372 (Hereafter *Olowu*). See I.E Sagay ' The dawn of Legal Acculturation in Nigeria- A Significant Development in Law and National Integration: Olowu v Olowu' 30 *Journal of African Law* 179-189.

If residence becomes a significant basis for choice of law in a plural Nigeria it would mean that Nigerians could become 'indigenous' in places where they reside and participate in her public life without the strictures of their birth as it were. Residence would not destroy customary law since one's birth as a connecting factor to customary law is changed by the voluntary acts of a person such as choosing a place of residence anywhere in Nigeria. The new customary law chosen through residence would then govern the personal laws of a citizen.

The importance of recognising residence as a central determinant of customary law has a huge impact on citizenship because it scrubs customary law of its exclusionary potential. Scholarly reflection have pointed to a number of reasons why ethnic identity has manifested and is managed in Nigeria's public sphere through the federal character principle[24] around which the 1999 Constitution seeks to manage the participation of Nigerian ethnicities in her public life. In this regard the State is enjoined to ensure in section 14(3) of the 1999 Constitution that:

> The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few State or from a few ethnic or other sectional groups in that Government or in any of its agencies.[25]

Several other constitutional provisions reinforce this fundamental objective and directive principle. For example, section 147 requires the President of the federation in the appointment of ministers of the federation to appoint at least one Minister from each State[26] who shall be an indigene of that State. Another example is section 217(3) which requires a reflection of federal character in the composition of the officer corps of the Nigerian armed forces. Even though the federating states and local governments of Nigeria are not equivalent to Nigeria's ethnicity, the requirement that federal character is reflected in Nigerian's public life heightens ethnic consciousness and exclusivity that is so crucial in the manifestation of

---

[24] See for example PP Ekeh & E Eghosa (eds) *Federal Character and Federalism in Nigeria* (Heineman Educational Books Nigeria 1989),

[25] Nigeria's states and local governments are similarly tasked in section 14(4) of the 1999 Constitution which provides that: The composition of the Government of a State, a local government council, or any of the agencies of such Government or council, and the conduct of the affairs of the Government or council or such agencies shall be carried out in such manner as to recognise the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation

[26] Nigeria is presently made up of 36 States.

Nigerian identity and ethnicity. The politics of establishing[27] an indigene or non-indigene essentially depends of belonging to a community indigenous to Nigeria and a citizen's immutable customary law as we saw above. Nigerians carry their ethnicity from birth and even with the judicial recognition that one's personal laws are capable of being changed mean little. Residence does not affect indigeneity and indigenes of a state are those who can connect to a state of the federation on the basis of birth which is also the basis of customary law. If residence were to mean much as a connecting factor in Nigerian public life; one's birth and therefore indigeneity would be relegated to the background and there would be little need for principles such as federal character.

3. Residence and judicial mediation of the challenges of associational ethnicity

The narratives of associational ethnicity reveal the struggles of individual desires and communal identity often intertwined in a multi-ethnic society. On one hand, citizens seek to embrace new cultures and yet, on the other hand, there are individuals who in the furtherance of their identity cling to what is familiar in 'foreign' domains. And these two demands are legitimate and compelling. And they are couched in the rights which are due to citizens. Clearly, each of claims set out above demand consideration and reconciliation if they are brought before Nigerian courts. Accordingly, this section sketches the architecture of the human rights framework to forecast how Nigeria n courts would react to each of the claims.

Claimants of associational ethnicity including those who seek the right to choose to install an *Eze Ndigbo* in foreign 'domains' in a federal Nigeria are likely to base their claims on a combination of the right to the freedom of movement; the right to freedom of association and the right to freedom from discrimination. The right to freedom of movement is crucial to citizens in a federal state because the cast of section 41(1) entitles citizens to move freely throughout Nigeria and to reside in any part thereof. It appears that the implied right to residence could be the basis of a claim to observe cultural practices. After all, if the residents form a community, it would be difficult to deny them the right to observe their cultural practices as they see fit. Nigerian courts in a number of cases have recognised the autonomy of Nigerians to join any association they deem fit in any part of the country.[28]

---

[27] See Fourchard, note 12.

[28] See for example the cases of *Agbai v Okagbue* 1997 7 NWLR (Pt 2914) and *Anigbogu v Uchejigbo* [2002] (Pt 776) 472

To depend on the right to freedom of movement to sustain cultural practices is indicative of the reality that the Nigerian Bill of Rights has no right to culture even though customary law is recognised and protected indirectly through the recognition of customary courts. Even though customary law is not directly protected it is the basis of claims made by communities such as *Ndigbo*. Nigerian courts have since the introduction of the Nigerian Bill of Rights evaluated the propriety of customary law rules against human rights standards and have found many of these rules discriminatory on a number of grounds such as gender.[29] Other grounds such as membership of a particular community, or ethnic group as well as sex, religion or political opinion is declared by s. 42 as grounds on which a citizen of Nigeria shall not be subjected expressly by or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of similar characteristics are not subjected to. Communities could argue that their entitlement to their customary law in whatever part of Nigeria they reside is an indication that they are not discriminated against.

Host communities in whose territories customary law is sought to be enforced by communities who are not indigenes would be faced with two options. On one hand, the 'host' community would be acting in furtherance of the constitution to accommodate the observance of such customary rites. The situation could be different if the 'host' community in furtherance of its customary rites imposes conditions or even refuses to allow such customary rites. Such restrictions and prohibition challenge the thrust of the residence rights which entitle communities like *Ndigbo* to observe their customary practices without any restriction. The host community could also rely on the provisions of the derogation clause of the Nigerian Bill of Rights which specifically subjects the exercise of the right to freedom of movement to any law that is reasonably justifiable in a democratic society in the interest of defence, public safety, public order[30], public morality or public health; or for the purpose of protecting the rights and freedom or other persons. Since 'customary law' qualifies as 'any law'[31] and the grounds of derogation broad

[29] See for example the cases of *Muojekwu v Muojekwu* [1977] 7 NWLR (Pt 512) 283; *Muojekwu v Ejikeme* [2000] 5 NWLR (Pt 657) 419; Muojekwu v Iwuchukwu [2004] ALL FWLR (Pt 211) 1406; *Uke v Iro* [2001] 11 NWLR (Pt 723) 196; *Asika v Atuanya* 2008 All FWLR (Pt. 433) 1293

[30] See the following cases: *Inspector General of Police v All Nigeria Peoples Party* [2007] 18 NWLR (pt. 1066) 457; *Chukwuma v Commissioner of Police* [2006] All FWLR (Pt. 335) 177; Osawe v Registrar of Trade Unions (1985) 1 NWLR (Pt 4) 755.

[31] In *Anzaku v Governor Nassarawa State* [2006] ALL FWLR (Pt 302) 308 341: Any Law" is so encompassing an expression, not limiting the type of law. It applies to any system, whether statute law, *customary law, Islamic law or common law,* applicable in Nigeria which subjects

enough, the complaints of the host community that seeks to restrict or prohibit customary practices such as the installation and maintenance of the *Eze Ndigbo* institution can be sustained. On the other hand, it is plausible that the 'host' community could argue that the exercise of the customary law of the community seeking to practice its customary law should be limited according to the tenor of s. 45.

It is important to look quite closely at the cast of s. 45. First, the phrase `reasonably justifiable in a democratic society´ governs the operation of s. 45. While this is a vague term, surely it must be the Nigerian democratic scene conceived by the Constitution as a democratic state with foundational values of freedom equality and social justice and with the fundamental objectives and directive principles of state policy as found in chapter two of the Constitution. Second, the examples of the public interest - defence, public safety, public order, public morality, and public health- are themselves vague and throw up fundamental questions of the nature of the Nigerian society. If `defence, public safety and public health´ seem easier to define, ` public order and public morality´ appear to be more difficult. For example, the question can be asked what is to be constitutive of Nigeria's public morality? There is no doubt that these communitarian values can be found in customary law rules even if indirectly. Accordingly, host communities can claim the broad derogatory principles of s.45 as a basis of the restriction of the exercise of diasporic cultural rights such as the *Eze Ndigbo* chieftaincy. The possibility of a restrictive application of cultural rights does not mean that such rights do not exist. In fact, derogation is evidence of the existence of a right.

In addition to the right to freedom of movement and association, there is abundant evidence that the right against non-discrimination will be used by Nigerian citizens to attack the distinction between indigenes and non-indigenes. Unfortunately numerous attempts to challenge the federal character principle and related issues such as the status of 'indigeneity' and 'non-indigeneity' as well as the use of quotas in the allocation of public goods have failed because of procedural challenges such as a lack of standing[32] mootness[33] and juridical avoidance findings such as the non-justiciability of

a citizen to discrimination, or disability, or restriction on account of any of the grounds specified in the section.

[32] See for example *Badejo v Federal Ministry of Education* 1996 8 NWLR (Pt 464) 8.

[33] See *Badejo* Ibid. A suit alleging discrimination on the basis of birth in terms of quotas in admission into post-primary education in Federal government colleges was struck out on the basis of a lack of standing. By the time an appeal was upheld by the Court of Appeal, the admission process had been completed a fact which led the Court of Appeal to strike out the appeal which was upheld by the Supreme Court.

chapter 2 of the 1999 Constitution.[34] Cumulatively, it would be fair to conclude strongly that Nigerian courts are wary of engaging with the challenge of customary law and citizenship. One needs to look beyond the constitution for a reason(s). It may well be that Nigerian courts imagine that the process of managing cultural peculiarities is intuitively a political process not easily amenable to judicial determination.[35] In this regard, there is evidence from parts of Nigeria for the management of 'indigene-non-indigene' dichotomy. In Kaduna State the Governor El-Rufai declared that this dichotomy has been abolished preferring to recognize the difference between residents and non-residents through the establishment of a Kaduna State Resident Registration Agency.[36] The fact that residents have been singled out appears to be an admission that the difference between indigenes and non-indigenes has become a significant part of Nigeria's political space. It may also be part of the political process of dealing with the exclusion of resident/citizens from the public space. This intervention can also be meaningful in ensuring that host communities respect the rights of citizens to enjoy their cultural rights. The provisioning of the *Eze Ndigbo* chieftaincy institution will certainly benefit from the mediation of State intervention. Perhaps, it is a political intervention that will arrest the inability of Nigerian courts through the Bill of Rights to act as a credible site for the engagement of the challenge posed by customary law and citizenship is unfortunate and costly. Since this dichotomy between indigenes and non-indigenes has led to violent ethnic protests confrontations and destruction[37] political initiatives to ensure that diasporic Nigerians are able to enjoy their citizenship rights are welcome.

It is unfortunate that the effect of *Olowu* has not been further explored in Nigerian jurisprudence because that decision comes down on the side of national integration. In this case, the Supreme Court clearly utilised the law as an instrument of social engineering, towards the promotion of national integration in Nigeria. In particular, the Court has clearly promoted the attainment of one of the goals of Chapter II of the 1979 Constitution on fundamental objectives and directive principles of State policy, namely section 15 which calls for unity and national integration and the prohibition

---

[34] See *Adamu v Attorney General of the Federation* (1996) 8 NWLR (Pt. 465) 203 where issues of religious discrimination were sidestepped because of a finding by the Court of Appeal that the suit bordered on section 18 of chapter 2 of the 1979 Constitution.

[35] This would fit within the classic example of the political question doctrine recognised by Nigerian courts in *Onuoha v Okafor* (1983) 2 SCNLR 244.

[36] See Premium Times Editorial ' Why El-Rufai's Concept of Equal Citizenship Deserves Support' Available at https://opinion.premiumtimesng.com/2019/04/30/editorial-why-el-rufais-concept-of-equal-citizenship-desrves-support (accessed 19 June 2019).

[37] See W Adebanwi "Terror Territoriality and the struggle for Indigeneity and Citizenship in Northern Nigeria" 2009 13 *Citizenship Studies* 349-363.

of discrimination based on place of origin, sex, religion, status, ethnic and linguistic association. While that decision speaks to Nigerian citizenship, it is also in support of a residence based customary law that is crucial in resolving the challenge posed by customary law to citizenship. If Nigerian citizens could change their customary law by cultural choices, it would mean that the exercise of their residence rights does not prejudice or 'reduce' the worth of their citizenship.

4 Concluding remarks

This chapter has engaged with the challenge of the normative relationship of customary law and citizenship rights mediated by indigeneity and residence through a human rights methodology to frame the tensions and contradictions in a federal Nigeria. The fact that the *Eze Ndigbo* chieftaincy institutions thrive in different parts of Nigeria is evidence of civic Nigerian citizenship constituted by cultural peculiarities. The emerging turn to the political process in resolving the tensions generated by this example of associational ethnicity is also to be welcomed. The articulation of the jurisprudence of a residence based customary law along the lines of *Olowu* is more than overdue by Nigerian courts.

BIBLIOGRAPHY

Literature

Adebanwi W (2009) “Terror Territoriality and the struggle for Indigeneity and Citizenship in Northern Nigeria”13 *Citizenship Studies* 349-363.

Albert IO (1993) “ The Growth of an Urban Migrant Community: The Hausa Settlement in Ibadan, c. 1830 - 1979’ 4 IFE: Annals of the Institute of Cultural Studies 1-15.

Ekeh PP & Eghosa E (eds) (1989) *Federal Character and Federalism in Nigeria* (Heineman Educational Books Nigeria)

Fourchard L (2015) “Bureaucrats and Indigenes: Producing and Bypassing Certificates of Origin in Nigeria” 85(1) *Africa* 37- 58.

Harneit-Sievers A (1998) '' Igbo ‘Traditional Rulers'': Chieftaincy and the State in Southeastern Nigeria'' 33(1) *Africa Spectrum* 57-79;

Nnoli, O. (1978) Ethnic Politics in Nigeria (Fourth Dimension Publishers)

Nwachukwu I (2005) “The Challenge of Local Citizenship for Human Rights in Nigeria” 13 *African Journal of International and Comparative Law* 235-261.

Olaniyi R (2006) *Approaching the Study of Yoruba Diaspora in Northern Nigeria in the 20th Century*’ in T Falola & A Genova (eds) Yoruba Identity and Power Politics University of Rochester Press 2006 231-250.

Osaghae EE (2013) Trends of Migrant Political Organisation in Nigeria: The Igbo in Kano (IFRA-Nigeria)

Sagay IE (1986) ‘The dawn of Legal Acculturation in Nigeria- A Significant Development in Law and National Integration: Olowu v Olowu’ 30 *Journal of African Law* 179-189.

Suddarkasa, N (‘From Stranger to Alien: The Socio-Political History of the Nigerian Yoruba in Ghana 1900-1970; in W A Shack & EP Skinner (eds) *Strangers in African Societies*, University of California Press Berkeley 141-167.

Tijani A "The Hausa Community in Agege, Nigeria 1960-1967' 17(2) 2008 *Journal of Social Sciences* 173-180.

Cases

Anzaku v Governor Nassarawa State [2006] ALL FWLR (Pt 302) 308 341
Adamu v Attorney General of the Federation (1996) 8 NWLR (Pt. 465) 203
Agbai v Okagbue 1997 7 NWLR (Pt 2914)
Anigbogu v Uchejigbo [2002] (Pt 776) 472
Asika v Atuanya 2008 All FWLR (Pt. 433) 1293
Badejo v Federal Ministry of Education 1996 8 NWLR (Pt 464) 8.
Chukwuma v Commissioner of Police [2006] All FWLR (Pt. 335) 177
Cole v Cole (1898) 1 NLR 15
Inspector General of Police v All Nigeria Peoples Party [2007] 18 NWLR (pt. 1066) 457
Muojekwu v Ejikeme [2000] 5 NWLR (Pt 657) 419;
Muojekwu v Iwuchukwu [2004] ALL FWLR (Pt 211) 1406
Muojekwu v Muojekwu [1977] 7 NWLR (Pt 512) 283;
Olowu v Olowu (1985) 3 NWLR (Pt 13) 372
Onuoha v Okafor (1983) 2 SCNLR 244
Osawe v Registrar of Trade Unions (1985) 1 NWLR (Pt 4) 755.
Osuagwu v Soldier 1959 NRNLR 39
Tapa v Kuka (1945) 18 NLR 5
Uke v Iro [2001] 11 NWLR (Pt 723) 196
Zaidan v Zaidan (1974) UILR 283

Legislation

Customary Courts Law of Rivers State 2014

Internet Sources

D Johnson " How Market Leadership Tussle Demotes Akure's Eze Ndigbo" Available at www.vanguardngr.com/2015/10/how-market-leadership-tussle-demotes-akures-eze-ndigbo (Accessed 23.10.2015);

O. Ajayi " Three Factions contesting Eze Ndigbo Title in Oyo" Available at www.vanguardngr.com/2015/three-factions-contesting-ezendigbo-title-in-oyo Accessed 23.10.2015

D Olatunji " Mixed Reactions trail Eze Ndigbo Title in Ogun" Available at www.vanguardngr/2015/10/mixed-reactions-trail-ezendigbo-title-in-ogun (Accessed 23.10.2015)

J Sowole " Akure Traditional Ruler, Igbo Leaders Crisis Resolved" Available at www.thisdaylive.com/articles/akure-traditional-ruler-igboleaders-crisis-resolved/223562 (Accessed 23.10.2015).

Aare Gani Adams Condemns Installation of obas in diaspora by Olugbo" The Guardian (Nigeria). Available at https://guardian.ng/news/aare-gani-adams-condemns-installation-of-obas-in-diaspora-by-olugbo (accessed 19-06-2019)

Chapter 6

Compulsory loss of pastoral land tenure systems in Ethiopia

Muradu A. Srur*

Abstract

This chapter examines three approaches to pastoral land tenure systems in the context of Ethiopia. The first approach is consideration of the degree to which pastoral land tenure systems have been recognized by successive governments in Ethiopia through review of constitutional and legislative instruments, and relevant literature; such analysis indicates that government policies and laws have adopted wholesale abolition of pastoral land tenure systems. The constitutional and legal nullification measures have been accompanied by schemes which have excluded pastoral people. The repudiation approach of successive governments of Ethiopia towards pastoral land systems has been influenced predominantly by the economic and individualistic orientation of property rights in land. The second approach to pastoralism comes from the pastoral people themselves who have persistently countered the high modernist perspective of the national government on the grounds of collective cultural identity and resilience of their own diverse modes of life rooted in custom form of dealing with pastoral lands and other natural resources. It is argued that both the status quo and bottom-up approaches to pastoralism are not sustainable - calling for a third way. Thus, the most important challenge ahead in pastoralism discourses for intellectuals as well as development practitioners is to find out the appropriate mix of the two seemingly contradictory perspectives. In this regard, one finds an emerging and promising scheme called benefit sharing, which is getting increasing attention in literature and development discourses.

