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## A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa

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### INTRODUCTION

Historically, traditional means of settling disputes have been commonplace in African societies. Before the advent of colonial administration, parties were represented by persons skilled in oratorical prowess, who could argue and who possessed the persuasive power of argument, parties recounted their story and “counsel” presented oral arguments in support, while the elders who acted as arbiters pronounced judgment which was garbed with wisdom and experience.<sup>1</sup> It was the general belief that no appeal could come out from those judgments partly because the people feared and believed in the elders, and therefore their wisdom could not be questioned. Parties also ensured that they complied with the judgment meted as a set of injunctions, enjoinder, and taboos handed down orally from generation to generation, which dominated the consciousness of every member of the collective from birth to death.<sup>2</sup> The advent of colonial rule saw the transposition of western-styled dispute resolution mechanisms where court assisted instrumentality became the only option for the parties.

In the wider African setting, African scholars have attested to this traditional means of settling disputes.<sup>3</sup> In traditional African communities, when a dispute arose among individuals, even in non-commercial transactions, the complainant invariably referred the matter to a third

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<sup>1</sup> Azadon S. Tiewul and Francis A. Tsegah, *Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice*, 24 *The Intl & Comp. L. Q.* 393, 396 (1975).

<sup>2</sup> Philip Ochieng, *Cultivating a Legally More Beneficial Future*, *THE NATION*, 186-7 (Nairobi, Kenya, 1987).

<sup>3</sup> Goodman Everard believes that arbitration and ADR have always existed in Africa, harking back to ancient custom that, unlike in the northern hemisphere, is still practised widely. See GOODMAN-EVERARD, *Book Review – Arbitration in Africa*, 14 *Arb. Intl* 457-8 (1998).

party for redress.<sup>4</sup> The most serious disputes were resolved by a Council of Elders that would take testimony and sometimes hear the arguments of agents advocating on behalf of the disputants.<sup>5</sup> Noteworthy is the fact that in similar cultures, this form of dispute resolution is also widely practiced. In ancient India, local village councils (*panchayats*) conducted informal arbitral proceedings and their decisions were considered binding.<sup>6</sup> There is some evidence that early Indian practice preferred *panchayat* dispute settlement to litigation before judges who had been appointed by political authorities; the informal nature of the proceedings and the ability to avoid the technical requirements of India's judicial system was seen as a significant advantage.<sup>7</sup>

Undoubtedly, Conflict Resolution paradigms has come to be a part of Africa's independence legal system.<sup>8</sup> The contribution of methods of alternative dispute resolution (ADR) to the development of not only Nigeria but the African continent, is no less important, let alone the satisfaction that the parties enjoy from the conflict resolution process. Indeed, ADR is the oldest method for the peaceful settlement of local and international disputes.<sup>9</sup> Mechanisms for ADR are not codified in any statutory enactment so as not to derail the world wide acceptability of this process. Moreover, ADR is meant to be less procedural to ensure that disputes are resolved expeditiously. The need for resorting to ADR is more compelling when the lacklustre attitude of Nigerian courts to the sophistication of business disputes are brought before the courts. When businessmen enter into disputes about a contractual relationship, their intention is certainly to have a speedy and trustworthy adjudication process, so that they can maintain or continue their business transactions. Almost always, the courts are not in a better position to provide this due to the imprecise basis of determining post-conflict relationships between the parties.

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<sup>4</sup> Liundi S., Introduction: Status of Tanzania and Zanzibar and Applicable Laws, in *Arbitration in Africa* 78-9 (Eugene Cotran & Austin Amisssah eds., 1996).

<sup>5</sup> *Id.* at 79.

<sup>6</sup> Raghavan Vikram, *New Horizons for Alternative Dispute Resolution in India – The New Arbitration Law of 1996*, 13 J. INT'L ARB. 5, 6 (No. 4, 1996).

<sup>7</sup> *Id.* at 8-15.

