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THE PEOPLES' LAW: TOWARD A NEW COMMON LAW FOR AFRICANS

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Abstract: *Law on the African continent draws from both indigenous, customary sources and from the legal norms and conventions brought to the continent by outsiders, principally colonial settlers. Historically however, customary African laws have been subordinated to the legal systems introduced through colonisation. The author argues in favour of achieving a better balance between these two sources of law in which customary law is, in future, shown more deference than it has been shown to date. Such reforms would make the array of applicable laws within Africa clearer and more comprehensible and, as well, bring law on the continent into closer conformity with citizens' lived experience.*

Keywords: African customary law – systems of law imported into Africa through colonization – commonalities and divergences between customary and imported legal norms – reconciling differences between different systems of laws – achieving a more defensible balance between the deference paid to imported and customary law in African states.

Introduction

Africans live, yes, but they live a life of contradictions. For them, law continuously presents dilemmas. At every stage, Africans encounter difficult existential questions that could grow in number and complexity with time. Such questions include: Is sex before marriage permissible? Is polygamy immoral? Is it wrong to visit a traditional specialist? Is traditional circumcision a backward and destructive practice? These questions arise across the African continent, but this article will examine them principally within the Kenyan context.

Since the differing civilisations that have shaped Africans reflect conflicting positions on these issues, the fact that such questions arise for consideration within court systems from time to time is understandable. For instance, while some African customs encourage certain forms of sexual interaction among youth, the Kenyan Sexual Offences Act, 2006 criminalises such practices. Although polygamy is a central custom for many Africans, section 171 of the Kenyan Penal Code makes it a criminal offence for a Kenyan married under statute to go through another ceremony of marriage during the lifetime of his or her spouse. The state's response to the activities of certain African specialists—such as healers and medicine persons—is to impose stern penal sanctions. The Witchcraft Act remains on the books in Kenya and it continues the colonial policy of criminalising such acts as:

a. pretending to practise witchcraft;

b. supplying advice or objects for witchcraft-related purposes with the intent to bewitch or injure; and

c. using medicine with intent to harm or injure.

The Witchcraft Act also makes it a criminal offence to possess 'a charm or other article usually used in the exercise of witchcraft, sorcery or enchantment for the purpose of causing fear, annoyance or injury to another in mind, person or property'.

Besides these existential dilemmas, even harder questions present themselves to the learned African. How did we end up with a myriad of legal systems in a single country like Kenya? Why does the government favour the formal legal system? Why does it often seem impossible to reconcile these different legal systems?

In my view, for many Africans the formal law lives its own life and the people another. These parallels should not have concerned me much, but for the fact that my people appear to me to live a lie: they must attempt to function within a formal but sometimes unrealistic legal system on the one hand, and an informal and not always authentic customary legal system on the other. It is difficult to defend either. The formal legal system is both foreign and colonial in origin, yet it has been preferred by all the post-colonial governments in Kenya. The informal law is native in origin, though it too has been heavily shaped by colonialism, leaving Africans sometimes ambivalent or confused. Moreover, the policy of all post-independence governments has been to subordinate the informal customary law to the law introduced by outsiders.

Against this backdrop, I argue that the formal legal system founded on western law and traditions and (more recently) emerging global values continues to enjoy superior status in Kenya, largely because of the vantage point it secured during the colonial epoch. I also show that the originally foreign formal law is often out of touch with Africans' lived experiences, a situation which calls for more customary and 'practical' content in the legal system. Yet, such a corrective endeavour meets with fundamental challenges for three main reasons. First, what exists today as customary law is a reified version, having suffered major modifications during the colonial epoch. Second, the lived experiences of Africans have always been and continue to be in a state of flux, making it nearly impossible to define the province of what exists today as customary law. And third, it is a significant challenge for the institutions which the colonists bequeathed and the 'colonised' personnel that operate them to dispense law for Africans. Further, I argue that the key to the dilemma lies in the two systems meeting halfway—that is, in tracing the history of Africans, including their interactions with foreign civilisations, studying their present experiences, and then pursuing a more realistic position that is alive to their realities. The result of such a process would be what I refer to in this article as a 'peoples' law'. Using the case study of the implementation of English common law in Kenya, I demonstrate how this fairly malleable source of law could serve the useful purpose of mediating that common ground.