Keywords: Pastoralists, compulsory, modernization, customary law, property, land, equality fairness, sedentarization

1. Introduction

This chapter examines the degree to which pastoral land tenure systems have been recognized by successive governments in Ethiopia through a review of constitutional and legislative instruments, and relevant literature; such analysis indicates that government policies and laws have adopted wholesale abolition of pastoral land tenure systems. Also, this chapter reveals that the constitutional and legal nullification measures have been accompanied by schemes which

have excluded pastoral people such as land enclosures for eco-tourism; national parks and wildlife sanctuaries; plantations and farming; dams, and sedentarization of pastoralists. These projects have produced significant adverse consequences on pastoral communities in terms of compulsory loss of land rights; food insecurity; competition for scarce resources; exacerbation of conflicts; environmental degradation and above all weakening of their distinctive livelihoods.

The chapter is organized as follows. Section 2 sets the scene for the entire discussion by explaining contexts and the importance of pastoral landholdings in Ethiopia. Section 3 analyzes the mechanisms embodied in various constitutions and subsidiary land statutes meant to nullify pastoral land tenure systems. Section 4 suggests that such measures of repudiation have not been innocuous as they have led to harmful consequences on pastoral communities, is followed in section 5 by a discussion of the justification invoked often by the government for their nullification approach to pastoral customary land laws. Section 6 discusses the counter-narratives of pastoral people. Finally, the chapter concludes with the underlying point that the repudiation approach of successive governments of Ethiopia towards pastoral land systems has been influenced predominantly by the economic and individualistic orientation of property rights in land. This in particular means that land rights, from the standpoint of successive governments of Ethiopia, exist in the context of a private and exclusively defined tract of land and a conception of pastoral land as falling invariably within the purview of state domain. The concluding discussion suggests further research be conducted on a third path to pastoralism – benefit-sharing approach.

2. Importance of the pastoral areas of Ethiopia

Pastoral people occupy Ethiopia`s periphery, which makes up about 60% of the total landmass of the Horn of Africa country. The pastoral area is home to approximately 12-15% of Ethiopia`s 105 million people with around 2.9% annual growth. It exhibits ethnic, religious and livelihood diversity. The pastoral part is encircled by the highland part of the Country, which supports around 85% percent of the total population that practices largely sedentary agriculture founded upon small landholders. Government bureaucracy and political leadership in Ethiopia have invariably been drawn from highland elites who have often viewed the pastoral territory as El Dorado.

Ethiopia`s pastoral area is agro-ecologically diverse with fragile eco-systems. It witnesses chronic, regular and massive food insecurity. The area lies 1,500 meters below sea level, representing arid and semi-arid plain fields; it is traversed by significant rivers suitable for commercial irrigation including ranching.[1] The pastoral area forms Ethiopia's long international border with Eritrea, Djibouti, Somalia, Kenya, South Sudan and Sudan. In the area, there are frequent intra and cross border conflicts, as well as contraband and movement of small arms.

Under the customary land law of pastoral people of Ethiopia, there are two broad landholding typologies; namely landholdings of individual pastoral families and communal rangelands. Landholdings of individual pastoral families are small in size and secondary in importance to the pastoral mode of life and are allocated to individual pastoralists by concerned clan authorities. These landholdings are used for housing, animal encampments, grazing land for milk cows and camels. Each pastoral family, concerning these land possessions, has exclusive use right including the right to cultivate, graze and plant perennial crops and the right to inherit to family members without any consultation to clan authorities. Family landholdings can also be leased or donated to members of the clan or third parties only after securing prior permission from clan authorities.[2]

Communal rangelands, which constitute the major land tenure form and institutions in the pastoral segment of Ethiopia, are founded upon communal exploitation of land and landed resources. Communal rangelands are vast and conferred on groups by clan authorities. Communal lands are central to the livelihoods of the pastoralists for they use the commons to carry out life-sustaining activities such as grazing, gleaning, and firewood and honey collection, as well as place of burial and of cultural, origins of water and sites of religious rites and festivities. Especially poor pastoralists, are disproportionately more dependent on the rural commons.[3] Beyond survival, pastoral land tenures reflect their world views, identity, and entire social, economic and political

---

* *Associate Professor of Law, Addis Ababa University, School of Law* muradu.abdo@aau.edu.et.

[1] They are the Awash River, the Wabe Shebelle River, the Omo River, the Baro River, and the Genalle River.

[2] N Kabtamu *Land Tenure and Tenure Security among Somali Pastoralists: Within the Contexts of Dual Tenure Systems* (2012) 73-76.

[3] D Bromley 'Property Relations and Economic Development; The Other Land Reform' (1989) 17 *World Development*.

fabrics. In specific terms, communal grazing lands, by custom, bestow use right upon all individual male members of a given clan. The use right encompasses the use of the entire rangeland for grazing livestock or making charcoal or using firewood or collection of gums and incense, yet rights over communal land do not extend to the right of transfer including the transfer of land to investors and land administration which are exclusively vested in the council of clan elders.[4] Both pastoral family landholdings and communal rangelands depend ultimately on clan land ownership and management. In this predominate clan space, economic activities such as eco-tourism; livestock farming; exploring and mining minerals; commercial agricultural and electricity generation threaten pastoral land tenure systems. Also, there are other projects such as the expansion of educational and health services; mega road and railway infrastructure developments with great national and continental geopolitical importance compound the problem. In sum, this chapter demonstrates that these projects have not been carried out in a manner that respects the rights of pastoral societies guaranteed in constitutional and international human rights standards.[5]

3. Constitutional and legislative status of pastoral land tenure systems in Ethiopia

As the present section portrays, the top-down transformation of the pastoral land tenure systems represents the underlying mindset of the successive governments of Ethiopia. This attitude is embodied in various constitutions and legislation which invariably invalidate and replace pastoral mode of land governance and thus heralding the juridical death of pastoral land tenure systems. To this end, the first and second sub-sections discuss history of constitutional and legislative treatment of norms and institutions that govern pastoral lands in Ethiopia by the Imperial and Derg regimes[6]. This is followed, in the third sub-section, by the examination of the similar issue of the

[4] Kabtamu (n 2 above) 76.

[5] D Ayele *Large-Scale Agricultural Development and Land Rights of Pastoralists in Ethiopia: A Case Study of The Bodi People* (2015).

[6] The Imperial Period refers to the period reign of Emperor Haile Selassie I who ruled Ethiopia between 1930 to early 1974 while the Derg Period relates to the time of military rule from 1974 to mid 1991.

constitutional and legal status of pastoral land norms and institutional arrangements in present-day Ethiopia.

The legal status of pastoral land tenures in the Imperial Period,1930-1974

The 1931 and 1955 Constitutions are similar in respect of their provision for pastoral land tenures. The 1931 Constitution of Ethiopia declared ultimate Crown ownership over all lands and other resources in the Country. That constitution under Articles 27, 76 and 78, recognized only three categories of property; namely, the property of the Crown, private property and state property; it did not give any recognition to communal ownership of land and other resources. The 1955 Revised Constitution, in Article 130 (d), provided that

> All property not held and possessed in the name of any person, natural or juridical,… whether real or personal, as well as all products of the sub-soil, all forests and all grazing lands, water-courses, lakes and territorial waters, are State Domain".

Further, within the tradition of its predecessor, the 1955 Revised Constitution acknowledged private property and state property without mentioning communal land and landed resources.[7] Both constitutions gave constitutional status to the state`s historic claim of absolute territorial dominion (radical state title) over all lands, both in sedentary or pastoral, areas of the country. Regarding the state`s historical claim over the land, Russel Berman writes "The theory of residual state ownership finds particular support in the Ethiopian tradition of feudal land tenure … the principle … seems to be generally accepted by scholars that all land in Empire was … held of the Emperor and at his pleasure…"[8] Richard Pankhrust also states that ''the ownership of land in Ethiopia was traditionally vested in the sovereign who could allocate or appropriate it at will."[9]

The 1960 Civil Code is one of the six western-oriented codes Ethiopia adopted between 1957 and 1965 with the primary aim of laying the foundation of a

[7] Revised Constitution of Ethiopia of 1955, Arts 43-44 and 60.

[8] B Russel 'Natural Resources: State Ownership and Control Based on Article 130 of the Revised Constitution' (1966) 3 *Eth. J. L.* 555.

[9] P Richard *State and Land in Ethiopian History* (1966) 185.

market economy, and more broadly, to assist the country`s endeavor to "modernize" itself.[10] The property law section of the Civil Code, which runs from Article 1126 to Article 1674, is to a large degree still in force. If one goes through this portion of the Civil Code in search of provisions based on customary property rules, one finds few and insignificant references to custom.[11]In fact, one finds the sweeping repeal provision in the Civil Code, that is, Article 3347/1 that provides that *"*Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed*".* Therefore, the ability to reference and apply customary laws under the Code is extremely limited.

At the time the Code was drafted state policy devalued and underestimated customary laws for they were thought to undermine the social, political and economic progress of the country.[12] In particular, the Code swept away custom generally and land tenure systems of the pastoral people particularly under the assumption that they impede land markets, encourage incessant land litigation, fragmentation, diminution of land and thus impediments to the modernization of agriculture and the wider economy.[13] This policy view is reflected in the writings of Rene David, the drafter of the Code, as follows.

> …Ethiopia wishes to modify her structure completely, even to the way of life of its people. Consequently, Ethiopians do not expect the new code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create. Ethiopia cannot wait 300 or 500 years to construct empirically a system of law which is unique to itself, as was done by the Romans and the English. The development and

[10] Such codes were: Criminal Procedure Code of 1961; Civil Procedure Code of 1965; Penal Code of 1957; Commercial Code of 1960 and Maritime Code of 1960.

[11] See, for example, the Civil Code of 1960 Arts 1132/1, 1168/1, 1170/2, 1370, 1386-1409 and 3363-3367.

[12] G Krzczunowicz 'Code and Custom in Ethiopia' (1965) 2 *Eth. J. L.*; J Beckstrom 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' (1973) 21 *AM. J. of Comp. L.*

[13] H Dunning 'Land Reform in Ethiopia: A Case Study in Non-Development' 18 *University of California Law Review*; S Joireman 'Contracting for Land: Lessons from Litigation in a Communal Tenure Area of Ethiopia' (1996) 30 *CJAS*.

> modernization of Ethiopia necessitate the adoption of a "ready-made" system; development and modernization force the reception of a foreign system of law in such a manner as to assure as quickly as possible minimal security in legal relations.[14]

The Imperial Period went far beyond mere constitutional and legislative declaration about the nullification of the norms concerning pastoral land tenure systems; it also invalidated and replaced the institutional arrangements for such landholding systems. Thus, the Imperial period put the administration of land, including pastoral landholdings under government institutions. In 1943, the Ministry of Interior[15] was in charge of urban land administration while later in 1966 the administration of both urban and rural lands was transferred ~~given~~ to the Ministry of Land Reform and Administration.[16] The Imperial government formed a network of territory-based government structures extending from province down to neighborhoods; such administrative edifice included the formation and functioning of land administration at *Teklay-Gezat* (province), Awuraja (sub-province) and woreda (sub-district) levels. These structures implied the intention of the government to repeal the institutional frameworks for customary land tenures including pastoral land tenures.

Status of pastoral land tenures during the Derg period, 1974-1991

The attitude of the Derg regime towards pastoral land regimes can be inferred from the core elements of the Public Ownership of Rural Lands Proclamation of 1975.[17] Firstly, the Rural Lands Proclamation patently abrogated the then-existing multiple forms of land tenure when it declared in Article 3 that,"…rist [communal) land is [abolished] … [thus] no person may put claims to land in rist areas… No law…practice, written or customary shall…have force…in respect of situation provided in this Proclamation." More specifically, the Rural Lands Proclamation, under Article 27, considered pastoral land tenure systems to last until the Government discharges its responsibility "to settle the nomadic people for farming purposes." Secondly, this revolutionary land statute, in Article 3,

[14] R David 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1963) 37 *Tul. L. Rev.* 188-89 and 193.

[15] See Imperial Order No 1 of 1943.

[16] See Imperial Order No 46 of 1966.

[17] Hereafter the Rural Lands Proclamation.

replaced the diverse customary land tenures by a single land tenure mode thus: "all rural lands shall be the collective property of the Ethiopian people…" Finally, the same law was built on the explicit assumption that land-use rights were to be held either privately by households or collectively by producers` cooperatives or by state farms following state laws but not communally according to customs.

The Derg regime adopted a constitution in 1987 which consolidated the Derg`s measures reflected in a series of proclamations enacted since 1974. The 1987 Constitution recognized three forms of property; namely, socialist property which included state property which encompassed all ''Natural resources, in particular land, minerals, water and forest and cooperative ownership", private ownership and other forms of property such as the property of mass associations and personal property (Articles 12, 13, 15 and 18). Thus, this constitution left no room for the autonomous existence of normative and institutional aspects of pastoral land tenure systems.

The Rural Lands Proclamation discussed above retained centralized and state-driven land administration organizational framework. To this end, the legislation divided rural Ethiopia, including pastoral parts of the country, into villages each with a minimum of 800 hectares of land and formed a peasant association in each of these villages. The peasant associations were mandated to carry out development by administering land including distribution and redistribution of rural lands and establishing judicial tribunals to hear land disputes,[18] undertaking villagization program, administering and conserving any public property within the area especially the soil, water, and forest.[19]Assumption of the leadership of the peasant's associations was supposed to be based on election, rather than traditional considerations, by the general assembly of a peasant association.[20]

The Rural Land Proclamation set up a second level rural administration called *woreda* (district) peasant association composed of delegates from each association established at an area level to coordinate the functions of peasant associations, to change the boundaries of areas so that peasants within a *woreda* would have, as far as possible, equal holdings, allot unoccupied land to any person who has no land or other means of livelihood, establish a *woreda*

[18] Article 28 of the Rural Lands Proclamation annulled rural land cases pending in the ordinary courts, prohibited regular courts from entertaining new rural land cases and vested judicial tribunals of peasant associations with the power to handle all rural land disputes.

[19] The Rural Lands Proclamation Arts 8 & 10.

[20] Art 9 ibid.

judicial tribunal to hear and decide appeals from the decision of the judicial tribunal at the area level as well as first instance jurisdiction to hear and render final decision over land disputes arising between areas.[21]For inter-*woreda* matters, the third tier of peasant association called an *Awuraja* (sub-province) peasant association was formed to coordinate the functions of *woreda* peasant associations and to establish an *Awuraja* judicial tribunal which was supposed to hear and render final decision over land disputes decided at first instance by a *woreda* judicial tribunal; land disputes were required to be heard and resolved by different levels of tribunals formed under peasant associations, no more by customary elders.[22]

Constitutional and legislative status of pastoral land tenures since 1991

The 1995 Constitution is quite progressive; it is the first of its kind in Ethiopia`s constitutional history to explicitly recognize land rights of pastoralists and offer protection against displacement from their lands. However, its recognition of the normative and institutional elements of pastoral land tenure system is weak. This is discernible from its various clauses. First, in terms of land ownership, the 1995 Constitution declares that land and all other natural resources are exclusively vested in the form of common property in the State and 'nations, nationalities and peoples' of Ethiopia.[23] Thus, pastoral people are not recognized as owners of their rangelands and other resources within their customary territory as a distinct land tenure form and mode of livelihood. Secondly, the 1995 Constitution recognized the attenuated land rights of pastoral people. Accordingly, the supreme law of the land provides that Ethiopian pastoralists have the right to access and use rights over agricultural land without payment.[24] The 1995 Constitution further provides for the immunity of pastoralists from eviction from their land possessions in stipulating in Article 40(5) that "Ethiopian pastoralists have the right … not to be displaced from their land." However, it should be noted that his constitutional arrangement precludes pastoralists from deciding on the contents of land rights according to their customs. This means pastoral people in Ethiopia are not given a constitutional entitlement to have access to and retain land within the tradition of the pastoral

[21] Art 11 ibid.

[22] Art 11 (3 and 4) ibid.

[23] The FDRE Constitution Art 40 (3).

[24] Art 40 (4) & (5) ibid.

form of tenure system. Thirdly, from an institutional point of view, the 1995 Constitution empowers the government as an administrator of land. This endowment implies the possibility of the government of expropriating pastoral land for demands including reallocation to the land poor, the landless and investors. The Constitution further empowers the Government, not the pastoral communities, as a trustee of land ''to hold land on behalf of the People and to deploy [it] for their common benefit and development…''.[25]Fourthly a combined reading of Articles 34 (5) and 78 (5) of the 1995 Constitution is an illustration of its further limitation concerning the recognition of pastoral land tenure systems. This is because these constitutional clauses offer limited scope for customary laws as they recognize adjudication of disputes relating to personal and family laws with the consent of the parties to the dispute. The provisions give green light to federal and regional lawmakers to recognize customary courts that can handle disputes over personal and family matters. This means that had the framers of the Constitution wished to give broader recognition to customary laws, they would not have limited themselves to the recognition of customary laws related only to personal and family matters. Finally, another example of weak recognition of pastoral land tenure systems by the 1995 Constitution is found in the concept of property, which is defined as: '… any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital of an individual citizen…'[26] Another clause in the same Constitution provides that '… Every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvement he brings about on the land by his labor or capital.'[27] The joint reading of these clauses[28]shows that the Constitution has subscribed to the notion of improvement, which means that, for any person to have a legal claim over land they must show that they have made an improvement traceable to their labor and/or capital. Thus one cannot claim land without establishing improvements thereon. Unimproved land in this sense belongs to the state. Those who merely extract mere natural fruits from communal land cannot under this approach claim to have a right over those resources for they have not met the requisite condition for claiming such right.