<sup>8</sup> Nigeria gained independence from the United Kingdom on Oct. 1, 1960 and became a republic on Oct. 1, 1963. It operates a federal constitution which current enactment was done on May 29, 1999, after Nigeria became a democratically elected government. See NIGERIA EMBASSY OF THE FEDERAL REPUBLIC OF NIGERIA, *Nigeria: Past, Present and Future*, <http://www.nigeriaembassyusa.org/index.php?page=nigeria-past-present-and-future> (last visited Jul. 7, 2017).

<sup>9</sup> ALEXANDER STUYT, *Survey of International Arbitrations 1794-1989* (3d ed. 1990).

Part One is the introduction. Part Two discusses the basic notion of native conflict resolution, the ideas surrounding the concept, and the impact it has had on the community. Part Three focuses on Rwanda's justice system paying particular attention to the *Gacaca court* system and how it has helped fast track the adoption of traditional conflict resolution concept. Part Four is an elaboration on Nigeria's various tribal dispute resolution methods and how those methods have been eroded over time. This has created a *lacuna* in forestalling conflicts and post-conflict community reconstruction. Part Five briefly discusses traditional dispute resolution in Kenya, while Part Six concludes the work. This work proposes a return to the age-long alternative and traditional means of settling conflicts that predate colonial rule. Africa is a peculiar continent and demands a peculiar alternative to dispute resolution. This paper argues for the recognition of African traditional dispute resolution in different African countries' bodies of law.

## I. PHYSIOGNOMIES OF NATIVE CONFLICT RESOLUTION

To an average African, conflict is part of his everyday life. This is partly due to the vast preserve of natural resources which has often fuelled ethnic wars and conflicts in most part of Sub-Saharan Africa. Harnessing the benefits of the resources has been problematic, for not only have many countries failed to reap the benefits of the resources, the development of the resources has in fact triggered violent conflicts, destroyed the environment, exacerbated inequalities across gender and geography, displaced communities, and undermined democratic governance in many African countries. While the developed societies have done fairly well in managing their resources, developing countries continue to grapple with the challenges of resource development in the face of huge financial incentives from multinational corporations.

Native conflict resolution has evolved over the years. In the pre-colonial era, for instance, traditional wrestling was a means of showing prowess or ascending to a kingly throne. To a typical African, conflict is exhibited in his culture which more often than not signals forms of virility, responsibility, and versatility. The essence of conflict and its effect on societal development were thus appreciated early in time. Conflict, therefore, is in the psyche of the Africans and its perception often exhibited

to make all and sundry vulnerable to the matrices of development.<sup>10</sup> One of the striking differences between traditional conflict resolution in pre-colonial Africa and its Western counterpart is the deep rooted cultural affinities that members of the community share amongst themselves. Conflicts were resolved in a cordial and harmonious way devoid of any formal process. Parties believed and trusted this process.

In modern times, resolution of conflicts is conducted at various platforms, including electronic media.<sup>11</sup> Certain rules guide the resolution of conflicts in this manner. Those rules were tailored towards ensuring dispensation of justice and preservation of regulations and directives. Almost always, conflicts were firmly resolved and parties complied with decisions from those resolutions without let or hindrance. This may be partly due to the belief in the repercussions of non-compliance. These processes utilise the potency in the powers of different deities, which are used in oath swearing by parties. Truth was thus the guiding fact.<sup>12</sup> The question that follows then is what is truth in this context. It is indeed a hard concept to easily identify. It denotes objective and subjective comprehension for the intended recipient. It reveals the mistakes of the past, conditions our perception of the present, and gives us a direction on the future. Clark highlights three types of truth which will be useful in the context of this work, especially with regards to the *Gacaca* court system.<sup>13</sup> He identifies the legal truth, the personal/therapeutic/emotional truth, and finally, the restorative truth. In a general sense, the notion of truth-telling is that it may provide a sense of healing on the individual and community level through regaining a “sense of belonging.”<sup>14</sup> This “sense of belonging” concerns how the truth is expressed and thus, shaped, to aid in the rebuilding of the social fabric of a society; thus it points to the communal aspects of truth as opposed to the individual.<sup>15</sup> Most truth and reconciliation committees set up by government have the tendency to

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<sup>10</sup> O.B. Olaoba, *African Traditional Methods of Conflict Resolution*, PCR831: Course Guide, 25 (NOUN, Lagos, 2010).