All Civilisations are Equal, but Some More than Others: Of Africa's Triple Heritage +1

In his influential book, *The Africans: A Triple Heritage*, published in 1986, and his article entitled 'The Re-invention of Africa: Edward Said, V.Y. Mudimbe, and Beyond', published in *Research in African Literatures* in 2005, Ali Alamin Mazrui advanced a triple heritage theory which conceives that today's Africa is an amalgam of three major civilisations; indigenous Africanity, Islam and westernisation. Indeed, prior to the arrival of foreigners, Africans observed largely indigenous religious and cultural traditions. These nearly 'pure' societies were altered by encounters with early visitors, imperialists and missionaries.

On the East African coast, the Portuguese and the Arabs introduced unique civilisations and their legacy remains embedded in local languages, cultures, political and social systems, agriculture, architecture, trade, and religion. A similar phenomenon is seen in West Africa with regard to Islam. For its part, Western colonialism occasioned extraordinary transformation in many parts of Africa through systematic imposition of foreign social, political and legal systems in which distinct western values were implanted. Accompanying the imperialists were the Christian missionaries who saw their religion and civilisation as being superior, and thus bestowing upon them a high responsibility to 'save' the native populations from their heathen ways.

Thus, Mazrui rightly perceives Africans as the manifestation of this civilisational 'trinity'. He visualises contemporary Africa as a cultural bazaar where a wide variety of ideas and values, drawn from different civilisations, compete for the attention of potential African buyers. However, the dominance of westernisation tends to tip the scales since, in his words, 'what Africa knows about itself, [and] what different parts of Africa know about each other, have been profoundly influenced by the West'. Thus, since the arrival of western colonising forces, this 'cultural bazaar' has doubled as a battlefield where indigenous African values and the forces of western civilisation have been set in opposition and from which westernisation has emerged victorious. As a

result, there has been a remarkable pace of cultural dis-Africanisation and westernisation throughout the political, cultural and legal spheres of African states like Kenya, to the detriment of indigenous systems.

Furthermore, with burgeoning of globalisation and the attendant juridical globalisation, African customary laws often come into contact with international systems whose norms and standards are largely shaped by western interests and values. Indeed, major human rights instruments like the *Convention on the Elimination of All forms of Discrimination Against Women*, the *Convention on the Rights of the Child* and the *Protocol to the African Charter on the Rights of Women in Africa* (or *Maputo Protocol*) denigrate some customary values still held dear by some Africans, including traditional circumcision of boys and girls, the age of maturity for children, and polygamy.

African Customary Laws Before Modification

Perhaps due to the hegemony of western civilisation in Africa's triple heritage, most studies proceed as if Africans had no legal systems of their own prior to their encounter with colonising societies. While it is true that African legal systems did not always exhibit elaborate governance institutions like those of the colonists, Africans did have their own methods of operating governance and justice systems, unintelligible within the now dominant western approach.

Some state-like traditional societies such as the Wanga of Kenya, the Baganda of Uganda and the Zulu of South Africa had conspicuously centralised governance institutions including formalised court systems. Most others lacked centralised political authority, codified law or regular systems of taxation and, therefore, administered the law through less formal structures like groups of elders or clan members whose decisions were enforced through public opinion and communal action.

As H.F. Morris noted in his 1970 treatise, *Some Perspectives of East African Legal History*, the heart of the customary systems was the concept of precedent, meaning that the dispensations were not just repetitive and predictable, they also established traditions and practices which then applied as law. Customary norms were unwritten and would be passed from generation to generation orally. In the societies where Islam had an impact, Islamic religious law also formed one of the sources of law.

African customary laws and related legal systems aimed, in Morris's words, 'to preserve the equilibrium between individuals or groups of individuals' and tended to address conflicts relating to matters such as birth and naming of children; sexuality, marriage and succession; and death and burial. In addition, something comparable to western criminal law was detectable mostly in state-like societies in offences like rebellion against the chief/king or violation of the chief/king's property rights—conduct which merited punishment. Pre-colonial African legal systems were also predominated by religion, which permeated nearly all aspects of life to the extent of making the separation of faith from action illusory.