[25] Art 89 (5) ibid.
[26]Art 40 (2) ibid.
[27] Art 40 (7) ibid.
[28] 40(8) ibid

What is worrisome, as discussed in what follows, is that the position of the Constitution regarding pastoral landholdings enunciated above has been made even weaker under federal and regional land laws passed since 1997. The first rural land law after the 1995 Constitution was the 1997 Federal Rural Land Law. This legislation did not provide for payment of compensation for improvements on communal landed resources in cases where 'nomads' lose their land rights due to government-initiated land distribution suggesting that the pastoral rangelands could be taken without compensation where the state needed them. This law defined land rights of 'nomads' in such a manner that their land-use rights is conditioned upon land demarcation in the sense of individual farm plots destined for sedentary agriculture and that it is only in that context that one`s land possession gets the blessing of the government with its implication for payment of compensation for labor-related improvements thereon upon expropriation and government initiated-distribution (Articles 2 (4), 6 (6) and 6 (7-9).) This legislation conflated a community with a *kebele*(neighborhood) - territory-bound lowest government administrative unit.

The 1997 Federal Rural Land Law was repealed and replaced by the 2005 Federal Rural Land Law, which is presently in force. The preamble of the Federal Rural Land Law of 2005 reveals the intention of the government to replace pastoral customary tenure when it states it's objective is to encourage "…private investors in pastoralist areas where there is tribe based communal landholding system." The same law defines state landholding as "rural land demarcated and those lands to be demarcated…and includes forest lands, wildlife protected areas, state farms, mining lands, lakes, rivers, and other rural lands" whereas communal landholding is described as "rural land which is given by the government to local residents for common grazing, forestry, and other social services." Thus, the government authorities are givers and takers of communal land. More telling is that the legislation under discussion seriously threatens the land rights of pastoralists when it stipulates that "Government being the owner of rural land, communal rural landholdings can be changed to private holdings as may be necessary."[29]Further, the land legislation in question stipulates that a pastoralist, is restricted to the transfer of his/her rural land use right through inheritance to a family member[30], which is defined as "any person who permanently lives with holder of holding right sharing the livelihood of the

[29] See Federal Rural Land Law of 2005 Art 5 (3).

[30]. Article 2 (4) cum Article 8 (5) ibid.

later."[31] This definition privileges livelihood as a sole criterion in obtaining land right in the form of succession; it detaches land right inheritance from natural and customary affinities. In doing so, it curbs the freedom of a pastoralist, recognized under pastoral land tenure systems, to bequeath his/her land-use rights to any person with whom he/she has blood or marital relations. Moreover, the 2005 Land Law states that "disputes over rural landholding right may be settled through agreement or discussion by the parties concerned or failing that by an arbitral body appointed by the parties to the dispute or be decided following rural land administration laws of the Region concerned."[32]Even if this provision appears to open an avenue for customary norms and institutions, the power to recognize the customary mechanism of dispute settlement is entirely left to the discretion of regional governments. Finally, there is the repeal clause in the 2005 Land Law which provides that, "No law …. or practice shall, in so far as it is inconsistent with Proclamation, be applicable concerning matters provided for in this Proclamation."[33]This opens, as mentioned above, the possibility of subsidiary land legislation to repeal pastoral land tenure systems which are in line with the tenets of the Constitution so long as such tenure rules are not in harmony with the legislation concerned. And beyond and above legal repeal, the general reluctance or even failure to issue land certificates concerning communal lands of pastoralists while issuing certificates to peasants` private landholdings under Ethiopia`s ongoing rural land certification programs reflect the age-old thinking of the Government that the pastoral commons belong to it.

Another legislation that threatens the pastoral land tenure system is the Federal Expropriation Law of 2005. This law was crafted in a manner that precludes pastoral people from demanding compensation in the event of expropriation of their land possessions. This is done by conceptualizing a landholder as "an individual…and [who] has lawful possession over the land to be expropriated…"[34]The concept of landholder is further amplified to mean he/she who produces ''proof of legitimate possession of the expropriated landholding…''[35] Thus, it appears that the communal holdings of pastoralists, for instance, are not given recognition in their existing forms but only when

[31]Article 2 (5) ibid.

[32]Article 12 ibid.

[33]Article 20 (2) Ibid.

[34] Federal Expropriation Law of 2005 Art 2(3).

[35]See Expropriation Regulations of 2007.

pastoralists transform their ways of life into sedentary farming. The ‘‘lawful possession of the expropriated landholding’’ is made a precondition to receiving compensation in the event of expropriation.[36]Here the term ‘lawfully' seems to mean production of evidence of the acquisition of private landholding according to state law, not any other evidence, such as per customary practices. Thus, it looks that any category of land other than the one held by private persons constitutes state holding. This implied classification of land enlarges the size of state landholding to the detriment of pastoral landholdings, thereby spelling the juridical death of the commons generally and pastoral land tenures particularly in the eye of the state.

It may be also instructive to consider the statutory status of pastoral land tenures under some regional state land laws.[37] The Rural Land Law of the Southern Regional State of 2007 defines communal landholding as ‘‘land out of government or individual possession and is being under the common use of the local community as a common holding for grazing, forest, and other social services’’[38] This same law states landless youth and peasants with less farmland shall be given rural land which is possessed by the community. Here local government authorities are authorized to distribute communal land, but not communities who are legitimate claimants of such lands. As a verbatim reproduction of a provision in the Federal Rural Land Law of 2005, the same statute confers ownership over communal land upon the government when it provides that ‘‘Government, being the owner of rural land, can change communal rural land holdings to private holdings as may be necessary.’’[39]Another regional land law, the Afar Regional State Rural Land Law of 2009[40] reproduces this same community disempowering stipulation concerning communal lands. The Rural Land Law of the Tigray Regional State of 2008 is also no exception in subjecting the fate of communal lands including pastoral landholdings to the will of the lowest echelon of government administration when it provides:

[36] Article 22 ibid.

[37] Ethiopia is a federal state with nine federating units called regional states according to the 1995 Constitution, each regional state with the power to administer land which entails enactment of laws on the matter.

[38] Art 2 (14)).

[39] Art 5 (14)).

[40]Art. 5 (16).

> Grazing land means land demarcated at the time of land redistribution and land demarcated with the consent of the local people and kebele administration. Use of grazing land shall be by the custom of the locality concerned. The local people shall prepare and implement regulations regarding use of grazing land through Kebele council.[41]

It is interesting to note that the 2010 Rural Land Law of the Beni-Shangul Gumz Regional State recognizes the value of community consultation by local communities about the conversion of communal lands to private holding. This law, thus, states:

> Where necessary and with the acceptance of the community, such lands shall be changed into private possession and by using modern technique utilizing the land for grazing, forest, and other perennial crops. Communal lands found in the region shall be changed into private grazing possession gradually and substituted by improved forest species to develop the potential of productivity. Communal grazing land shall be put to its development potential/productivity with the participation of the community. Local laws issued by the people and customary practices that do not contravene the law shall apply to utilization of communal lands. [42]

It should nevertheless be noted that the critical decision about communal landholdings (changing communal land use patterns), under the Beni-Shangul Gumz Regional State land legislation just cited, still lies in the hands of local government authorities. A mere obligation to consult communities is imposed on them. The translation into reality of such kind of pledges to consult people in authoritarian states such as Ethiopia has often been something much to be desired.

From an institutional perspective, customary institutions in charge of administering pastoral lands have been overlaid by state-driven land administration institutions. In the current federal political dispensation, there is a federal ministry of agriculture and natural resources in charge of drafting and proposing to the Government rural land laws with nation-wide applicability and building the capacity of regional land administration institutions. The federating units (regional states) are mandated to administer land and to that effect, they

[41]Art. 26.

[42] See Art 29.

have organized themselves into land administration bureaus at the regional level, land administration sectors at zonal level, land administration office at *woreda* (district level), land administration desk at *kebele* (neighborhood level). There is further the Ministry of Peace in charge of some kind of intervention including resettlement in pastoral areas of the country. In this array of government institutional arrangements, the role of customary pastoral land administration institutions is nowhere to be seen. Hence, tacit statutory repudiation seems to be the government`s preferred approach towards the institutional arrangements of pastoral land tenure systems.

4. The effect of the constitutional and legislative laws on pastoral land tenure systems

The discussion in section 3 on constitutional and legislative frameworks indicates that wholesale repudiation of the pastoral form of land governance has been the policy intent of the successive governments. At this juncture, it is sound to inquire whether or not such sweeping statutory nullification of the normative and institutional aspects of pastoral land tenure systems is of any ~~no~~ practical effect. There are two contrasting narratives to this end; one argues in favor of the harmless nature of the sweeping repeal measures while the other thinks that the weakened pastoral land tenure system is consequential.

Arguments in favor of the harmless nature of repudiation of pastoral land tenure systems

The first narrative in the literature holds that one should not make a fuss of federal and regional land laws regimes that seek to wipe out pastoral land norms and institutions because pastoral people enjoy *de facto* effective control of land administration. It is argued that the reason for the survival of pastoral land systems in spite of government legal onslaught is their communal nature which enables them to adapt to changing conditions of each generation by readjusting themselves to changing land uses and social relations within the pastoral community.[43]

[43] See, for example, A Wily 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' (2018) www.mdpi.com/journal/land (accessed April 29, 2018).

Proponents of this narrative cite illustrations of the resilience of pastoral land tenure regimes from the three successive regimes. In the Imperial period (between 1930 and 1974), pastoral communities` traditional legal institutions generally and their land tenure systems particularly continued to operate even after the introduction of state land laws. The transplantation of modern laws with repealing provisions did not lead to the elimination of preexisting customary land tenures in the pastoral society. Pragmatic considerations necessitated *de facto* tolerance on the part of the state of customary practices including the land tenures systems of the people there. The Imperial Government did not have the requisite infrastructure and administrative reach to impose itself on the nomadic people. The pastoral people did not also have reasons to detach themselves from their long-standing customary institutions. Norman Singer states that:

> The central government did nothing to prevent the traditional systems of law from operating. Interference with that operation could have meant a complete disruption of the institution most closely valued by members of traditional society and an impossible workload for the governors… The government would not appoint a full complement of judges to adjudicate in the provinces… The core of provincial governors was burdensome enough to administer as no system of communications existed. The customary system remained unchanged. The Ministry of Interior performed [some required] legal functions [in the pastoral territories], while the local population …continued with their own pattern of existence.[44]

What is said in general terms in this quote should be true for land tenure. Bahru Zewde also argues that even if there was an interference with customary institutions after the incorporation of the pastoral parts of Ethiopia into the Imperial territory in 19th and 20th centuries, customary institutions remained of vital force for the local population and that this was possible because the emperor`s rule had been, as a matter of fact, ''more of a decentralized monarchy rather than a centralized one''[45] and that his ''imperial authority was exercised through the annual collection of tributes rather than using direct intervention in local administration''[46]. The customary land tenures in the pastoral areas were no exception. In this vein, Ann Lambton tells us about the continued survival of

[44] N Singer 'The Ethiopian Civil Code and the Recognition of Customary Law' (1971-1972) 9 *Houston Law Review* 466-467.

[45] B Zewde *Ethiopia: the Challenges of Democracy from Below (2002)* 19.

[46] Zewde (n 45 above) 10

customary land tenures in the post-imperial incorporation of the pastoral areas including the reasons for the persistence of such tenures:

> These [state] tenures were superimposed on older titles in disregard of existing land rights, but such preexisting land rights such as communal tenures of great variety continued to exist…In spite of legal reforms, the old tenures linger on. Some of them, notably the collective tenures, no doubt, appear anachronistic to the western-trained economist. But it is important to remember that they have been preserved in conditions of geographical isolation as forms of group security-a security which may have little in common with security as understood by economists, but which has meaning for the local people.[47]

In connection with the Derg regime (between 1975 and 1990), the lack of government capacity to implement land law and geographic distance from the seat of political power created a conducive environment for the continued operation of the traditional land laws of the pastoral communities. Also the Rural Lands Proclamation was terse, leaving many issues unaddressed, consisting of few broad provisions. The provisions were not detailed by second and third level implement legislation. The sketchy nature of the Rural Lands Proclamation led to the *de facto* application of customary land tenures chiefly customary land dispute settlements. Similarly, the perspective that maintains the innocuous nature of state land laws in Ethiopia claims that since 1991, pastoral people have been and still are using customary land tenure forms and institutions s widely despite contrary state land law prescriptions.

The consequential nature of the repeal clauses concerning pastoral land tenure regimes

The second contending perspective is that constitutional and legislative nullifications have impacted customary land tenure systems for a couple of reasons. One justification for this position is that legal pronouncement matters for claim-making and claim-denying. This means state land laws give the state the power to assert that pastoral people are mere squatters using the lands without any legitimate title. What is more the state takes pastoral land, without being obliged to pay compensation or seek consultation with the people. Its claim over the commons is not merely symbolic nor is it made to protect the

[47] A Lambton (1971), 'An Approach to Land Reform' (1971) 34 *Bulletin of the School of Oriental and African Studies* 224 and 227.

interests of community members with full acknowledgment of their traditional land title. It is rather a radical claim in the sense that the state`s control over the commons results in the gross expropriation of communal lands. Thus, rural people are turned into squatters concerning their access to the commons. And the underlying thinking behind the lack of recognition of pastoral tenures is the attitude that either pastoral people possess no land tenure rules or if they have them, these land tenure rules are not proper laws. State ownership and expropriation of pastoral land have resulted in national projects with significant land dispossessions. What follows is a representative sample of different Ethiopian governments expropriation of pastoral land tenure regimes for projects such as large scale farms, villagization, elites small farming and conservation measures.

The Imperial Government

The Imperial Government created a state land domain of large size primarily out of communal lands[48] in the 1960s and 1970s using four successive five year plans to push for expansion of commercial agriculture in the pastoral areas and individual private landholdings.[49]

The Imperial Government endeavored to translate these plans into reality in the pastoral areas. Due to these government measures, for instance, on the eve of the revolution in 1974, there were an ‘‘estimated 5,000 large-scale farms covering 750,000 hectares, with infrastructure, field layouts, and machinery designed for large-scale operation.”[50] To this end, the state offered to the commercial large farm sector attractive investment incentives in the form of cheap land, tax holidays and of exemption from customs duties on capital goods.[51]The state itself engaged in commercial farms concentrating its investments in cotton, fruits and sugarcane plantations along the Awash Valley that brought about the eviction of pastoralists and semi-pastoralists. In pockets of pastoral areas such as Afar, landlords and other commercial farmers started cultivating commercial crops including oilseeds destined for national and international markets. In the contexts of these national plans, the Imperial Regime further used lands under state domain for imposed conservation measures, parks and wildlife sanctuaries with rangelands to be controlled by

[48] Pankhurst (n 9 above).

[49] Dunning (n 13 above).

[50] H Scholler & P Brietzke *Ethiopia: Revolution, Law and Politics* (1976) 637 and 651.

[51] B Zewde *Society, State and History: Selected Essays* (2008); Scholler & Brietzke (n 50 above).

rangers to the exclusion of local people in the management of such resources. It is in this connection that said that the imperial regime believed that "Salvation could only come from the development of "large and mechanized farm enterprises." Hence the emergence of "agrarian capitalism" or "mechanised feudalism" through land concessions…"[52]

The Derg Regime

The Derg`s Ten Year Perspective Plan (intended to run from 1984 to 1994) designated the commons as 'vacant lands' and to be put under full utilization in the form of resettlements of people from highland Ethiopia, settlement of the pastoral peoples themselves, expansion of socialist agriculture in the form of expansion of producers cooperatives and state commercial farms. The Derg thought that ''for the pastoralists to develop, they must settle first.''[53] To the Derg, pastoralists were compatriots ''who follow the tails of their cow, aimless wanderers who do not plan their movements rationally, who languish in backward socio-economic stages, [who] must [be] liberate[d] from such backwardness.''[54]

The Present Government, since 1991

The current Government of Ethiopia has subscribed to the goal of transforming, rather than enhancing, the pastoral mode of life which involves the introduction of sedentary agriculture. This transformational agenda has been given concrete shape in successive government plans. For instance, the *Growth and Transformation Plan I (*2010-2015) (the GTP I) and *Growth and Transformation Plan II (*2015/16-2019/20), focus upon rapid economic growth by dealing with natural resource management and utilization and raising agricultural productivity. Both plans have capitalized upon production for the international market. GTP I, in particular, characterized pastoral areas as sites,

> …where abundant and extensive land exists, large-scale commercial agriculture is possible, an assessment will be made to identify suitable land and

[52] R Lefort 'Ethiopia`s Election: All Losers' (2010), <http://www.opendemocracy.net>.

[53] F Gadamu, 'The Post-Revolutionary Rethinking of Arid Land Policy in Ethiopia' (1994) 34 *Nomadic Peoples* 72-73.

[54] Gadamu (n 53 above) 73.

> keeping the same in organized land bank, and promoting such lands for investment by facilitating for local and external investors to develop it using lease system. While keeping the support for private investment in large-scale farms, the focus will be made to ensure that the products produced from such farms to be primarily for exports. In this regard, emphasis will be accorded for cotton, date palm, tea, rubber tree and the like…In the coming five years, over 3 million hectares of land will be identified, prepared and, used for the desired development purpose by transferring it to investors and in so doing tangible support will also be given to private investors to enhance their investment in commercial agriculture[55]

This tone of GTP I have been retained in GTP II. The transformational agenda of the Government as embodied in the two plans targets pastoral areas as El Dorado, among others, to boost agricultural productivity and commercialization. Thus, this has led to the extensive compulsory appropriation of landholdings of pastoralists in a manner incompatible with the nature and ethos of their customary land tenure systems. Implementation of these mid-term plans has led to transfer to corporate farmers of several millions of hectare of land which compulsorily taken from pastoralists without compensation with the effects of land dispossessions and pushing pastoralists to marginal grazing lands.[56] Also tied to release of land for large-scale corporate farming is the Government`s ventured into villagization programs which have affected 275,000 households in the

[55] Ethiopia: Growth and Transformation Plan I (2010/11-2014/15) (2010) 23-24.