<sup>11</sup> There have been various conflict resolution programmes carried out through the media. These include programmes such as: ‘e gbani e làjà’ (Help us resolve this conflict), ‘gbòrò mi ró’ (Hear our story and decide), ‘ìjókò òjògbón’ (The counsel of the wise).

<sup>12</sup> BASIL DAVIDSON, *Which way Africa? The Search for a New Society* (3rd ed., London 1964); O. ADEWOYE, *The Judicial System in Southern Nigeria, 1854- 1954* (London: Longman 1977).

<sup>13</sup> Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice Without Lawyers 195-96* (CUP 2010).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

unravel the mystery behind the occurrence of a conflict as well as bring out the truth about such conflict, however, in varying degrees. Discourse on the *Gacaca court* will be carried out in the course of this work. However, suffice it to say that the legitimacy of the *Gacaca court* is based upon the willing participation of the parties and the community. Traditionally, village elders would convene all the parties to a crime and mediate a solution involving reparations or some act of contrition. This process guaranteed the much needed restorative effect. It allowed the community to freely and openly discuss the genocide, participate in the creation of justice and a standard of responsibility for criminal actions, and swiftly deal with recent disturbing events.<sup>16</sup>

*A. Principles of Conflict Resolution in Traditional African Society*

Customary practices and rules of behaviour culturally known and applied by natives dominated the core values of conflict resolution in traditional African societies. The values were widely believed to represent the character and personality of a typical African. The principles of conflict resolution in traditional African society were therefore built on the desirability of Africans to administer social order and justice in a unique way based on mutual trust and cohesion, the bedrock of affirming public morality and customary values.<sup>17</sup>

Further, the dominating factors for ensuring these principles are forgiveness, the prevalence of truth, attainment of social justice, and coherence amongst the community. These ensured the cohesiveness and mutual respect for one another under the African pre-colonial existence. For instance, elders under this dispensation whose respect in their respective communities were unwavering and manifested honesty and truthfulness resolved disputes. African elders view truth as the objective confirmation of scientific trust and ethical modesty showcasing movement of time in development process.<sup>18</sup>

Legend has it that the commercial activities of pre-colonial days were based on mutual trust and honesty. Sellers displayed their wares with price tags on them without necessarily staying with the goods. Any potential buyer would place the fares on the spot where those goods were

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<sup>16</sup> *Id.* at 137.

<sup>17</sup> Olaoba, *supra* note 10 at 41.

<sup>18</sup> *Id.*

taken from. Such was the extent of transparency and truthfulness that permeated the commercial activities that predated colonial Africa. However, with the positive emergence of globalisation and commercialisation came their attendant problems. The global world has been bedevilled by various activities that affect social interactions between individuals. In resolving conflicts arising from these interactions, oftentimes recourse is made to official court systems. This work is an assessment of the essence of oath taking and various forms of resolving disputes traditionally known in the African space. It does not call for a total abrogation of the formal means of settling disputes through court instrumentality but calls for a stepped up approach recognising traditional mechanisms rather than formal court instrumentality, which more often than not never really settles disputes and is full of warped contradiction. To put the issues in perspectives, this work analyses conflict resolution in some select communities in three jurisdictions.

## II. RWANDA

This section discusses the importance of Rwanda's *Gacaca* justice system as a means of resolving post-conflict challenges. Rwanda is a small landlocked country located in the central part of Africa, sharing borders with Uganda in the north, Burundi in the south, Tanzania in the east and Democratic Republic of Congo (DRC) in the west.<sup>19</sup> History reveals that the first people to live in Rwanda were hunter-gatherers commonly known as "Twa" or pygmies. After this, subsequent migrations brought other groups of farmers and cattle herders. Finally, one of the clans, now known as the Tutsi tribe, came to dominate the others.<sup>20</sup>

Pre-colonial Rwandan history, shrouded in mystery, could only be recorded in myths and poems.<sup>21</sup> Despite the fact that the Hutu ethnic tribe was large in number, colonial Rwanda promoted Tutsi superiority that contributed to the 1994 genocide.<sup>22</sup> The 1994 Rwanda genocide saw lots of Tutsis fleeing Rwanda as a result of the Hutu attacks on Tutsis and

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<sup>19</sup> RWANDA, CIA WORLD FACTBOOK. CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html> (last visited Jun. 26, 2016).