I should clarify that I refer to pre-colonial African customary laws and legal systems in the plural because there were close to 1,000 different tribes and about 10,000 polities in Africa prior to colonisation and each had its own customs, religions and political system. However, comparative research has shown general trends and patterns that make the study of Africans' patterns of governance and law-making amenable to generic academic analysis as is attempted here. Finally, I add the rider that it is difficult to situate pre-colonial African legal systems precisely in space and time because of the frequent migration of populations, and the constant modification of cultures and systems as a result of cross-cultural pollination. African cultural, political and legal systems were in constant state of flux.

Enter the Modifiers: New Legal Systems are Prescribed for Africans

I have already noted above that colonialism did not constitute Africa's first contact with foreign civilisations. At the same time, there is no doubt that colonialism represents the most influential of Africans' encounters with foreigners; it is during the colonial epoch that, in countries like Kenya, the British transformed

Africans' institutions beyond recognition. One of the areas where colonists impacted Africans' institutions most significantly is their legal systems.

Throughout their occupied territories in Africa, the British operated two legal systems. The first, formal and considered to be superior, was modelled upon the English common law. The second, customary and subservient, sprang from Africans' traditions but was subjected to constant colonial surveillance and control. In the end, in former British colonies like Kenya, British values and methods pervaded both legal systems significantly.

The colonial legislation that introduced the common law in the territory now called Kenya, the East Africa Order-in-Council of 1897 (and later the 1921 Order), outlined three foreign sources of law: procedural and penal law, which the British had applied in the India colony; the common law and doctrines of equity; and statutes of general application in force in England on 12 August 1897. Importantly, even as it introduced foreign laws, the Order-in-Council was clear in a proviso that the common law (and the other foreign laws) would apply only so far as the circumstances of the colony and its inhabitants permitted.

In practice, little regard was paid to the above-noted proviso. On the contrary, it was African customary laws that were made to comply with British values. Where the morality of an African custom was in doubt, the colonial judicial officers would weigh it against the yardstick of British values through what came to be known as the doctrine of repugnancy. As a British judge in an East African colonial court frankly stated in a case decided in 1938: 'I have no doubt whatsoever that the only standard of justice and morality which a British court in Africa can apply is its own British standard'.

The 1917 case of *R v Amkeyo* is exemplary of this contemptuous colonial attitude on the part of the judiciary toward African customary laws. In that decision, the High Court indicted the Africans' polygamous marriage institution by declaring it repugnant to justice and morality, and describing such a relationship pegged on payment of dowry (and not limited in the number of women one could marry) simply as 'wife purchase'.

The marginalisation of African customary laws extended beyond legislative and judicial institutions. On the administrative front, the British deployed both subtle and overt methods to control customary systems, in line with the goal to 'civilise' Africans. (For an interesting analysis of these practices, see Mahmoud Mamdani's 1996 title, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*.) To implant their ethos into the customary systems, the British recruited chiefs as allies in some communities where chieftains already existed; they also imposed such institutions where they were non-existent. These chiefs (collaborators or appointees of the central colonial administration) oversaw a modified version of customary laws adapted to the interests of the colonial state such as the acquisition of land, the procurement of labour and the 'civilisation' of native social mores. This hybrid legal system, saturated by British values and methods, was (and remains) largely oblivious to the lived realities of Africans. As a result, Africans often interact with a legal system branded after them but many times contradictory to their own circumstances.

Through legislative, judicial and administrative institutions, the colonists effected sweeping transformation of customary systems. When it was all done, Africans (especially the emerging elite) had only a vague recollection of their original customary laws, let alone nostalgia for their restoration. Instead, their affections were attuned to the imported legal system in which they were schooled.