[56] F Albrecht *et al* 'Using Crowdsourcing to Examine Land Acquisitions in Ethiopia' (2013) 100 <gispoint.de/fileadmin/user_upload/paper_gis_open/537532003.pdf>, (accessed 4 April 2019). F Horne 'Understanding Land Investment Deals in Africa, Country Report: Ethiopia' (2011) 7. K Deininger & D Byerlee *Rising Global Interests in Farmland. Can It Yield Sustainable and Equitable Benefits?* 2011. Fieldwork data, 22 September 2012, and 10 October 2014. Report of the Ministry of Agriculture and Rural Development of Ethiopia, 2012. P Baumgartner *et al* 'Impacts of Large-Scale Land Investments on Income, Prices and Employment: Empirical Analysis in Ethiopia' (2013) 11 <www.zef.de/..../90cd_Baumgartner-%20etal%202013%20Impact%2> (accessed 4 April 2019). A Gebre*Pastoralism under Pressure: Land alienation and pastoral transformations among the Karrayu of eastern Ethiopia, 1941 to the present* (2001). E Elias & Abdi, F Abdi *Putting Pastoralists on the Policy Agenda: Land alienation in Southern Ethiopia* (2010); D Ayele (n 5 above).

pastoral segments of Ethiopia.[57] Finally, Solomon *et al* have graphically described the adverse effects of these projects on the pastoral people as follows.

> Such large scale alienation of land has been devastating to the livelihood of pastoralists by severely diminishing their access to dry season grazing, resulting in overstocking on their wet season grazing, and consequent bush encroachment and degradation of the range resources. The combined effect

[57] As fieldwork data gathered by this researcher in Addis Ababa in December 2013 show, these households are drawn from four regions that enjoy special assistance under the Federal Special Assistance Board namely, Afar, Somali, Gambella and Beni-Shangul regional states. The state rejects the accusation by international human rights groups that the ongoing villagization program has connection with the transfer of land to corporate farmers, arguing instead it is a voluntary `village clustering` for providing the hitherto scattered villages infrastructure and social services; members of clustered villages are given up to 5 hectares of fertile land, for free, which is thought to be sufficient for their livelihood on the top of provision of land for house construction, community services and as well as for grazing purpose and with extension services and inputs so that they are able to use the land in a productive manner.

Thomas Staal, former USAID/Ethiopia Director, said there was no link between moving people in the lowland areas and releasing land for corporate farming. In Gambella and Benishangul-Gumuz, my staff has had several trips out there. But, we have not seen any evidence of human rights abuses, and we have not seen evidence of a link between moving people to make way for large-scale commercial agriculture.
However, there is evidence that village clustering in the lowland areas is accompanied by land dispossession and is linked to large-scale agricultural land transfers. This has been suggested by (a) a complaint filed on behalf of people in Gambella with the World Bank Inspection Board; (b) a bill passed by the US Congress which prohibits US aid from being utilized in connection with government programs linked to land dispossessions; and (c) court proceedings by an Ethiopian farmer against the UK Government over resettlement project seeking a ruling that the UK ''acted unlawfully by providing aid to Ethiopia without assessing its human rights record'' and thus the aid has contributed to the dispossession of land from him and thousands of fellow villagers from Gambella Region. See, <http://www.addisfortune.net/interview-Where%20Mission%20Man%20Goes%20Missionary.htm>(accessed 13 September 2013). 'Ethiopian Accuses UK over Support for Brutal Government in Addis' The Daily Mail 30 March 2014.

> of shrinkage of grazing resources and population growth has reduced the per capita livestock holdings.[58]

The projects set aside rather than preserve "mobility and flexibility for their risk management value in the face of environmental uncertainty."[59] Such government-driven projects implemented and being implemented in the pastoral areas of the Country have worked against rather than working with "existing land use management institutions, in particular, with traditional institutions, taking advantage of their legitimacy and local knowledge."[60] However, such development initiatives have not made the pastoralists who are dispossessed of their landholdings beneficiaries of the process to avoid and minimize its adverse effects on them. For example, this can take the form of converting the value of their holdings into shares of the estates that yield continuous streams of annual income for the dispossessed or implementing for the man out-grower scheme as well as spate irrigation of rangelands to produce additional fodder. Payment of monetary compensation for the rangeland taken usually ends up in the pockets of the elite without trickling down to the average pastoralist and without enabling them to follow supportive activities to maintain their livelihood. In cases where rangelands are taken for national parks, community- based eco-tourism can be introduced so that the affected pastoralists benefit from a continuous stream of income as practiced in Eastern and Southern Africa.[61] The overall net consequence of the modernization projects of the government implemented in the pastoral parts of Ethiopia can be expressed as the pastoralists` forcible loss of "rights over their grazing territory…The symbolic significance of this is expressed as the loss of

---

[58] S Bekure *et al* (2018) *Formalizing Pastoral Land Rights in Ethiopia: A Breakthrough in Oromia National Regional State* (2018) 15. These researchers assert that: "Karrayu pastoral households who used to own on average about100 heads of cattle and 35camels 40 years ago have now to do with12 cattle and 16 camels. In Borana, average ownership of livestock has declined from30 cattle and 11 camels to 12 cattle and5 camels per household. This is at tremendous downward adjustment to their livelihood and curtails their resilience to cope with severe droughts. Consequently, the number of households becoming destitute and receiving food aid has increased."

[59] Bekure (n 58 above).

[60] J Bruce *et al* 'Protection of pastoralists' land rights: Lessons from the international experience' (2015) Prepared by TetraTech for the United States Agency for International Development.

[61] Bekure (n 58 above).

citizenship or, at the very least lower status than the average citizens of the country.''[62] Land, at the heart of the collective organization of pastoral people, is used to autonomously arrange, maintain or change their socio-economic, political and cultural affairs. Particularly shared norms about the ownership, allocation, reallocation, use, and transfer of land embed in clan authority and may be regarded as obligatory by these sub-national communities. Under international bills of human rights, the Ethiopian state is required to respect, protect and even support, this mode of organization of life unless it can demonstrate that it is intervening on account of libration of some social groups within the pastoral societies such as women and occupational minorities from the repressive effect of cultural practices including customary land norms and institutions. However, what is being witnessed, as the above account reveals, is continuous, longstanding and significant state efforts to dismantle and transform the pastoral mode of life against their active and persistent resistance. Hence, compulsory reordering of their lives by the state in the name of modernity constitutes an assault against the citizenship of members of pastoral communities` - offends their right to be different 'under the banner of the equality of political citizenship'.[63]

5. Justifications for the Government`s Expropriation of Pastoral Land

A mixture of the doctrine of *terra nullius,* 'civilizing the pastoral people' and the beneficial investment approach is some of the narratives often invoked by governments in Ethiopia to take land from pastoral society.

The Terra Nullius narrative

The first is the *terra nullius* narrative - the land being taken is space*.* The late Prime Minister Mr. Meles Zenawi said,

> [W]hat we are doing is [using] all unutilized land in this country and we have a lot of unutilized land in the lowlands. What we have done is to build infrastructure in those areas and therefore open up the area for investments both by domestic and foreign private sector… [w]e have three million hectares

[62] Gadamu (n 53 above) 71.

[63] ES Nwauche 'Affiliation to A New Customary Law in Post-Apartheid South Africa' (2015) 18 *PER/PELJ* 574.

> of unutilized land. This land is not used by anybody. This land should be developed…''[64]

Mr. Abay Tsehaye, a former senior minister in the current government, in responding to critiques directed against the Kuraz Project, a multi-billion dollar sugar plantation project underway in the pastoral areas of South Omo on about 150,000 ha land, said:

> The farms are in barren areas… the plan is to transform South Omo residents socially, economically and culturally… Groups campaigning against the plans have selfish motives. They want these people to remain as primitive as they used to be, as poor as they used to be, as naked as they used to be so that they will be specimens for research and an agenda for raising funds… Previously impoverished communities will be "far better off" as they will benefit from irrigated land, improved social services, support from agricultural experts and job opportunities.[65]

The Minister echoed the late Zenawi`s statements that:

> [This area is known as backward in term of civilization… The Ethiopian government will never allow the pastoralist community to remain under poverty and backwardness any more. The livelihoods and living styles of Ethiopian pastoralists should be altered altogether.[66]

The concept of *terra nullius* invoked in connection with pastoral people suggests the need for transformation of the entire pastoral mode of life. Successive governments have attempted to superimpose modern property rights on pastoral landholdings defining pastoral land as un-owned or government property as well as denigrating pastoral way of life as stagnant and archaic that needs to be modernized, transformed, not just merely improved.[67]

---

[64] <http://transformingethiopia.wordpress.com> (accessed 3 January 2018).

[65] <http:www.etsugar.gov.et/en/projects>(accessed 27 December 2017).

[66] <http://www.waltainfo.com> (accessed 22 October 2017).

[67] A Wily 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' (2018) www.mdpi.com/journal/land (accessed 29 April 2018); A Regassa *et al* (2018) 'Civilizing' the Pastoral Frontier: Land grabbing, dispossession, and coercive agrarian development in Ethiopia' *The Journal of Peasant Studies.*

The beneficial investment narrative

The other narrative is that the investment projects carried out on such hitherto space are beneficial. The State`s storyline on account of beneficial corporate farming is that the process does not affect the food and tenure security of the local populations; that improvement of such empty lands transferred to investors would benefit through technology transfer, employment, integration of local agriculture with corporate farms and infrastructure development. As mentioned above, apart from the empty land claim, the Government is defending the project of large-scale agriculture on the ground that legal and institutional frameworks have been put in place to ensure beneficial outcomes for the local population and the nation as a whole in terms of jobs, social and physical infrastructure, and foreign currency and scientific production techniques. Thus, land deals are done,

> ... on the basis of a clearly set out lease arrangement. That is a win-win arrangement. It is not a land grab. And, therefore, we are very comfortable with the fact that we have put in place all the necessary guidelines, environmental and otherwise, to make sure that everyone benefits from this exercise … these agreements that we are signing with Indians, as well as other foreign companies, are precisely designed to make sure that everybody benefits ... we have a constitutional order here. The Constitution clearly states you do not disempower; you do not grab property from anybody. There is a rule of law here and it is firmly entrenched in our system.[68]

6. The pastoralists` counter-narratives?

Pastoral people deploy counter-narratives that reject the perspectives and actions of the government towards their land. Firstly, pastoral people reject the government`s empty land narrative arguing that such narrative including the associated underutilization argument is an incorrect assessment by outsiders of the productivity of the land. The land tagged empty is in fact, being used by people in a way compatible with their mode of life. For the affected people, the 'empty land' that is being alienated is a source of their livelihoods.[69] In particular, the people use such 'such vacant land' in common for grazing, firewood, forage,

[68] <http://transformingethiopia.wordpress.com> (accessed 3 January 2018)

[69] <www.fao.org/docrep/012e/a1209e00.pdf>, (accessed 30 December 2016)

thatches for construction of huts, honey collection and generally to obtain a significant amount of their food necessities in addition to the use of such spots for social, religious and cultural festivities. Hence, the local population sees communal lands as belonging to them, as an intrinsic part of each of the member`s private landholding. A local man said, ‘‘There is no empty land in Gambella without a history...’’[70]An elderly man in the Somali Regional State, when asked to be part of the government`s program of village clustering, which entails a change of his mode of life into sedentary farming said, ‘‘we the Somalis are not condemned to dig land and our land is also not created for digging.”[71] He added even highlanders who have been ‘‘digging land for centuries are unable to ensure their food security”, thereby suggesting that sedentary agriculture and food security do not necessarily have a positive correlation and, thus, by implication pastoral lifestyle can also bring about food security.[72]AsmaromLegesseputs the attitude of Borana pastoralists in South Eastern Ethiopia towards the enclosure and tilling as ‘‘nothing but contempt for those who stoop to till the soil.”[73] An indigenous man from the Gambella said:

> All of the land in the Gambella region is utilized. Each community has and looks after its territory and the rivers and farmlands within it. It is a myth propagated by the government and investors to say that there is wasteland or land that is unutilized in Gambella...[74]

Secondly, land transcends economic value; it is embedded in people’s culture. In stating that land is rooted in people`s culture, a local man says,

> There is a fear that there will be no more culture within the pastoralist area…We're going to lose our culture and there will be nothing remaining for the next generation. I'm afraid this life may only be a story that we can tell our children (BBC News*,* December 16, 2010).

As a cultural asset, for the people, no one including the community itself, let alone the central government, has the mandate to alienate land. It is stated to this effect by a member of an affected community in South-western Ethiopia

---

[70] ‘Land Grab Fears for Ethiopian Rural Communities’ BBC News, 16 December 2010.

[71] Kabtamu (n 2 above).

[72] Kabtamu (n 2 above).

[73] A Legesse *Gada: Three Approaches to the Study of African Society* (1973) 17.

[74]‘How Food and Water are Driving a 21st-century African Land Grab’ The UK Guardian 7 March 2010.

that if elders in the pastoral areas are being bribed to sell land, they: ''...can't sell the land, it's not theirs. That land is ancestral land.''[75] The Oromo sing the following verses in praise of the Earth:

> Oh Earth, mother of grasses,
> under you is water,
> on top of you is grain,
> we dig and eat on you,
> we raise cattle and lead them out
> to the pasture on you,
> you carry us on your back,
> Please, give us your peace![76]

Parker Shiptonputs the matter as,

> … people seek in land not just material satisfaction but also power, wealth, and meaning-their aims can be political, economic, and cultural … people relate to land not just as individuals, but also as members of groups, networks, and categories… Despite what economic development planners may think and hope, land is seldom if ever just a commodity.[77]

Thirdly, they reject how lands are taken away from them for agricultural investment and the attendant effect. An affected local man from Gambella Region stated:

> All the land around my family village has been taken over and is being cleared. People now have to work for an Indian company. Their land has been compulsorily taken and they have been given no compensation. People cannot believe what is happening. Thousands of people will be affected and people will go hungry. The foreign companies are arriving in large numbers, depriving people of the land they have used for centuries. There is no consultation with

[75] BBC News (n 70 above).

[76] As quoted in M Damtie (2011), 'Anthropocentric and Eco-centric Versions of the Ethiopian Legal Regime' in (Peter Burdon, ed.) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (2011) 167.

[77] P Shipton 'Land and Culture in Tropical Africa: Soils, Symbols, the Metaphysics of the Mundane' (1994) 23 *Annual Review of Anthropology* 348 and 350.

> the indigenous population. The deals are done secretly. The only thing the local people see is people coming with lots of tractors to invade their lands.[78]

A farmer told the Voice of America that: ‘‘We are for development of our country, but we cannot develop our country when land is in the hands of the government…You can work on your land, and all of a sudden, they push you out of your land.’’[79] Enclosures for sugar plantations in the Lower Omo Valley have led to the remark that ‘‘with thousands facing uncertain futures, never before has sugar left such a sour taste in the mouth.’’[80] This story by the people is contrary to the late Prime Minister Zenawi`s statement of assurance: ‘‘We are making sure that the Gambela people are settled and have land and that young people can go to farms not as guards but as farmers.’’[81] A frustrated local man said,

> What power do we have to stop them? We just stay silent. They are cutting down our bush and forest, and bulldozing our garden then they want us to sell off all our cows. No one is going to sell their cattle. They should go away. They should leave our forest alone and leave it to us to cultivate with our hands.[82]

Further, people also engage in preemptive informal land transfers to richer outsiders and pastoralists and enclosure of the commons for themselves in anticipation of Government dispossession of their communal lands. People assert their version of the improvement doctrine arguing that they possess the ability to improve the communal land.[83]There have not so far been legal consequences of these practices; the informal land transferees continue using their lands without any formal legal recognition by the state. One, however, may anticipate potential controversy to arise particularly between pastoralists who sold land and these informal landholders; the former perhaps invoking the unconstitutionality of the land transactions citing the Federal Constitution which

---

[78]‘How food and water are driving a 21st-century African land grab’ The UK Guardian 6 March 2010.

[79] ‘Foreign Agro Firms Scoop Up Ethiopian Farmland’ The VOA News 22 February 2010.

[80] ‘Ethiopia`s Tribe Cry for Help’ *Al Jazeera* 13 February 2012).

[81] ‘How Meles Rules Ethiopia’ www.africanarguments.org 12 May 2012 (accessed 20 June 2013).

[82] ‘Ethiopia at centre of global farmland rush’<http://www.guardian.co.uk/global-development/video/2011/mar/21/ethiopia-land-rush> The Uk Guardian 21 March 2011.

[83] A Gebre ‘Resource Deprivation and Changes in Pastoral Land Tenure Systems: The Case of the Karrayu in the upper Awash Valley of Ethiopia’ (2004) in Proceedings of the Workshop on Some Aspects of Rural Land Tenure in Ethiopia: Access, Use and Transfer 14 and 24.

under Article 40 (3) declares that land ownership is exclusively vested in the State and the peoples of Ethiopia and sale or exchange of land is prohibited. People also act in a way that creates a specter of fear in the minds of those who took over land without their approval. They take matters into their own hands. This is evidenced by the invasion of parks, game reserves, state farms and state forests by local people, the evictions of those resettled as outsiders, the dissolution of cooperatives leading to the partition of land allocated for such cooperatives, and claims for distribution of state farms.[84] Haunted by this specter of tenure insecurity, many people who resettled on the Commons returned to their original villages and others still stay there with recurrent conflicts with the natives and with a lingering sense of insecurity of their tenure. Finally, people occasionally attempt to resort to a formal complaint to avoid land alienation or mitigate their effects. A recent example where local people have filed their formal complaints to the Office of the President of the country is a Gambella case. The case involved the grant by the Ministry of Agriculture of 3, 012 hectares of land to New Delhi-based Vedanta Harvests Private Limited Company for tea production.[85] The people unsuccessfully argued that it is forest land that they have protected for generations to steward it for future generations and that such an allocation of forest land is inconsistent with ‘‘our country`s representation of Africa in international panels regarding global warming through our Prime Minister.”[86]

However, in terms of the extent of success of pastoral people's counter-narrative, local people`s set of reactions just outlined is not fully effective due to a powerful alliance in support of the land alienation process and the ill-organized nature of the resistance.[87] The ineffectiveness also lies in the failure to clearly articulate the nature of their argument: is the people`s argument that the state shall take their claim into account in the alienation process or the state itself

[84] N Nishizaki ‘Revisiting Imposed Wildlife Conservation: Arssi Oromo and the Senkelle Swayne`s Hartebeest Sanctuary, Ethiopia’ (2004) 25 *African Study Monographs*.