<sup>20</sup> FERGAL KEANE, *SEASON OF BLOOD: A RWANDAN JOURNEY* 11-12 (Penguin Book, 1999).

<sup>21</sup> LINDA MELVERN, *A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE* 7 (2009).

<sup>22</sup> *Id.*

moderate Hutus. It is important to note that the Hutus were pushed by a sense of injustice and inferiority.<sup>23</sup>

Undoubtedly, the dividing factors between the Hutus and the Tutsi were primarily occupation and wealth. The Tutsi owned large herds of cattle; their Hutu subjects farmed the land.<sup>24</sup> However, with time, a lot of Hutus became assimilated into the Tutsi aristocracy because they could buy and own large herds of cattle. On the other hand, some Tutsi lost their privileged status as they lost their wealth and became poor.<sup>25</sup> Thus, to a very large extent, pre-colonial Rwandan society was solidly materialistic.<sup>26</sup>

### A. THE RWANDAN JUSTICE SYSTEM

At the end of the 1994 genocide, the Rwandan government lacked the legal and institutional framework to address the challenges of the genocide. The judiciary, for instance, lacked the capacity to enforce the constitution and adjudicate cases within a reasonable time.<sup>27</sup> This apart, most infrastructure had been depleted, corruption was at the peak, and executive recklessness was rife.<sup>28</sup> Besides, professionals who could deal with post-genocide Rwanda had become refugees in foreign countries.

To achieve constructive national reconciliation, innovative approach to dealing with post-conflict crisis surfaced. The Rwandan government established a National Unity and Reconciliation Commission in 1999 which ultimately recommended that Rwanda adopt the traditional *Gacaca* system.<sup>29</sup>

#### 1. The *Gacaca* Courts

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<sup>23</sup>Keane, *supra* note 20 at 12.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 13.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>See the Organic Law No. 40/2000 of Jan. 26, 2001 setting up *gacaca* jurisdictions. [Category 1 relates to the most serious genocide offences and includes individuals who allegedly organized, instigated, led or took particularly zealous role in the violence. Category 2 of Law includes alleged perpetrators of or accomplices to international homicides or serious assaults that led to death. Accused persons who do not confess but subsequently convicted face maximum term of 25 years. Category 3 contains persons accused of other serious assaults against individuals. Category 4 includes those persons who committed property crimes].

The legitimacy of the *Gacaca court* was based on the willing participation of parties to the dispute and the community. This aided the effective implementation of the court's decision. Traditionally, respected community elders would convene all the parties to a crime and mediate a solution involving reparations or some act of contrition.<sup>30</sup> The participatory justice system of the *Gacaca court* is an important move in the restorative justice paradigm. This process contributed in no small measure in healing the divide between the Hutus and Tutsis.<sup>31</sup>

The *Gacaca court* system provides some form of incentives for defendants who are willing to confess to the crimes accused in return for a reduced sentence.<sup>32</sup> The reduced sentence comes in the form of community service. This provision utilises the concept of assisting the same community destroyed through the acts of the accused by helping to rebuild the community. In so doing, survivors of genocide, seeing the defendant engaged in community service, will feel a sign of fulfilment seeing one of the actors in the worst form of crime that ruined the fortunes of their city now helping to re-build that same community.<sup>33</sup>

The *Gacaca court* system could have potentially positive or negative effects on achieving accountability and reconciliation in Rwanda. On the positive side, the *Gacaca court* could ease the burden on the courts and prison system by helping to quickly prosecute the accused. This process could have a restorative effect by allowing many individuals in society to discuss the genocide in liberal terms, participate in the creation of justice and a standard of responsibility for criminal actions, and swiftly deal with recent disturbing events. *Gacaca court* activists argue that the *Gacaca court*

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<sup>30</sup> Madeline H. Morris, *Rwandan Justice and the International Criminal Court*, 5 ILSA J. INT'L & COMP. L. 352 (1999).