Political Independence Without Juridical Decolonisation

The scenario described above—of imported legal systems predominating over native customary laws—should have angered the emerging African elite. But it did not. While nationalistic sentiments were conspicuous on the political scene, similar resistance was absent on the juridical front. The fact that the question of whether to continue with the colonial legal systems or to establish an indigenous system was a subject of debate in the early post-independence period is testimony to the paradox of political independence without juridical decolonisation. The anxieties of the departing colonists over the future of the English common law,

given the euphoria of independence and the prospect of indigenisation, would soon be assuaged, as the African elite chose to continue operating the western legal systems. Some post-independence governments even outdid their colonial mentors in the 'art' of juridical westernisation.

In post-independence Kenya, subjugation of even the modified African customary laws has been effected through various constitutional documents, Acts of Parliament and judicial precedent. The Constitution, Kenya's basic law, impacts African customary laws at five levels.

First, like its predecessor, the 2010 Constitution disqualifies any law, including customary law, which fails its own standards. Therefore, the Constitution is the first most important yardstick against which the relevance of African customary laws is measured. However, it is arguable that by explicitly addressing customary law, the Kenyan Constitution may impart some added recognition to this source of law.

Second, in a manner similar to Kenya's repealed 1963 Independence Constitution, the 2010 Constitution provides that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the state or international law. This, in effect, renders the entire corpus of African customary criminal law invalid because African customs are not written and only recognised formal legislative structures such as Parliament are permitted to enact criminal law that is recognised under the Constitution. Yet, prior to colonisation, Africans recognised various offences and crimes which were handled by the local population according to their traditions. Some of these crimes are no longer acknowledged, given the supremacy of the Constitution and Parliament in the penal realm; and especially after the post-independence Kenyan state failed to seize an initial window of opportunity built into the 1963 Independence Constitution allowing the codification of African customary crimes within a three-year grace period. It followed that, by 12 December 1966, the subject became entirely extinguished.

Third, the current Constitution restricts customary law through subtle provisions whose overall effect is to disallow traditional practices. Article 55(d) requiring that youth be 'protected from harmful cultural practices' is an example of such provisions. Among the harmful traditions from which youth are to be protected are practices such as female genital mutilation ('FGM'), a common tradition among Africans. Similarly, the Constitution makes the right to marry a preserve of persons of opposite sexes, meaning that woman-to-woman marriages, found in some African communities, may not have an outright legal basis.

Fourth, it must be acknowledged that there are certain concessions in the 2010 Constitution which favour customary laws. One such concession yields ground to Islamic customary law 'in matters relating to personal status, marriage, divorce and inheritance'. Another is the constitutional recognition of culture, and arguably customary laws, as the foundation of the nation and the cumulative civilisation of the Kenyan people and nation.

Fifth, though subject to scrutiny for constitutional validity and survival of the repugnancy test, Kenya's 2010 Constitution recognises the use of traditional dispute resolution mechanisms. On this basis, Chief Justice Willy Mutunga appointed the Taskforce on Informal Justice Systems, whose work could lead to the triumph not just of some customary laws but also of customary dispute resolution institutions.

The marginalisation of customary laws persists also on the statutory front. For instance, section 3 of the Kenyan Judicature Act of 1967 creates a hierarchy of legal norms, which elevates the imported English laws (statutes, common law and the doctrines of equity) while customary laws appear as secondary and subject to the demeaning repugnancy doctrine. The significance of such sequential ranking was confirmed in a case called *Rono v Rono*, where the presiding judge observed that the Constitution has 'hierarchical primacy' with respect to the sources of law enumerated in the Judicature Act.

The very isolation of African customary laws to a different and latter sub-section 3(2) is testament to its subordination. It is ridiculous that even English Acts of Parliament applicable

on or before 12 August 1897 continue to be superior to African customary laws, the more so that English customary laws (in the nature of common law and doctrines of equity) rank higher as well. Moreover, African customary laws are not a binding source of law but are merely a source of 'guidance'. Even then, customary laws are only applicable to civil matters and only where they affect the rights and obligations of parties to disputes before the courts. Once again, African customary criminal laws are disregarded. The final blow is the restatement of the 'repugnancy clause' and its deference to western standards of 'justice and morality'.

Beside the Judicature Act, other statutes have been regulating areas like marriage, succession and matters relating to children, all formerly the domains of African customary laws.