[85]‘Ethiopian President Concerned by Lease of Forest to Indian Firm’ The Bloomberg 4 February 2012 (accessed 12 October 2012).

[86] E Stebek ‘Between ‘Land Grabs` and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia`s Normative Setting in Focus’ (2011) 5 *Mizan Law Review* 200.

[87] G Meszaros ‘Social Movement, Law and the Politics of Land Reform: Lessons from Brazil’ (2013) *Legal Studies Research Paper* No. 2014-08 <ssnr.com/abstract=2459909> (accessed 1 December 2014); S Moyo & W Chambati (eds.) (2013), *Land and Agrarian Reform in Zimbabwe: Beyond White Settler Capitalism* (2013).

shall make claim to the people in taking the land? That is, it is unclear as to who must be a claim maker regarding land transferred to developers. Moreover, the people`s contestation is unsupported by civil society organizations operating within the Ethiopian territory due to restrictive law on charities and civil society.[88] Thus, there is a limited and ineffective contestation of large-scale land transfers in Ethiopia.

The counter-narratives of the pastoral community have not been tested in Ethiopian courts. Even though the possible justifications for this merit separate research, tentatively, one can point to a mix of three factors. The first factor can be attributed to the law on charities and civil societies which has muzzled their operation and thus believed to have contributed to a deficit in rights awareness on the part of pastoral societies as well as weakened their capacity to make claims in the courts based on bill of rights ratified by Ethiopia. Another impediment seems to be the Expropriation Law of 2005, which precludes people including pastoralists affected by land expropriation from challenging the existence of public purpose in a court of law; ultimate decision making power concerning the existence or otherwise of public purpose being vested under this legislation in executive discretion.[89]Another consideration is a general lack of public trust in the judiciary particularly its impartiality when it comes to a dispute against the government[90] Lastly, even if the evictions of pastoral people from their land possessions brought about by the various government projects recounted above raises constitutionality, the issue has not nevertheless landed in the House of Federation (HOF), which pursuant to Articles 83 (1) and 61 (1) the Constitution, is entrusted to decide 'all constitutional disputes'; the fact that members of the HOF, as a matter of practice, have so far been drawn invariably from top executives of the nine regional states[91] and the bestowal of far-reaching power to the HOF, its independence from the executive and its trustworthiness as an adjudicator of

[88] Charities and Societies Proclamation of 2009, which, by severely limiting the amount of funds they obtain from foreign sources, prevents civil societies from engaging in activities related to rights advocacy. The good news is that the Ethiopian parliament has revised this law.

[89] M Abdo 'Reforming Ethiopia`s Expropriation Law' (2015) 9 *Mizan Law Review*.

[90] C Mgbako *et al* 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights' (2008) 32 *Fordham International Law Journal*

[91] The FDRE Constitution Arts 83 (2), 84 and 61-68.

"sensitive political matters involving the Constitution in an unbiased manner" has been questioned.[92]

7. Concluding remarks

The narrative of the Government of Ethiopia considered in this chapter is a model of developing pastoral societies, which is dominant. It advances a conception of good life founded upon a radical involuntary transformation of the pastoral land tenure systems and thus their entire mode of life. The status quo emphasizes commercial crop production and livestock rearing in a sedentary setting based on a property right model reflective of highland Ethiopia. This model is firmly embedded in national laws and plans as well as in the minds of the state bureaucracy. Such narrative, even though it may be well-intentioned, is not inclusive of pastoral people; entirely top-down in its modus operandi; and leads to inequality and is unacceptable. There is another approach to pastoralism, which comes from the pastoral people themselves who have persistently countered the high modernist perspective of the national government on the grounds of collective cultural identity and resilience of their diverse modes of life rooted in the customary form of dealing with pastoral lands and other natural resources. However, if this approach is taken literally, it would demand the Government to renounce its interests in pastoral areas; it builds on extreme romanticism of traditional pastoral ways of life; it hides power imbalances within such societies and tends to exclude others with legitimate interest in pastoral areas – ignores the strategic importance of pastoral population, land and other resources to the political economy of the Country.

Therefore, it appears that both the status quo and bottom-up approaches to pastoralism are not sustainable - calling for a third way. Thus, the most important challenge ahead in pastoralism discourses for intellectuals as well as development practitioners is to find out the appropriate mix of the two seemingly contradictory perspectives. In this regard, one finds an emerging and

[92] A Fiseha (2007) 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' (2007) 1 *Mizan Law Review;* T Regassa 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice (2010) 23 *Afrika Focus;* Y Tesfaye 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' (2008), 22*Journal of Ethiopian Law*; G Assefa 'All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 *Journal of Ethiopian Law*.

promising scheme called benefit sharing, which is getting increasing attention in literature[93] and garners support from international development institutions.[94]

The benefit-sharing mode is also grounded in international, regional and national legal instruments on traditional knowledge concerning genetic resources.[95] However, it is easier said than done. As it stands, the benefit-sharing approach is at its infancy and tends to focus largely on economic benefits; even in relation to the economic interests to be shared, it is at present neither in a position to overcome the dominant corporatist attitude of the first path to pastoralism nor first inhabitant versus newcomer dichotomy entrenched behind the grassroots approach to pastoral people. Also, there are no adequate functioning institutional safeguards for the capture by traditional and government elites of the economic benefits to be shared among members of the pastoral community. Thus, the benefit-sharing approach to be a robust and legitimate approach to the advancement of pastoral societies in Ethiopian and beyond the horizons, it is expected to avoid the exclusionist nature of the first two approaches; it must duly cater for legitimate interests of various forces including human rights, food security, cultural identity, inclusive and sustainable development without romanticizing or denigrating pastoral livelihoods as backward. It is suggested here that the sharing of benefit model merits separate in-depth research to explore how to remedy its shortcomings.

---

[93] P Little *et al* (2010) 'Future Scenarios for Pastoral Development in Ethiopia, 2010-2025 Report Number 2 Pastoral Economic Growth and Development Policy Assessment, Ethiopia' https://www.future-agricultures.org/wp-content/uploads/pdf-archive/Pastoral%20Growth%20Study%20Policy%20SCENARIOS%20Paper%202%20FINAL_P1.pdf (accessed 24 July 2019).

[94] A Napier and D Solomon (2011) 'PLI Policy Project Review of Pastoral Rangeland Enclosures in Ethiopia', https://fic.tufts.edu/assets/Tufts-Range-Enclosure-Review-PLI.pdf (accessed July 23, 2019).

[95] For international and regional legal framework related to sharing of benefits, see, respectively, the Convention on Biodiversity (1992), https://www.cbd.int/doc/legal/cbd-en.pdf, accessed on 26, July 2019; African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, https://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf, accessed on July 29, 2019; for national legal frameworks, see Access to Genetic Resources and Community Knowledge, Community Rights Proclamation No. 482/2006, http://www.ebi.gov.et/wp-content/uploads/2018/01/ABS-Proclamation-Ethiopia.pdf (accessed on July 29, 2019); and Council of Ministers Regulations 169/2009 to Provide for Access to Genetic Resources, and Community Knowledge, and Community Rights, http://www.ebi.gov.et/wp-content/uploads/2018/01/ABS-Regulation-Ethiopia.pdf, accessed on July 29, 2019).

BIBLIOGRAPHY

Literature

Abdo M (2013) 'Rural Commons and the Ethiopian State' (2013) 17 Law, Social Justice and Global Development Journal (30-80)

Abdo M (2015) 'Reforming Ethiopia`s Expropriation Law' 9 Mizan Law Review (301-340)

Abdulahi M (2007) 'Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities' 14 International Journal on Minority and Groups Rights (85-125

Assefa G (2010) 'All about Words: Discovering the Intention of the makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' 24 Journal of Ethiopian Law (140-170)

Ayele D (2015) Large-Scale Agricultural Development and Land Rights of Pastoralists in Ethiopia: A Case Study of The Bodi People (LL.M Thesis, School of Law, Addis Ababa University, Ethiopia, unpublished, on file with the author)

Beckstrom J (1973) 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' 21 AM. J. of Comp. L. (559-582)

Bekure S; Mulatu A; Dagnew A; Negassa D; Haddis Z and Gebremeskel T (2018) Formalizing Pastoral Land Rights in Ethiopia: A Breakthrough in Oromia National Regional State (Unpublished, on file with the author)

Brietzke P (1976), 'Land Reform in Revolutionary Ethiopia', 14 The Journal of Modern African Studies (637-660)

Bromley D (1989) 'Property Relations and Economic Development; The Other Land Reform' (1989) 17 World Development (867-877)

Damtie M (2011) 'Anthropocentric and Eco-centric Versions of the Ethiopian Legal Regime' in (Peter Burdon, ed.) Exploring Wild Law: The Philosophy of Earth Jurisprudence (Kent Town, Australia, Wakefield Press) (159-172)

David R (1963) 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' (1963) 37 Tul. L. Rev. (187-204)

Deininger K & Byerlee D (2011) Rising Global Interests in Farmland. Can It Yield Sustainable and Equitable Benefits? (World Bank, Washington, DC.).

Dunning H (1970-1971) 'Land Reform in Ethiopia: A Case Study in Non-Development' 18 University of California Law Review (271-307)

Dunning H (1986) 'Law and Economic Development in Africa: The Law of Eminent Domain', (1986) 68 Colum. L. Rev. (1286-1315)

Elias E & Abdi F (2010) Putting Pastoralists on the Policy Agenda: Land alienation in Southern Ethiopia. (IIED, Washington, DC.)

Fiseha A (2007) 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HOF)' 1 Mizan Law Review (1-32)

Gebre A (2001) Pastoralism under Pressure: Land alienation and pastoral transformations among the Karrayu of eastern Ethiopia, 1941 to the present (Addis Ababa University, Addis Ababa)

Joireman S (1986) 'Contracting for Land: Lessons from Litigation in a Communal Tenure Area of Ethiopia' 30 CJAS (214–232)

Kabtamu N (2012) Land Tenure and Tenure Security among Somali Pastoralists: Within the Contexts of Dual Tenure Systems (LL.M Thesis, School of Law, Bahir Dar University, Ethiopia, unpublished, on file with the author)

Krzczunowicz G (1965) 'Code and Custom in Ethiopia' 2 Eth. J. L. (425-466)

Lambton A (1971), 'An Approach to Land Reform' (1971) 34 Bulletin of the School of Oriental and African Studies (224-240)

Legesse A Gada: (1973) Three Approaches to the Study of African Society (New York: The Free Press)

Mgbako C., Braasch S., Degol A., Morgan M., Segura F. Tezera T. (2008) 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights' (2008), 32 Fordham International Law Journal (259-297)

Moyo S & Chambati W (eds.) (2013) Land and Agrarian Reform in Zimbabwe: Beyond White Settler Capitalism (Dakar, ODESRIA)

Nishizaki N (2004) 'Revisiting Imposed Wildlife Conservation: Arssi Oromo and the

Senkelle Swayne`s Hartebeest Sanctuary, Ethiopia' 25 African Study Monographs (61-77)

Nwauche ES (2015) 'Affiliation to A New Customary Law in Post-Apartheid South Africa' (2015) 18 PER/PELJ (569-592)

Regassa A., Hizekiel T., Korf B. (2018) 'Civilizing' the Pastoral Frontier: Land grabbing, dispossession, and coercive agrarian development in Ethiopia' The Journal of Peasant Studies (1-21)

Regassa T 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice (2010) 23 Afrika Focus (85-118)

Richard P (1966) State and Land in Ethiopian History (Oxford: Oxford University Press)

Russel B (1996) 'Natural Resources: State Ownership and Control Based on Article 130 of the Revised Constitution' (1966) 3 Eth. J. L. (555-590)

Scholler H & Brietzke P (1976) Ethiopia: Revolution, Law and Politics (Munchen, Weltforum Verlag)

Shipton P (1994) 'Land and Culture in Tropical Africa: Soils, Symbols, the Metaphysics of the Mundane' (1994) 23 Annual Review of Anthropology (347-377)

Singer N (1971-1972) 'The Ethiopian Civil Code and the Recognition of Customary Law' (1971-1972) 9 Houston Law Review (460-494)

Stebek E (2010) 'Between 'Land Grabs` and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia`s Normative Setting in Focus' (2011) 5 Mizan Law Review (175-214)

Tesfaye Y (2008) 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' 22Journal of Ethiopian Law (128-144)

Zewde B (2002) Ethiopia: the Challenges of Democracy from Below (Uppsala: Nordiska Afrikainstitutet)

Zewde B (2008) Society, State and History: Selected Essays (Addis Ababa: Addis Ababa University Press)

Legislation

Ethiopia

Access to Genetic Resources and Community Knowledge, Community Rights Proclamation No. 482/2006
Amhara Region Rural Land Law of 2006
Beni-Shangul Gumz Region Rural Land Law of 2010
Charities and Societies Proclamation of 2009
Civil Code of Ethiopia of 1960
Civil Procedure Code of Ethiopia of 1965
Commercial Code of Ethiopia of 1960
Council of Ministers Regulations 169/2009 to Provide for Access to Genetic Resources, and Community Knowledge, and Community Rights
Criminal Procedure Code of Ethiopia of 1961
Expropriation Law of 2005
Expropriation Regulations of 2007
Federal Rural Lands Proclamation 2005
Imperial Order No 1 of 1943
Imperial Order No 46 of 1966
Maritime Code of Ethiopia of 1960

Oromia Rural Land Administration and Use Proclamation of 2007
Penal Code of Ethiopia of 1957
Public Ownership of Rural Lands Proclamation of 1975
Regulations on License for Agricultural Activities of 1990
Revised Constitution of Ethiopia of 1955
Southern Regional State Rural Land Administration and Use Proclamation of 2007
Tigray Regional State Land Administration and Use Proclamation of 2007

International

African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources
The Convention on Biodiversity (1992)

Newspaper articles

'Ethiopian President Concerned by Lease of Forest to Indian Firm' The Bloomberg 4 February 201 (accessed 12October 2012).
'Land Grab Fears for Ethiopian Rural Communities' BBC News, 16 December 2010.
'How Food and Water are driving a 21st-century African Land Grab' The UK Guardian 7 March 2010.
'How food and water are driving a 21st-century African land grab' The UK Guardian 6 March 2010.
'Foreign Agro Firms Scoop Up Ethiopian Farmland' The VOA News 22 February 2010.
'Ethiopia`s Tribe Cry for Help' *Al Jazeera* 13 February 2012).
'Ethiopia at centre of global farmland rush' The Uk Guardian 21 March 2011.
'Ethiopian Accuses UK over Support for Brutal Government in Addis' The Daily Mail 30 March 2014.

Internet sources

Albrecht F *et al* 'Using Crowdsourcing to Examine Land Acquisitions in Ethiopia' (2013) 100 www.gispoint.de/fileadmin/user_upload/paper_gis_open/537532003.pdf (Accessed 4 April 2019)

Baumgartner P *et al* 'Impacts of Large-Scale Land Investments on Income, Prices and Employment: Empirical Analysis in Ethiopia' (2013) 11 www.zef.de/..../90cd_Baumgartner-%20etal%202013%20Impact%2 (Accessed 4 April 2019)

Bruce J *et al* 'Protection of pastoralists' land rights: Lessons from the international experience' (2015) Prepared by TetraTech for the United States Agency for International Development http://ethiopia.usaid.gov/node/326 (Accessed 15 July 2016)

Dowden R, 'How Meles Rules Ethiopia' https://african.arguments.org/2012/05/21/how-meles-rules-ethiopia--by-richard-dowden (accessed 20 June 2013)

Ethiopia: Growth and Transformation Plan I (2010/11-2014/15) (2010) the Ministry of Finance and Economic Development, www.moard.gov.et (Accessed 20 May, 2018)

Gadamu, F 'The Post-Revolutionary Rethinking of Arid Land Policy in Ethiopia' (1994) 34 *Nomadic Peoples* https://fic.tufts.edu/assets/Tufts-Range-Enclosure-Review-PLI.pdf (Accessed 23 July 2019)

Gebre A ''Resource Deprivation and Changes in Pastoral Land Tenure Systems: The Case of the Karrayu in the upper Awash Valley of Ethiopia'' (2004) in Proceedings of the Workshop on Some Aspects of Rural Land Tenure in Ethiopia: Access, Use and Transfer https://fic.tufts.edu/assets/Tufts-Range-Enclosure-Review-PLI.pdf (Accessed 23 July 2019)

Horne F 'Understanding Land Investment Deals in Africa, Country Report: Ethiopia' (2011) www.eastafricaforum.net (Accessed 4 April 2019)

Lefort R 'Ethiopia`s Election: All Losers' (2010), http://www.opendemocracy.net (Accessed 3 April, 2018)

Little P *et al* (2010) 'Future Scenarios for Pastoral Development in Ethiopia, 2010-2025 Report Number 2 Pastoral Economic Growth and Development Policy Assessment, Ethiopia' https://www.future-agricultures.org/wp-content/uploads/pdf-archive/Pastoral%20Growth%20Study%20Policy%20SCENARIOS%20Paper%202%20FINAL_P1.pdf (accessed 24 July 2019).

Meszaros G 'Social Movement, Law and the Politics of Land Reform: Lessons from Brazil' (2013) *Legal Studies Research Paper* No. 2014-08 ssnr.com/abstract=2459909 (accessed 1 December 2014)

Napier A and Solomon D (2011) 'PLI Policy Project Review of Pastoral Rangeland Enclosures in Ethiopia', https://fic.tufts.edu/assets/Tufts-Range-Enclosure-Review-PLI.pdf (accessed 23 July 2019).