<sup>31</sup> *Rwanda: Reconciliation Commission Making Progress*, AFRICA NEWS, June 27 2001 (reporting that the National Unity and Reconciliation Commission has established programs to bring about reconciliation between the Hutus and Tutsis).

<sup>32</sup> A modern day concept of plea bargain.

<sup>33</sup> See *Organic Law on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity Committed Since 1 October 1990*, Law No. 8/96, *Rwanda Official Gazette*, 30 August 1996, Art. 66; <http://www.preventgenocide.org/law/domestic/rwanda.htm>, Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, N.Y.U. J. INT'L L., 44-45 (2002), <http://jurisafrika.org/docs/Ironside+and+Gacaca+Jurisdictions.pdf> (The proceedings in each *Gacaca Court* begin by listing every victim and criminal act committed in the area. Then the cases for each suspect are debated, based on testimonies from the general assembly and whatever information that exists in the files that were prepared by the public prosecutors finally, the seat reaches a verdict based on that. Each verdict can be appealed at the next higher *Gacaca* level. The defendant does not have lawyers, but all village people can participate and intervene, either against or in favour of the defendant).

system is a more efficient solution for Rwanda because rehabilitative penalties can be quickly assigned if “the moral force of the village is used to shame perpetrators into admitting the truth.”<sup>34</sup>

Indeed, as was the practice in pre-colonial Rwanda, many Rwandans are of the opinion that the more official, received Western-style system of justice does more harm than good in ensuring reconciliation and true justice.<sup>35</sup> For instance, Rwanda’s former Justice Minister, Jean de Dieu Mucyo, believes that the *Gacaca* system will lead to truth for the whole society, whereas Western-style justice only leads to a small part of the truth for the accused, the judge, and the victims.<sup>36</sup>

Observers, however, have expressed a number of concerns with the *Gacaca* system. One of them is that the *Gacaca court* system is structured as a speedy penal justice process but lacking the requisite due process safeguards. Although the African Commission on Human and Peoples’ Rights guaranteed the right to a fair trial in its Dakar Declaration.<sup>37</sup> It particularly stated that “traditional courts are not exempt from the provisions of the African Charter on Human and Peoples’ Rights relating to a fair trial.”<sup>38</sup> This is the underlying basis of the twin principles of natural justice: *nemo iudex in causa sua*<sup>39</sup> and *audi alteram partem*.<sup>40</sup> Amnesty International reports, for instance, suggest that “a number of detainees, who had been arrested by the security forces, had no case file.”<sup>41</sup> The reports also suggest that there are several events that have called into question the independence of the *Gacaca courts*. These are, expectedly, teething problems associated with a unique innovation destined to alleviate the technicalities of the formalised system of criminal justice. Another criticism

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<sup>34</sup>E. NEUFFER, *It Takes a Village*, 113-14 (New Republic, 2000).

<sup>35</sup>*Report of the Situation of Hum. RTS in Rwanda Prepared by the Special Representative of the Commission on Hum. RTS Pursuant to Economic and Social Couns. Decision 1999/288*, UN GAOR, 54th Sess., Agenda Item 116(c), UN Doc. A/54/359, paras. 147, 156 (1999).

<sup>36</sup>Clark, *supra* note 13. (Indeed, the *Gacaca court* system could serve as a medication for the wounds left open by genocide and continuous conflicts in a manner western-styled retributive justice system may not. The received criminal law system cannot obviate the technicalities inherent in resolving cases such as post-conflict Rwanda. This is due to local differences in language, custom, behaviours, mores and social ethos).

<sup>37</sup>School of and African Studies, *The Right to a Fair Trial: The Dakar Declaration*, 45 J.AFR.L. 140-42 (2001).

<sup>38</sup>*Dakar Declaration of the African Commission on Human and Peoples’ Rights*, Dakar, Senegal, Sep. 11, 1999.

<sup>39</sup>‘No man should be a judge in his own cause.’

<sup>40</sup>‘Hear the other party.’