Toward a New Common Law—The 'Peoples' Law'

- Looking at the history of Kenya's legal systems since the imposition of colonial rule, the tragedy that has befallen African customary systems could have been avoided, or at least mitigated, from independence onwards. There were several opportunities to emancipate African customary laws from colonial bondage and to redeploy them for the service of Africans but these opportunities were ignored.
- The irony is that the most promising salvation for African customary systems lay in the original East African Order-in-Council of 1867, which introduced colonial law to Africans. And the salvation is in the requirement that foreign law shall apply only as far as the circumstances of the colony and its inhabitants permitted and subject to such qualifications as local circumstances rendered necessary. Had this opening been seized and factored into the formal legal system since 1897 or even after Kenyan independence in 1963, African customary laws and legal systems would arguably have taken a different path.
- An opportunity still remained, at independence, to latch onto the nationalist fervour of the moment during the constitutional deliberations of the early 1960s—an opportunity to push for the recognition of both customary dispute resolution mechanisms and the substantive provisions of the various customary laws. This opportunity too was passed up. Even the three-year window provided in the Independence Constitution for the first African government to incorporate African customary criminal laws into formal penal law lapsed before any serious measures were attempted.
- But it is the English common law doctrine of *stare decisis,* which upholds the decisions made by judges in like circumstances in the course of determining disputes, that perhaps stood (and still stands) as the greatest tool available to adapt imported laws to African circumstances, thereby developing a legal system more attuned to the Africans' triple heritage (now plus globalisation) and advance the peoples' law. While recognising that judges with foreign training will always have fundamental limitations when adjudicating conflicts between locals, the benefits of using the malleability of the English common law to reconcile the many values at play among Africans should have been attempted, nonetheless.
- As the experience since the enactment of the 2010 Constitution shows, a pool of judges willing to try might be all that is needed to arrive at a 'peoples' law'. Armed with a Constitution that gives slight credence to traditional dispute resolution mechanisms and customary law (which in this case may either be the common law or African customary laws), the post-2010 judiciary in Kenya has dared to dream. For instance, in the 2011 case of *Monica Jesang Katam v Jackson Chepkwony & another*, then High Court judge, J.B. Ojwang, protected the inheritance rights of a woman married to another woman under Nandi customary law. The judge found that the petitioner 'was a "wife", and, by the operative customary law, she and her sons belonged to the household of the deceased, and were entitled to inheritance rights, prior to anyone else'. In the penal realm, the 2013 case of *R v Mohamed Abdow Mohamed* is a much-lauded milestone

decision which acknowledges the place of customary dispute resolution mechanisms in criminal matters. The accused in that case had been charged and arraigned for murder. However, during the course of proceedings, the deceased's family approached the prosecution, seeking to withdraw the matter following a settlement reached by both families in accordance with Somali law and custom. In allowing the withdrawal, the High Court held that in the 'unique circumstances of the case' the ends of justice had been met. Similarly, the High Court in the 2017 case of *R v Musili Ivia & another* allowed such a settlement regarding a charge of murder settled under Kamba customary law.

- However, the decision in the matter of *Dr Tatu Kamau v AG & Others* that was delivered in 2021 is illustrative of the complexity of adapting customary law questions to the formal system. Asked to decide on the validity of the prohibition of the circumcision of adult women, the three-judge bench found itself torn between, on the one hand, addressing the cultural nuances of the practice within its unique context, and on the other, the weight of the international consensus condemning FGM. In the end, as in the civilisational battlefront, the African customary laws did not prevail. While that outcome of the case can be understood, it is concerning that the court placed so little importance upon investigating and seeking better to understand the customary point of view.

In Lieu of a Conclusion

Colonists changed Africans beyond recognition. By the end of the colonial epoch, Kenyans had forgotten their way back, and they had no idea where to go forward either. While the country has been making do with colonial legal systems, it has also had to adjust to the emerging international normative consensuses, none of which fully reflects African peoples' lived realities. A reconciliation of the law and our lived realities is long overdue. The 2010 Constitution has set the stage, and some judges are showing that the common law is sufficiently malleable to be flexed in the search for a 'peoples' law'. I believe that this is the way to go. In the meantime…

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