Report of the Ministry of Agriculture and Rural Development of Ethiopia, 2012, www.moard.gov.et (Accessed 9 October 2013)

Wily A 'The Community Land Act in Kenya: Opportunities and Challenges for Communities' (2018) www.mdpi.com/journal/land (Accessed 29 April 2018)

Citizenship, communal land rights and "New" cultural communities in Namibia

Tapiwa Victor Warikandwa*

Abstract

The crisis around the land issue in Namibia has worsened arguably as a result of little or no thought being placed around the notion of citizenship. Citizenship can be an indicator of the substantive differences in the quality of life between a landless African in the colonial and post-colonial societies and one who has land in both the aforementioned eras. It appears that little effort has been put in expanding upon the conventional notions of citizenship to include citizenship as not only a claim to rights but also a claim to full societal belonging which includes struggles for recognition and redistribution and how citizenship ought to be socially construed. At the center of such critique is the issue that there is no worth in Namibian citizenship without citizens' right of access to land, more specifically communal land. This places significance on an undying need to realise an equitable communal land tenure reform programme in the country. In Namibia, such policy and legislative reforms have taken place within the broader context of restructuring societal relations in the country's communities. This chapter explores how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It will be argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the re-definition of the nature and extent of Traditional Authorities who are custodians of communal land. Most importantly though, it will be argued that the allocation of customary land rights irrespective of consanguinity is giving rise to new cultural communities in Namibia at the same time enriching formal citizenship of Namibians.

Keywords: Citizenship, new cultural communities, cultural diversity, communal land rights, Traditional Authorities

1. Introduction

In the greater parts of Namibia, the land question remains a fundamental subject with regards to food security, efforts to reduce poverty and the quest to realise the much sought after yet "elusive" economic development. In principle, the land question is of fundamental significance to Namibian societies and their economies of scale. In Namibia, the land issue assumes greater significance should it be construed from the lances of the notion of

citizenship, more so cultural citizenship. The traditional concept of citizenship has largely focused on formal membership, including access to rights in a national community.[1] However, the same notion of citizenship has largely been limited as its definition has not gone beyond citizenship as a legal status to focus on struggles for societal inclusion of and justice for marginalised populations, or citizenship as both a social and symbolic boundary of exclusion.[2] Nowhere is this conceptualization important than it is when matters of customary land rights and communal land claims are discussed. Customary land rights and communal land claims can determine a Namibian's inclusion or exclusion from accessing socio-economic development and realising substantive citizenship. This perception is attributed to the fact that, in Namibia, land has a significant and direct bearing on the livelihood of over 80% of the country's land-based population.[3] Further, land also impacts on the country's Gross Domestic Product (GDP) as well as wealth and employment creation. Regrettably, due to the never-ending scramble for African land, it has become insufficient in many areas.[4] To that end, the crisis around the land issue in Namibia has worsened arguably as a result of little or no thought being placed around the notion of cultural citizenship. Citizenship can be an indicator of the substantive differences in the quality of life between a landless African in the

---

**Senior Lecturer, Faculty of Law, University of Namibia.* twarikandwa@unam.na

[1] J Beaman 'Citizenship as cultural: Towards a theory of cultural citizenship' (2016) 10 *Sociology Compass* 849.

[2] Beaman (n 1 above) 849.

[3] H Becker 'Women and land rights' in J Malan J & M Hinz (eds) Communal *Land Administration: Second National Traditional Authority Conference – Proceedings* (1997). See also JI Barnes 'The value of non-agricultural land use in some Namibian communal areas: A database for planning' DEA Research Discussion Paper 6 (1995); B Fuller 'Returning their rights: A case study of Namibia's communal areas' in J Oglethorpe (ed) *Tenure and sustainable use* (1999) 111-117; B Fuller 'A Namibian path for land reform' in J Hunter (ed) *Who should own the land?* (2004) 83-86; N Horn 'Eddie Mabo and Namibia: Land reform and pre-colonial land rights' (2005) 3 *Sur - International Journal on Human Rights* 81; P Kaapama 'Commercial land reforms in post-colonial Namibia. What happened to liberation struggle rhetoric?' in H Melber (ed) *Transitions in Namibia. Which changes for whom?* (2007); H Melber 'Land politics in Namibia' (2005) 103 *Review of African Political Economy* 135; H Melber 'Transitions in Namibia. Which changes for whom?' (2007); J Mendelsohn, A Jarvis, C Roberts, & T Robertson *Atlas of Namibia. A portrait of the land and its people* (3rd ed) (2009); and J Mendelsohn *Customary and legislative aspects of land registration and* management *on communal land in Namibia* (2008).

[4] TV Warikandwa & A Nhemachena 'Human rights to land or land rights? Charting a new roadmap to land ownership in Africa' in TV Warikandwa, A Nhemachena & Mtapuri *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio-Legal Perspective* (2017) 529.

colonial and post-colonial societies and one who has land in both the aforementioned eras.

Population growth and unrelenting pressure on the land as a resource, due to globalisation processes, has led to its inadequacy.[5] Incessant pressure on land has been attributed to a sharp increase in competition for land between different multiple land users.[6] Such land users include but are not limited to the following: 1) foreign investors, 2) well connected political and urban elites, 3) white livestock and crop farmers, 4) an emerging class of black bourgeoisie livestock and crop farmers, and 5) the marginalised small-scale farmers.[7] The globalisation driven socio-economic transformation has also eroded the rules and institutions of Traditional Authorities as well as customary norms that were used in administering land rights in most African communities, including Namibia.[8] However, it appears that little effort has been put in expanding upon the conventional notions of citizenship to include citizenship as not only a claim to rights but also a claim to full societal belonging which includes struggles for recognition and redistribution and how citizenship ought to be socially construed. In principle, citizenship in Namibia must not just be a status accorded by the State but must also involve individuals' ability to claim recognition by the State. It is, therefore, crucial to critique the prevalence of incessant cases of unequal access to land in Namibia. At the centre of such critique is the issue that there is no worth in Namibian citizenship without citizens' right of access to land, more specifically communal land. This places significance on an undying need to realise an equitable communal land tenure reform programme in the country. In Namibia, such policy and legislative reforms have taken place within the broader context of restructuring societal relations in the country's communities. It is therefore not surprising that Namibia has adopted a Constitution inspired by principles

[5] TV Warikandwa & A Nhemachena 'Human rights to land or land rights? Charting a new roadmap to land ownership in Africa' in TV Warikandwa, A Nhemachena & O Mtapuri (n 4 above) 529.

[6] Bank of Namibia 'Unlocking the Economic Potential of Communal Land' (2012) Available at https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/7d/7dafdec3-24a1-4817902a-c4a686f57489.pdf (accessed 12 December 2019).

[7] Bank of Namibia (n 6 above) 11.

[8] L von Carlowitz & P Mandimika 'Promoting Dialogue and Raising Awareness: Land Reform and the Arts in Namibia' A paper prepared and presented at the 2015 World Bank Conference on Land and Poverty- The World Bank- Washington DC, March 23-27 (2015).

of human rights,[9] freedom,[10] "democratic" culture[11] and good governance.[12] This Constitution enshrines fundamental principles on land relations which in turn are articulated through the relevant legislation.[13]

This chapter explores how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It will be argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the re-definition of the nature and extent of Traditional Authorities who are custodians of communal land.

2. Communal land rights and customary law: A historical overview

This section undertakes a historical overview of communal land rights to provide a context for the ensuing discussions. Namibia is characterized by a dual land tenure system. About 43% of Namibia's land area is held under freehold title (generally referred to as the commercial sector), whereas 15% consists of proclaimed state land such as game parks.[14] The remaining 42% consists of non-freehold or communal land.[15] After independence, the post-colonial Namibian Government initiated an ambitious land reform programme.[16] It sought to improve access to agricultural land for previously disadvantaged communities as added to secure the tenure of households and individuals who hold land under different customary land tenure regimes.[17]

[9] See Chapter 3 of the Constitution of the Republic of Namibia 21 March 1990.
[10] Art 21 of the Namibian Constitution.
[11] Art 19 of the Namibian Constitution.
[12] Art 18 of the Namibian Constitution.
[13] See Art 16 of the Namibian Constitution. Art 16(1) of the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property in any part of Namibia. Art 16(2) gives the power to Parliament to make laws that would allow the state or a lawfully established body or organ to expropriate property in the public interest, on the condition that the state pays what is termed "just compensation" to those affected by such an expropriation. See also the Agricultural (Commercial) Land Reform Act 6 of 1995; and Communal Land Reform Act 5 of 2002.
[14] W Werner 'Tenure reform in Namibia's communal areas' (2015) 18 *Journal of Namibian Studies* 67.
[15] Werner (n 14 above) 67.
[16] Werner (n 14 above 67). See also J Malan & MO Hinz (eds) 'Communal Land Administration. Second National Traditional Authority Conference Proceedings' (1997).
[17] Werner (n 14 above) 67.

A National Conference on Land Reform and the Land Question was hosted by the Namibia Government, in 1991, to discuss how the country's land reform programme in the freehold and non-freehold sectors should be conceptualized and implemented.[18] The consensus at the Conference was "that the communal areas should be retained, developed and expanded where necessary", as communal lands sustained a majority of the Namibian population, "especially poor farmers".[19] To protect the rights of access to communal land for farming households, it was resolved that new applicants for access to communal land "should take account of the rights and customs of the local communities living there" and that "farmers with the potential to become commercial farmers can be encouraged, if necessary through government schemes, to acquire land in the commercial sector".[20] Lastly, it was resolved that "farmland now used by large farmers in the communal areas should not be expanded and in future should be reduced to make space for small farmers".[21]

The Traditional Authorities Act (TAT)[22] defines communal area as that land which is "habitually inhabited by a specific traditional community".[23] A traditional community, in turn, is defined as an "indigenous, homogenous, endogamous social grouping of persons that shares a common language, culture, and customs and recognizes a traditional authority".[24] The legal definition alludes to a common characteristic of communal tenure systems across the African continent, which includes "a degree of community control over who is allowed into the group, and thus being able to obtain residential and farming rights, which are usually strong and secure".[25] The legal definition also alludes to homogenous groups of people, suggesting a high degree of social equity in communal systems.[26]

The reality in Namibia's communal areas at independence and since then has been much more complex than simple legal definitions suggest. To

---

[18] J Mendelsohn *Farming Systems in Namibia* (2006) 39. See also B Cousins & A Claassens 2004. 'Communal Land Rights, Democracy and Traditional Leaders in Post - Apartheid South Africa' in M Saruchera (ed) *Securing Land and Resource Rights in Africa: Pan- African Perspectives, Bellville, Programme for Land and Agrarian Studies* (2004) 139.
[19] Werner (n 14 above) 67.
[20] Werner (n 14 above) 68.
[21] Werner (n 14 above) 68.
[22] Traditional Authorities Act 17 of 1995 (hereinafter TAT).
[23] Sec 1 of the TAT.
[24] Sec 1 of the TAT.
[25] Sec 1 of the TAT.
[26] Sec 1 of the TAT.

start with, communal areas were characterized by growing inequalities. It was estimated in the early 1990s that approximately 50% of farming households in the north-central regions, for example, did not own any livestock.[27] Farming was no longer restricted to subsistence farming but was becoming commercial in orientation, at least for a small but growing group of farmers.[28] Increasing inequalities in asset ownership characterized communal areas across the country.[29] The individualization of communal grazing areas for private farming supports this assertion.

The growing enclosures of communal grazing areas were also a manifestation of the weakening of customary governance systems in some communal areas. The legitimacy of traditional authorities to administer customary land rights in some areas was called into question.[30] A socio-economic survey conducted across Namibia in preparation for the First National Land Conference found widespread dissatisfaction with the system of land allocation in the war-ravaged north-central regions.[31] The treatment of women's rights and private enclosures was singled out. By contrast, traditional authorities in Caprivi - now Zambezi-Region - were "highly respected" and their continued role in land governance was widely supported. In the southern communal areas, issues of privatization of communal land rather than a lack of legitimacy of traditional leaders were more prominent.[32] This, in turn, pitched the interests of a "rich, politically powerful minority ... at odds with those of the poor majority".[33] Tenure reform in Namibia thus had to address a complex situation, characterized by significant regional differences.[34]

The only commonality across the country was that under the Namibian Constitution, the state is the legal owner of all communal land.[35] This, as Adams *et al* have argued, "can be an opportunity or a difficulty, depending on how tenure reform is perceived to affect the interests of those with power

[27] Werner (n 14 above) 69. See also J Cox, C Kerven, W Werner, & R Behnke *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto* (1998).
[28] Werner (n 14 above) 69.
[29] Werner (n 14 above) 69.
[30] Werner (n 14 above) 69.
[31] Werner (n 14 above) 69.
[32] Werner (n 14 above) 69.
[33] Werner (n 14 above) 69.
[34] Werner (n 14 above) 69.
[35] See schedules 5(1) and 5(3) of the Namibian Constitution.

and influence".[36] The state had the power to give effect to the consensus resolutions of the First National Land Conference, which called for the development of communal land in the interests of poorer sections of society or assert the interests of the new elite by promoting the commercialization of communal areas through a transformation of customary tenure systems to individual rights.[37]

3. State Ownership of Land and Universal Access to Communal Land

The Government of the Republic of Namibia metaphorically owns communal land in the country. Traditional authorities are regarded as the emblematic custodians of such communal land as is owned by the State. In terms of schedule 5(1) of the Constitution of Namibia, all communal land vests in the State, in other words, communal land belongs to the State. In furtherance of the constitutional endowment of State ownership, Section 17 of the Communal Land Reform Act (CLRA), provides that;

> ...all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.

The State has therefore inherited, as successor in title to communal lands, social obligations and has to use land for "public good". The State's obligations relate to the need for it to respect the interests held by affected communities in communal land. Such communities are largely composed of people who heavily rely on communal land for survival and livelihood.

Article 16 of the Constitution of Namibia, which is largely referred to as the property clause, provides that all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immoveable and moveable property individually or in association with others and to bequeath their property to their heirs or legatees: Provided that Parliament may by

[36] A Martin, S Sibanda, & S Turner 2000 'Land Tenure Reform and Livelihoods in Southern Africa' in C Toulmin & J Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000) 1-15. See in general, A Fiona & W Werner *The Land Issue in Namibia: An Inquiry* (1990).
[37] Werner (n 14 above) 70.

legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. Section 16(1) of the Constitution of Namibia, by implication, can be interpreted to imply that every Namibian citizen has a right to customary land rights.[38]

The Supreme Court of Namibia in providing meaning to Article 16(1) of the Constitution and section 17 of the Communal Land Reform Act (CLRA), in so far as communal land rights are concerned, pointed out that Namibia has two mainland tenure systems: the freehold land tenure system and the customary land tenure system on communal land. In the case of *Kashela v Katima Mulilo Town Council*[39] Damaseb DCJ observed that:

> ... the concept of communal land defies precise definition. Despite the fact that the concept of communal land defies precise definition, it has, in Namibia, generally been understood that communal land includes land owned in trust by the government but administered by traditional authorities who make allocation of parcels of land to members of the community, ordinarily but not exclusively to live thereon, till and or graze thereon and generally to make a living, without acquiring ownership or title to that land.[40]

In distinguishing the communal land and freehold land tenure systems, the Supreme Court pointed out that the freehold land tenure system is largely applicable in respect of pieces of land in urban areas and commercial farms.[41] As such, under the freehold land tenure system, the land is surveyed and is capable of being privately owned (regardless of whether such land is in the urban area or a commercial farm).[42] On the other hand, under the communal land tenure system, whilst the State is symbolically regarded as the owner of the land, it holds the land in trust on behalf of traditional communities and their members who live there.[43] Section 16 of

[38] However, sect 16(1) of the CLRA authorises the President of Namibia to, with the approval of Parliament, by proclamation "withdraw from any communal land area, subject to . . . subsection (2) any defined portion (of communal land) which is required for any purpose in the public interest, and in such proclamation make appropriate amendments to Schedule 1 (which defines the boundaries of communal land areas) so as to. . . redefine any communal land area affected by (the withdrawal of land from a communal area)"

[39] *Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others:* Case No: SA 15/2017 delivered on 16 November 2018.

[40] *Ndevahoma v Shimwooshili* **(**HC-MD-CIV-ACT-OTH-2017/03184) [2019] NAHCMD 32(25 January2019), para 18.

[41] *Ndevahoma* case (n 40 above) para 19.

[42] *Ndevahoma* case (n 40 above) para 19.

[43] *Ndevahoma* case (n 40 above) para 20.

the CLRA provides that the President, with the approval of the National Assembly, may by proclamation, "...declare any defined State land to be communal, add any State land to an existing communal land area, or withdraw a defined area from communal land". More importantly, section 17 of the CLRA then makes it succinctly clear that whilst there is a property right conferred in terms of Article 16 of the Constitution, all communal land belongs to the State which must keep the land in trust for the benefit of traditional communities living in those areas. The emphasis in this regard is not placed on consanguinity but on residence. As such, the State is enjoined to make sure that communal lands are administered and managed in the interests of persons living in those areas.[44] This, in essence, gives rise to "new" cultural communities as one does not need to be related to someone who lives in the area to be able to access communal land. These "new" cultural communities have translated to the spread of infrastructure across larger groups of people in Namibia and facilitated economic diversification for improved livelihoods.[45] However, in some regions, such as Kavango East and Kavango West, communities have opted out of the communal land registration programme as they regard as not conforming to the norms and cultural values of their people.[46]

It is imperative to take note that the CLRA makes it clear that communal land cannot be sold as freehold to any person.[47] Section 19 of the CLRA then stipulates that the rights that may be allocated in respect of communal land under the Act are divided into customary land rights and rights of leasehold. The customary rights that may be allocated in respect of communal land rights are set out in section 21 of the CLRA.[48] Significantly, in the context of citizenship and customary land rights in Namibia, section 28 of the CLRA recognises existing customary land rights and provides that any person who immediately before the commencement of the Act held a right in respect of the occupation or use of communal land, being a right of

[44]Ministry of Land Reform 'Mid-term Report Evaluation, Programme for Communal Land Development' Windhoek (2017).
[45] Ministry of Land Reform (n 44 above).
[46] P Mandimika & J Mulofwa 'Securing customary land rights for development in Namibia: Learning from new approaches, opportunities and social settings' Paper prepared for presentation at the 2018 World Bank Conference on Land and Property, The World Bank – Washington DC, March 19-23 (2018) 3.
[47]*Ndevahoma* case (n.40 above) para 22.
[48] Customary land rights that may be allocated in respect of communal land are as follows: a) A right to a farming unit; b) A right to a residential unit; and c) A right to any form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of the CLRA.

nature referred to in section 21, and which was granted to or acquired by such person in terms of any law or otherwise, shall continue to hold that right.[49] Section 29 of the CLRA which deals with grazing rights stipulates that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. Section 30 of the CLRA confers the power to grant rights of leasehold in respect of any portion of communal land on a Communal Land Board. This right of leasehold can only be granted if the Traditional Authority of the community in whose communal area the land is situated consents to the right of leasehold.

In the case of *Ongwediva Town Council v Jonas*[50] it was pointed out that Article 16(1) of the Constitution of Namibia recognises the fundamental right of all persons to acquire, own and dispose of property in Namibia. Article 16(2) of the Constitution then protects ownership rights. The protection afforded in article 16(2) is against expropriation without just compensation. With regards to expropriation, a citizen's land rights can only be withdrawn once such person's rights as held in respect of communal land have been acquired by the State. If the land in question is communal land withdrawn after 2002, the rights of the communal land rights holder would be against the State represented by the Minister of Lands and Resettlement. In the *Kashela* case, Agnes Kahimbi Kashela approached the High Court and on appeal the Supreme Court, seeking compensation for communal land "expropriated" by the Katima Mulilo Town Council (KTC). The communal land initially belonged to Kashela's father but she later acquired a right of exclusive use and occupation of the communal land after the death of her father. Kashela argued that the KTC was unjustly enriched (to her prejudice) by unlawfully renting out the land in dispute. She also claimed that, by offering to sell the land, KTC unlawfully "expropriated" her land "without just compensation" "at market value". The appellant relied for those allegations on Article 16(1) of the Constitution which guarantees property rights and Article 16(2) which provides that property may only be expropriated upon payment of just compensation. She also relied on section 16(2) of the CLRA which states that land may not be removed from a communal land area without just compensation to the persons affected. The High Court had initially ruled in favour of KTC but this decision was reversed on appeal by the Supreme

[49] *Ndevahoma* case (n 40 above) para 28.
[50] *Ongwediva Town Council v Jonas* (HC-NLD-CIV-MOT-GEN-2018/00001) [2018] NAHCNLD 22(12 March 2018).

Court which found that the communal land right in dispute remained existent after the passing of Kashela's father. The right thus survived and attached to the land even after its proclamation as town land.[51]

In the case of *Halidulu v The Council for the Town of Ondangwa*[52] the finding of the Supreme Court in the case of *Kashela* was applied. Halidulu was allocated land before Namibia's independence to habituate on and use. Schedule 5(3) of the Namibian Constitution created a right in favour of Halidudlu over communal land that was succeeded to by the Government of the Republic of Namibia. Such right continued to exist, even though not registered in terms of the Deeds Registries Act 47 of 1937, when the land was transferred to the Ondangwa Town Council, a local authority council. The defendant failed to establish any defence known to the law in challenging Halidulu's ownership of the land. The Court accordingly protected Halidulu's right to the property by declaration.

4. Universal Access Traditional Authorities and Customary Land Rights

This part of the chapter explores the process by which Namibians access customary land rights and the consequences of such allocation. The issues that will be addressed include which parties have the power to allocate customary land rights; whether such an allocation makes the allotee a member of the customary community who is bound by the customary laws of that community in instances of marriage succession and inheritance; and the nature and extent of the control by the Chief or Traditional Authority.

The first issue which this section explores is the authority to allocate customary land rights. Sections 20 and 21 of the CLRA provide that the Chief of a traditional community, or if the Chief so decides, the Traditional Authority of the particular traditional community is empowered to allocate customary land rights for purposes of residence and a farming unit. Only once this decision has been made, will the matter be referred to the Communal Land Board for ratification of the decision by the Chief or Traditional Authority.[53] Section 22 of the CLRA sets out the procedure(s) which must be followed when one is applying for communal land rights. It provides that an

[51] *Kashela* case (n 39 above) para 81.
[52] *Halidulu v The Council for the Town of Ondangwa* (I 389/2015) [2019] NAHCMD 460 (7 November 2019).
[53] Sec 3 of the CLRA.

application for the allocation of a customary land right in respect of communal land must be made in writing in the prescribed form; and be submitted to the Chief of the traditional community within whose communal area the land in question is situated. The section further provides that an applicant for a land right in respect of a communal land must, in his or her application for the land right, furnish such information and submit such documents as the Chief or the Traditional Authority may require for purposes of consideration of the application. The section furthermore provides that when considering an application for a customary land right in respect of communal land, a Chief or Traditional Authority may make investigations and consult persons in connection with the application; and if any member of the traditional community objects to the allocation of the right, conduct a hearing to allow the applicant and such objector to make representations in connection with the application, and may refuse or, grant the application.

For the purposes of ascertaining fairness and equality in the process of allocating customary land rights, it is imperative to establish whether or not the nature and composition of Traditional Authorities are crucial to a determination of how these Authorities have addressed applications for customary land rights. In this regard, it will be ascertained if the CLRA by including women has changed the ability of Traditional Authorities to ensure that the landless are allocated customary land in Namibia. Traditional Authorities have largely involved themselves in matters related to land management by controlling people's applications to reside on communal land. Such applications have traditionally been assessed not solely on the basis of consanguinity but related issues such as an applicant's familiarity with the community as well as the need to avoid future disputes.[54] Traditional authorities are thus considered as mediators and gatekeepers with regards to communal land. For example, Nama and Damara Traditional Authorities consider the availability of water and grazing before granting newcomers to the community, customary residential and farming rights. Further, some San Traditional Authorities in granting communal land rights impose restrictions on the number of livestock a resident may keep at any given time. However, regardless of these attendant issues regarding Traditional Authorities, there remains much debate around gender in land matters. It, therefore, has to be ascertained whether or not Traditional Authorities consider the interest of

[54]J Mendelsohn 'Customary and legislative aspects of land registration and management on communal land in Namibia' A Report prepared for the Ministry of Land and Rural Resettlement and the Rural Poverty Reduction Programme of the European Union, December 2008, (2009).

women on access to communal land rights. This should be considered in the context that for women to realise substantive citizenship in Namibia, their centrality in agricultural and domestic production and reproduction in the country must be given due regard. This discussion unravels from the context that in Africa, governments have put in place land policies to promote men and women having equal access to land and land rights. More importantly, section 3(g) of the Traditional Authorities Act 25 of 2002 provides that traditional authorities should promote affirmative action, specifically about positions of leadership, as required by Article 23 of the Constitution of Namibia. At present, most of the Traditional Authorities are men with a few being women.

The Communal Land Reform Act does not provide specific provisions on women's land rights. This poses significant challenges to Traditional Leaders in their efforts to strike a balance between customary law and the requirements of common law and the Constitution.[55] For example, the Traditional Authorities Act 25 of 2000 provides that Traditional Authorities and their members are in charge of the administration and execution of the customary laws of specific communities, and must "uphold, promote, protect and preserve the culture, language, tradition and traditional values" of these communities.[56] They are also responsible for hearing and settling disputes among members of a specific traditional community in accordance with customary laws. Chiefs and Headmen, in turn, are expected to "exercise [their] powers and perform [their] duties and functions … in accordance with … customary law". At the same time, they are called upon to promote affirmative action as required by Article 23 of the Constitution, "in particular by promoting gender equality with regard to positions of leadership".[57]

Chiari pointed out, this twofold role is particularly pertinent with regards to women's land and property rights.[58] The Communal Land Reform Act fails to address the fact that in terms of customary law, access to land and its transfer after a spouse's death is subject to power relationships that

[55] W Werner 'Protection for women in Namibia's Communal Land Reform Act: Is it working?' A report published by the Land, Environment and Development Project Gender Research and Advocacy Project, Legal Assistance Centre, March 2008 (2008).
[56] See sec 3 of the Traditional Authorities Act 25 of 2002.
[57] See Arts 3 and 7 of the Namibian Constitution.
[58]GP Chiari 'Draft Report: UNDP Mission on Rural Livelihoods and Poverty in Namibia' (2004) 90.

are based on gender roles.[59] For example, the grabbing of property by relatives of a deceased husband is considered by the perpetrators to be legitimate in terms of customary law, in so far as this law is claimed to follow matrilineal inheritance rules.[60] However, statutory law regards such an act as theft and thus a criminal offence. When cases of property grabbing were brought before the Traditional Authority of Ondonga, for example, the Authority attempted to negotiate acceptable solutions but did not fine the perpetrators because their actions were not regarded as criminal offences - unlike stock theft.[61] On the contrary, the Traditional Authority regards property grabbing as constituting a matrilineal system of inheritance, whereby the family of a deceased husband claims his property and assets.[62] The Traditional Authorities Act emphasises the importance of customary laws and practices in administering the affairs of traditional communities without questioning the inequalities that such laws and practices may perpetuate, particularly in the case of women. This vacuum provides opportunities to continue some unconstitutional practices. The CLRA does not provide much guidance in this respect either. As Chiari pointed out, the CLRA pays "insufficient attention … to the concepts of rights and legitimacy", and appears to be too legalistic in the way that it seeks to address gender issues.[63] Since the CLRA is administered from the top-down, statutory provisions that conflict with customary laws run the risk of being ignored. Chiari thus pleaded for an approach that encourages community participation in implementing and controlling land tenure reform as a key factor in contributing to increase social security and to reverse the material and non-material social sanctions taken against women - and, particularly, divorcees and widows.[64]

Revised customary laws have nevertheless provided for the protection of widows and the property belonging to the household. Widows were previously not only allowed to stay on the land of their husbands but were no longer required to pay to acquire husbands' land rights.[65] The

[59] Werner (n 55 above) 13.
[60] J Malan *Peoples of SWA/Namibia* (1980) 83-84. See also J Lebert 'Inheritance practices and property rights in Ohangwena Region' in Gender Research and Advocacy Project *The Meanings of Inheritance: Perspectives on Namibian inheritance practices* (2005) 79-81.
[61] Werner (n 55 above) 13.
[62] Werner (n 55 above 13).
[63] Werner (n 55 above) 19.
[64] Werner (n 55 above) 13.
[65]Traditional Authority of Ondonga 'Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga' (1994) 35-36.

CLRA, in turn, codified these provisions in law. The revised customary laws also responded to a dynamic and changing social and economic environment which has brought about changes in inheritance systems and practices. Women's land rights are now shaped not only by marital status but also by laws of inheritance and divorce. These rules and practices, in turn, are shaped by changes in the wider socio-economic sphere.[66]

The Chief or the Traditional Authority constitute part of the administrative process and work together with the Communal Land Boards in allocating communal land. Section 20 of the CLRA provides that the Chief of a traditional community or - if the Chief so decides - the Traditional Authority of a particular power has the primary power to allocate or cancel any customary land rights. In principle, the Chief or Traditional Authority has the first duty of deciding whether or not to grant an application for a customary land right. Once the decision has been made by the Chief or the Traditional Authority, the matter will then be referred to the Communal Land Board for ratification. The Chief or Traditional Authority thus has the following powers: a) Investigating the matter and consult the people about the application; or b) Hold a hearing if a member of the community objects to the allocation of the customary land right. At this hearing, both the applicant and the objector are given the chance to state their reasons for and against the application.Once the chief or Traditional Authority has considered the matter, they may either a) refuse the application or b) grant the application. Once the application for a farming unit or residential unit is granted, the Chief or Traditional Authority may: a) allocate the right to the specific area of land applied for; b) allocate the right to another area of land by agreement with the applicant; and c) determine the size and boundaries of the area of land for which the right has been granted.

It is also important to note that the powers of Traditional Authorities are to be exercised in accordance with the Namibian Bill of Rights.[67] For example, in the case of *Tjiriange v Kambazembi* where in adjudicating over a dispute, the court also placed emphasis on the significance of administrative justice entrenched by Article 18 of the Namibian Constitution. Article 18 requires administrative bodies to follow rules of natural justice in adjudicating over disputes. Such administrative bodies should give parties

[66] M Hinz & P Kauluma 'The laws of Ondonga - introductory remarks' in Traditional Authority of Ondonga, Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga (1994) 33-34.

[67] *Kapia v Minister of Regional and Local Government Housing and Rural Development* (A333/2012) [2013] NAHCMD 13 (24 January 2014)

an opportunity to be heard as failure to do so could lead to fatal consequences. To that end, the exercise of power by Chief Kambazembi as a traditional authority, pursuant to the Traditional Authorities Act,[68] is plainly the exercise of public power, and in exercising those powers the Chief was an administrative body as contemplated in Article 18 of the Namibian Constitution. The Traditional Authorities must also: 1) protect the fundamental rights and freedoms of communal land rights holders;[69] 2) promote equality and freedom of discrimination;[70] 3) protect the right to family especially where women's rights to succession of communal land are concerned;[71] 4) protect children's rights in so far as inheritance of communal land is concerned;[72] 5) protect the right to property for both men and women;[73] 6) promote cultural rights;[74] 7) protect fundamental freedoms especially the right to reside and settle in any part of Namibia;[75] and 8) promote Affirmative Action in Traditional Authorities especially women empowerment.[76]

Since the scheme of universal access to customary land is facilitated by the attenuated powers of Traditional Authorities, it is imperative to observe that such Traditional Authorities do not just exercise their powers arbitrarily. The functions of Communal Land Boards are set out in section 3 of the CLRA. Key amongst the functions of the Communal Land Boards are the following: 1) controlling the allocation and cancellation of customary land rights by Chiefs or Traditional Authorities; 2) deciding on applications for rights of leasehold; and 3) creating and maintaining registers for the allocation, transfer and cancellation of customary land rights and rights of leasehold.

The CLRA stipulates that Land Boards may only approve and register customary land rights that do not exceed 20 hectares, ostensibly to curb "land grabbing". The narrow definition of rights to communal land potentially compromises the objective of removing uncertainty about legitimate access and rights to communal resources. The registration of customary land rights began in 2003. The initial estimate of customary land

[68] Traditional Authorities Act 25 of 2000.
[69] Art 5 of the Constitution of Namibia.
[70] Art 10 of the Constitution of Namibia.
[71] Art 14 of the Constitution of Namibia.
[72] Art 15 of the Constitution of Namibia.
[73] Art 16 of the Constitution of Namibia.
[74] Art 19 of the Constitution of Namibia.
[75] Art 21(6) of the Constitution of Namibia.
[76] Art 23 of the Constitution of Namibia.

rights to be registered was based on census data, but has been revised to an estimated total of 245,000 in 2014.[77] The registration of customary land rights follows a process of demarcating the boundaries of the land and validating the claim to a specific parcel of land through a participatory process at the village level.[78] All land parcels are then digitally mapped and combined with the details of applicants. Once this process is complete, all applications are displayed in public for seven days, before being submitted to the Communal Land Board (CLB) for approval or rejection.[79] Once a right has been approved by the CLB, it becomes a registered land right. The registration of customary land rights in the communal areas is very important because it: 1) gives security to landholders, their spouses, children and/or dependants; 2) ensures that a land holder has documentary proof of their right to the land and know the boundaries and exact size of the legally allocated land parcel; 3) allows each parcel of land to be owned by one person at a time which rules out any form of land grabbing; 4) It indicates the CLBs and the Traditional Authority as to which land is occupied and which land is available for allocation; and 5) avails a right for compensation when the parcel or part of it is claimed by the Government for public purposes that include building of new roads or expansion of towns.[80]

Section 24 of the CLRA empowers a CLB to ratify an allocation of customary land rights that may be made by a Chief or a Traditional Authority. If the allocation by a Chief or Traditional Authority is not ratified by the relevant board, such allocation has no legal effect. As such, in the case of *Chairman Ohangwena Communal Land Board N.O. v Wapulile,*[81] Tileinge Wapulile (the respondent) was involved in a protracted dispute with the Ohangwena CLB regarding the erection of a fence around the Odjele Grazing Farm. The farm was allocated to the respondent by the Ondonga Traditional Authority in the late 1980's. The allocation of the farm was confirmed on 7 August 1996 in a letter from the Ondonga Traditional

[77] M Thiem *A Decade of Communal Land Reform. Review and Lessons Learnt, with a Focus on Communal Land Rights Registration* (2014) 32.
[78] Sec 25 of the CLRA.
[79] Millennium Challenge Corporation/Orgut COWI, Legal Requirements for Group Land Rights, Windhoek, Millennium Challenge Account Namibia (2014). See also Proposed Guidelines for Group Land Rights in Communal Areas, Windhoek, Millennium Challenge Account Namibia (2014); and Proposed Working Policy for Group Land Rights, Windhoek, Millennium Challenge Account Namibia, (2014).
[80] Sec 25 of the CLRA.
[81] *Chairman Ohangwena Communal Land Board N.O. v Wapulile* (SA 81/2013) [2017] NASC 19 (08 June 2017).

Authority which stated that the Authority "gave permission" to respondent "to own" the farm known as Odjele Grazing Farm on 2 September 1988. In October 2012 the *Ohangwena Communal Land Board* served the respondent with a letter headed "Notification order to remove the fence". The notification required the respondent to remove the perimeter fence around the Odjele Grazing Farm within 30 days of receipt of the letter. After the notification, the respondent contacted his legal representatives and the Ondonga Traditional Authority that had granted the respondent the right to occupy the Grazing Farm. The Chief invited the Minister of Lands and Resettlement to his Palace and the Minister was requested to stop the removal of the fences. With the interventions of the Chief and his lawyers and the fact that the 30 days notification had expired without any action from the appellant, the respondent thought all was well. On 26 July 2013, officials from the Ministry of Lands accompanied by Police officers arrived at the respondent's farm and started dismantling the fence regardless of the authorisation granted from the Chief. The removal of the fence was later deemed as being unlawful by Judge Smuts in the case of *Wapulile v Chairman, Ohangwena Communal Land Board.*[82]

The customary land rights last for the natural life of the holder.[83] It comes to an end only when the occupant dies,[84] or decides to give up (relinquish) the right before his or her death.[85] The customary land right is, therefore, an occupation in perpetuity; and the holder need not fear eviction or expropriation without just compensation.[86] Registered customary land rights are thus formal and enjoy official recognition and protection and thus are secure.

In addition to customary land rights, the CLRA empowers the CLBs to grant Rights of Leasehold to any portion of communal land, but this Right of Leasehold may only be granted if the Traditional Authority of the traditional community, in whose area of jurisdiction the land is situated, gives consent.[87] If the land to be leased falls within a Conservancy, the use of the land must be in conformity with the Conservancy's management or utilization plan.[88] To date over 314 leaseholds for agricultural purposes have

[82] *Wapulile v Chairman, Ohangwena Communal Land Board* N.O (A 265/2013) [2013] NAHCMD 340 (15 November 2013).
[83] Sec 26(1) of the CLRA.
[84] Sec 26(2) of the CLRA.
[85] Sec 26(1) of the CLRA.
[86] Sec 26(1) of the CLRA.
[87] Sec 3 of the CLRA.
[88] Sec 4(f) of the CLRA.

been issued in Kavango region and 47 leaseholds issued for tourism enterprises and over a 113 for commerce activities such as the building of supermarkets and Petrol Service stations across communal areas of Namibia. After an application of Right of Leasehold is granted, and a Deed of Leasehold is signed, the CLB Secretary ensures that the Right of Leasehold is registered in the name of the applicant in the prescribed register and the applicant is issued with a Certificate of Leasehold.[89] It is the responsibility of the leaseholder to register the lease in the Deeds Registry Office.[90] The Leasehold thus grants the lessees the opportunity to access financial capital to invest in their properties and this improves their living standard.

It would appear that residence is a factor in the use of customary land rights thereby complementing allocation in determining universal access to customary land rights. Part of the powers of Traditional Authorities is with respect to grazing areas. Section 29 deals with grazing rights. That section, amongst other things, provides that the commonage in the communal area of a traditional community is available for use by the lawful residents of such area for the grazing of their stock, but the right is subject to such conditions as may be prescribed or as the Chief or Traditional Authority concerned may impose. The conditions that may be imposed include conditions relating: (a) to the kinds and number of stock that may be grazed; (b) to the section or sections of the commonage where stock may be grazed and the grazing in rotation on different sections; (c) to the right of the Chief or Traditional Authority or the relevant board to utilise any portion of the commonage which is required for the allocation of a right under this Act; and (e) to the right of the President under section 16(1)(c) to withdraw and reserve any portion of the commonage for any purpose in the public interest. In the case of *Tjiriange v Kambazembi*,[91] a dispute arose amongst members of the Ova-Herero traditional community who had resided and conducted farming activities since 1979, in a village called Ondjamo No.1 situated in the communal area known as Otjituuo in Namibia. The colonial government fenced off the area of Ondjamo village No.1 into about four camps. Two of the camps being, Camp A and B, since 1979, had been utilized by the Tjiriange family. A dispute arose between the Tjiriange siblings about the utilization of the camps. On the 28th day of May 2015 Chief Sam Kambazembi, a certain Alexander Tjihokoru, Erastus Tjihokoru,

[89] Sec 33(1)(b) of the CLRA.
[90] Sec 33(1)(b)(2) of the CLRA.
[91] *Tjiriange v Kambazembi* (A 164/2015) [2017] NAHCMD 59 (24 February 2017).

four police officers, together with Theodor Tjiriange, Ambrosius Tjiriange and Willem Tjiriange arrived at the applicant Godfried Tjiriange's residence at Ondjamo No. 1. Chief Kambazembi there and then informed the applicant that he considered the matter and divided the grazing rights. The court in addressing the dispute pointed out that Section 29(1) of the CLRA confers on a person the right to graze their livestock on a commonage because they are lawful residents of a communal area and not because it has been allocated to them by the Traditional Chief or Traditional Authority. Section 17 read with section 29(1) makes it impossible to deny a resident of a communal area the right to graze his or her livestock in the commonage area of that communal land. A proper reading of section 28(1) of the CLRA suggests that the occupation of communal land continues unless the claim to the land is rejected upon application or the land in question is reverted to the State. Therefore, if the land has reverted to the State, then the right to hold or occupy the land in terms of section 28 of the Act thus ceases. On the contrary, if a Certificate of Registration of Recognition of Existing Customary Land Right for Residential Units is issued, such right to hold or occupy the land in terms of section 28 of the CLRA never ceases and the holder remains a lawful resident. Section 29(1) confers lawful residents of communal land the right to graze their livestock on commonage. That right derives from the fact that a party is a lawful resident of the commonage and not because it has been allocated to them by the Traditional Chief or Traditional Authority. It thus follows that section 17 read with section 29(1) make it impossible to deny a lawful resident of a communal area the right to graze his or her livestock in the commonage area of a specific communal land.

In *Vita Royal House v The Minister of Land Reform and 10 others*[92] the applicant brought an application seeking orders to evict the respondents from a communal area under its jurisdiction. According to the applicant, between the years 2002 and 2015 the respondents moved and settled permanently into the communal area without permission having been granted to them by the applicant in terms of section 29 (4) of the Communal Land Reform Act, 2002. Initially, some of the respondents were granted temporary grazing rights during the drought period. After the expiry of the temporary grazing right, they were requested to leave the area but failed and/or refused to vacate the area. Other respondents simply moved into the area and settled without the necessary permission from the applicant. The respondents opposed the application on varied grounds. Some of the

[92]*Vita Royal House v The Minister of Land Reform & 10 Others* (A 109/2015) [2016] NAHCMD 339 (7 November 2016).

respondents contended that they were granted permission by the Chief, others by the traditional councillors and others by the members of the community[93] and others even by the applicant or by a Traditional Authority adjacent to the applicant's area. The court held that the respondents did not have valid permission as envisaged by section 29(4) of the CLRA, which entitled them to permanently reside in the communal area under the jurisdiction of the applicants. Accordingly, the respondents were held to be in unlawful occupation of the area under the applicant's jurisdiction. As such, it was held that once a traditional community has established a Traditional Authority, the authorized body to act on behalf of the traditional community is the Traditional Authority, and not the Chief. The overall import of the *Tjiriange v Kambazembi* and *Vita Royal House v The Minister of Land Reform and 10 others* appears to be that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands as long as they are lawfully resident in a specific communal area.

Once a customary land right is granted, it is evident that a dual-process is developing around the allocation of communal land rights in Namibia. New cultural communities are being formed as one does not need to be related to someone (consanguinity) to access communal land rights in any part of Namibia. People of mixed cultural backgrounds are thus settling together to form new communities at the same time socio-economically enriching the formal citizenship of Namibians who through the constitution and legislation become new members of cultural communities. It is imperative to interrogate whether or not such new communities, as being formed, fit into the definition of traditional communities and Article 19 of the Namibian constitution. Section 1 of the Traditional Authorities Act provides that, "Traditional community means an indigenous homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions ..." This definition must be construed within the context of the supreme law of Namibia, the Namibian Constitution. Article 19 of the Namibian Constitution provides that, "Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or

[93]See the case of *Mutrifa v Tjombe* (I 1384/2016) [2017] NAHCMD 162. In this case, it was held that a customary land right is a personal right, inseparable from its holder. Accordingly, the holder of such land rights is entitled to the exclusive enjoyment of the benefits conferred upon him under those rights.

religion subject to the terms of the constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or national interest." Whilst section 1 of the TAT appears to refer to specific cultural groupings with specific cultural practices, Article 19 of the Namibian Constitution makes reference to a broader concept of "any culture". The use of the concept "any culture" is indicative of the drafters of the Namibian Constitution's deliberate attempt at promoting unity in diversity where all Namibians through mutual understanding, respect and tolerate one's practice of any culture, within the scope of the constitution. The new cultural communities are regarded as a feature of cultural diversity, a process through which new cultural communities can be constitutionally recognised.

The existence of the new cultural communities in Namibia can be justified by the policy position of the Office of the United Nations High Commissioner for Human Rights (OHCHR) to the effect that, "States are encouraged to create an environment of tolerance and understanding where indigenous people's languages and culture are celebrated within the State, promoting an understanding of the value of cultural difference within the society at large."[94] Cultural differences or the development of new cultures, as is the case in Namibia, are given rise to by the inescapable fact that customary law is "living law" which evolves and develops to meet changing communal needs.[95] Cultural communities can therefore not be expected to be fixed and formally classified in a transforming society. People in Namibia are likely to develop their patterns of life or change them to meet the changing needs of their communities. Such changing needs could be informed by a need to develop new cultural practices to accommodate new land occupants coming from different cultural groupings and who are allocated land in new communities within Namibia. Such a practice cannot be regarded as being unconstitutional as it aligns with the principle of cultural diversity in Namibia.

5. Conclusion

[94] OHCHR, Thematic Advice of the Expert Mechanism on the Rights of Indigenous Peoples: A compilation (2009-2013) 26.

[95]AC Diala 'The concept of living customary law: A critique' (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 143. See also *Bhe & Others v Khayelitsha Magistrates & Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 81.

This chapter explored how the desire to fulfill the promise of Namibian citizenship has led to state ownership of land and a principle that all Namibians irrespective of traditional linkages of consanguinity and customary belongings are entitled to communal lands. It has been argued, that state ownership of land and universal access to customary land rights in Namibia has arguably led to the redefinition of the nature and extent of Traditional Authorities who are custodians of communal land, especially where gender issues are concerned. It has been outlined that the scheme of universal access to customary land rights is facilitated by the attenuated powers of Traditional Authorities. It has also been ascertained that residence is a factor in the use of customary land rights thereby complementing allocation in determining universal access to customary land rights. The nature and composition of Traditional Authorities have also emerged as being crucial to a determination of how these Authorities have addressed applications for customary land rights, especially where the recognition of women's customary land rights is concerned. It is thus anticipated that the arguments advanced in this chapter will curb the incessant cases of unequal access to land in Namibia. Key to curbing unequal access to land in Namibia is the observation that Namibian citizenship is of no worth without access to land hence the need to realise equitable communal land tenure reform for all Namibia citizens regardless of consanguinity. Most importantly though, it has been argued that the allocation of customary land rights irrespective of consanguinity is giving rise to new cultural communities in Namibia at the same time enriching formal citizenship of Namibians.

BIBLIOGRAPHY

Literature

Beaman J (2016) 'Citizenship as cultural: Towards a theory of cultural citizenship' 10 *Sociology Compass* 849-857

Becker H (1997) 'Women and land rights' in J Malan & M Hinz (eds) *Communal Land Administration: Second National Traditional Authority Conference – Proceedings* Konrad Adenauer Stiftung: Windhoek, 5 -20.

Cousins B & A Claassens (2004) 'Communal Land Rights, Democracy and Traditional Leaders in Post- Apartheid South Africa' in M Saruchera (ed*) Securing Land and Resource Rights in Africa: Pan- African Perspectives*

(Programme for Land and Agrarian Studies: Beville 2004) 139-154

Cox J, C Kerven, W Werner & R Behnke (1998) *The Privatisation of Rangeland Resources in Namibia: Enclosure in Eastern Oshikoto* (Overseas) Development Institute: London)

Diala AC (2017) 'The concept of living customary law: A critique' 49(2) *The Journal of Legal Pluralism and Unofficial Law* 143-165

Fiona A & W Werner (1990) *The Land Issue in Namibia: An Inquiry* (Namibia Institute for Social and Economic Research: Windhoek)

Fuller B (2004) 'A Namibian path for land reform' in J Hunter (ed) Who should own the land? (Konrad Adenauer Stiftung Namibia Institute for Democracy: Windhoek) 83-86

Fuller B (1999) 'Returning their rights: A case study of Namibia's communal areas' in J Oglethorpe (ed) *Tenure and sustainable use* (IUCN & Gland: Switzerland & Cambridge 1999) 111-118

Horn N (2005) 'Eddie Mabo and Namibia: Land reform and pre-colonial land rights' 3 *Sur –International Journal on Human Rights* 81-94

Kaapama P (2007) 'Commercial land reforms in post-colonial Namibia: What happened to liberation struggle rhetoric?' in H Melber (ed) *Transitions in Namibia. Which changes for whom?* (Nordiska Afrikainstitutet: Stockholm) 29-49

Lebert J (2005) 'Inheritance practices and property rights in Ohangwena Region' in Gender Research and Advocacy: *The meanings of inheritance: Perspectives on Namibian inheritance practices* (Legal Assistance Centre: Windhoek) 71-92

Malan J & MO Hinz (eds) (1997) *Communal Land Administration Second National Traditional Authority Conference*. Proceedings (Centre for Applied Social Sciences: Windhoek)

Malan J (1980) *Peoples of SWA/Namibia* (Hollandsche Afrikaanse Uitgeweers Maatschappij (HAUM): Pretoria and Cape Town)

Martin A, S Sibanda & S Turner (2000) 'Land Tenure Reform and Livelihoods in Southern Africa' in C Toulmin & J Quan (eds) Evolving Land Rights, Policy and Tenure in Africa (International Institute for Environment and Development: London) 302-319

Melber H, (2005) 'Land politics in Namibia' 103 *Review of African Political Economy*, 135-204

Melber H, (ed) (2007) *Transitions in Namibia. Which changes for whom?* (Nordiska Afrikainstitutet: Stockholm)

Mendelsohn J (2008) *Customary and legislative aspects of land registration and management on communal land in Namibia* (MLR: Windhoek)

Mendelsohn J (2006) *Farming Systems in Namibia* (Research and Information Services of Namibia: Windhoek)

Mendelsohn J, A Jarvis, C Roberts, & T Robertson (2009) *Atlas of Namibia. A portrait of the and its people* (3rd ed) (Sunbird Publishers: Cape Town)

Thiem M A (2014) *Decade of Communal Land Reform: Review and Lessons Learnt, with a Focus on Communal Land Rights Registration* (Windhoek)

Warikandwa TV, A Nhemachena & O Mtapuri (eds) (2017) *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio-Legal Perspective* (Langaa Research & Publishing Common Initiative Group: Mankon, Bameda)

Warikandwa TV & A Nhemachena (2017) 'Human rights to land or land rights? Charting a new roadmap to land ownership in Africa' in TV Warikandwa, A Nhemachena, & O Mtapuri (eds) *Transnational Land Grabs and Restitution in an Age of the (De-) Militarised New Scramble for Africa: A Pan African Socio- Legal Perspective* (Langaa Research & Publishing Common Initiative Group: Mankon, Bameda) pp 529-552.

Werner, W (2015) 'Tenure reform in Namibia's communal areas' 18 *Journal of Namibian Studies* 67-87

Cases

Namibia

Agnes Kahimbi Kashela v Katima Mulilo Town Council and Others: Case No: SA 15/2017 delivered on 16 November 2018

Chairman Ohangwena Communal Land Board N.O. v Wapulile (SA 81/2013) [2017] NASC 19 (08 June 2017)

Halidulu v The Council for the Town of Ondangwa (I 389/2015) [2019] NAHCMD 460 (7 November 2019)

Kapia v Minister of Regional and Local Government Housing and Rural Development (A 333/2012) [2013] NAHCMD 13 (24 January 2014)

Mutrifa v Tjombe (I 1384/2016) [2017] NAHCMD 162

Ndevahoma v Shimwooshili (HC-MD-CIV-ACT-OTH-2017/03184) [2019] NAHCMD 32 (25 January 2019)

Ongwediva Town Council v Jonas (HC-NLD-CIV-MOT-GEN-2018/00001) [2018] NAHCNLD 22(12 March 2018)

Tjiriange v Kambazembi (A 164/2015) [2017] NAHCMD 59 (24 February 2017)

Vita Royal House v The Minister of Land Reform & 10 Others (A 109/2015) [2016] NAHCMD 339 (7 November 2016)

Wapulile v Chairman, Ohangwena Communal Land Board N.O (A 265/2013) [2013] NAHCMD 340 (15 November 2013)

South Africa

Bhe & Others v Khayelitsha Magistrates & Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) para 81

Legislation

Agricultural (Commercial) Land Reform Act 6 of 1995

Communal Land Reform Act 5 of 2002

Constitution for the Republic of Namibia, 21 March 1990

Traditional Authorities Act 17 of 1995

Traditional Authorities Act 25 of 2000

Reports

GP Chiari 'Draft Report: UNDP Mission on Rural Livelihoods and Poverty in Namibia' Windhoek: United Nations Development Programme (2004)

J Mendelsohn 'Customary and legislative aspects of land registration and management on communal land in Namibia' A Report prepared for the Ministry of Land and Rural Resettlement and the Rural Poverty Reduction Programme of the European Union, December 2008 (2009)

Ministry of Land Reform 'Mid-term Report Evaluation, Programme for Communal Land Development' Windhoek (2017).

OHCHR, Thematic Advice of the Expert Mechanism on the Rights of Indigenous Peoples: A compilation (2009-2013) 26

W Werner 'Protection for women in Namibia's Communal Land Reform Act: Is it working?' A report published by the Land, Environment and Development Project Gender Research and Advocacy Project, Legal Assistance Centre, March 2008 (2008)

JI Barnes 'The value of non-agricultural land use in some Namibian communal areas: A data base for planning' DEA Research Discussion Paper 6 (MET: Windhoek 1995)

L von Carlowitz & P Mandimika 'Promoting Dialogue and Raising Awareness: Land Reform and the Arts in Namibia' A paper prepared and presented at the 2015 World Bank Conference on Land and Poverty - The World Bank- Washington DC, March 23-27 (2015)

M Hinz & P Kauluma 'The laws of Ondonga – introductory remarks' in Traditional Authority of Ondonga, Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga (Evangelical Lutheran Church of Namibia (ELCIN): Oniipa1994)

Millennium Challenge Corporation/Orgut COWI, Legal Requirements for Group Land Rights, Windhoek, Millennium Challenge Account Namibia (2014)

Proposed Guidelines for Group Land Rights in Communal Areas, Windhoek, Millennium Challenge Account Namibia (2014)

Proposed Working Policy for Group Land Rights, Windhoek, Millennium Challenge Account Namibia (2014)

P Mandimika & J Mulofwa 'Securing customary land rights for development in Namibia: Learning from new approaches, opportunities and social settings' Paper prepared for presentation at the 2018 World Bank Conference on Land and Property, The World Bank – Washington DC, March 19-23 (2018).

Traditional Authority of Ondonga 'Ooveta (oompango) dhoshilongo shondonga/The Laws of Ondonga' (Evangelical Lutheran Church in Namibia (ELCIN): Oniipa 1994)

Internet Sources

Bank of Namibia 'Unlocking the Economic Potential of Communal Land' (2012) available at https://www.bon.com.na/CMSTemplates/Bon/Files/bon.com.na/7d/7dafdec3-24a1-4817-902a-c4a686f57489.pdf (accessed 12 December 2019)