<sup>41</sup>AMNESTY INTERNATIONAL, RWANDA: GACACA: A QUESTION OF JUSTICE, 24 (2002), <https://www.amnesty.org/en/documents/afr47/007/2002/en/> (last visited Jul. 4, 2016).

is that the *Gacaca court* system does not seem to be achieving reconciliation. This is due to the fact that the process puts the populace against the accused.<sup>42</sup> It is also claimed that the court proceedings assign collective guilt to Hutus, ignoring crimes committed by rebel forces and other Tutsis, thus allowing only Tutsi survivors to be key witnesses against Hutus, thereby hindering reconciliation.<sup>43</sup> The idea behind *Gacaca* is to create an environment where parties could interact and discuss the genocide in a more relaxed atmosphere. *Gacaca* seamlessly created that environment. People were free to talk about genocide openly without fear of repercussion or prosecution. It opened space for dialogue.

The emergence of the *Gacaca Court* system was borne out of the desire to find an alternative to the volume of cases that would have been heard at the international criminal tribunal. An alternative could have been found in the formal courts, however, a more traditional approach understands the culture and disposition of the people. Thus, any alternative to the *Gacaca court* would, in my view, be incapable of providing the basis for justice or reconciliation in Rwanda which is the essence of post-conflict community reconstruction.

### III. NIGERIA

Nigeria has had its fair share of conflicts. From the civil war in the 1960s to *Boko Haram* terrorist insurgency; community clashes of Tiv-Jukun, Ife-Modakeke, Fulani/grazing dichotomy. Indeed, no society is immune from conflicts. What makes a country strong is its ability to streamline its judicial procedure to ensure that future conflicts are forestalled or prevented.

Nigeria is a deeply unique country. With about two-hundred and fifty ethnic groups, it stands in all probability as one of, if not the country, with the largest concentration of ethnic groups under one corporate existence in the world.<sup>44</sup> Unfortunately, the uniqueness in resolving conflicts arising from the admixture of these various ethnic nationalities has been whittled down by Western civilisation. Respect for traditionally

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<sup>42</sup> Paul Ntambara, *Gacaca Head Murdered*, THE NEW TIMES, Nov. 26, 2006 (referring to “anti-Gacaca campaign against genocide survivors and Gacaca judges”).

<sup>43</sup>*Id.* See also Christopher J. Le Mon, *Rwanda’s Troubled Gacaca Courts*, 14 HUMAN RIGHTS BRIEF 16,18-19 (2007).

<sup>44</sup> THE WORLD FACTBOOK, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited Jul. 4 2016).

constituted authority no longer plays a role in forestalling and resolving conflicts. The three main ethnic groups in Nigeria are Hausa/Fulani (29%), Yoruba (21%), and Igbo (18%).<sup>45</sup> However, for the purpose of our discourse, the Yoruba and Hausa traditional dispute settlement paradigms will be analysed.

#### A. Nigeria's Justice System

The Nigerian Courts, in a plethora of cases, have given deference to the informal means of settling disputes. In *Agu v. Ikewibe*,<sup>46</sup> the Supreme Court held that customary arbitration is recognised in Nigeria's judicial system and this type of arbitration is founded on the voluntary submission of the parties to the decision of the arbitrators, who are usually elders and chiefs in their community. The decision of these elders was binding.<sup>47</sup> It is important to note that the basis for recognition of traditional means of settling disputes by the courts and the general populace is based on two principles: firstly, that the parties voluntarily submit their disputes to a non-judicial body, which usually consists of their elders or chiefs for resolution, and secondly, that the parties willingly agree to be bound by the decision of this non-judicial body.<sup>48</sup>

The foregoing is *sine qua non* for the acceptability of any decision given by a non-judicial body. The reason for this is because human beings by their nature tend to change history and thwart facts. Thus, where the decision does not go down well with one of the parties, such party may refuse to honour the terms of the agreement. It is on the basis that courts will more readily defer to the decision of the non-judicial bodies if those conditions are met. The exception, however, would seem to be the case where parties have sworn to an oath before a traditional priest. As will be seen in the course of this work, most African communities tend to avoid the repercussions or consequences of not respecting whatever is said, agreed upon, or done in a shrine or before a traditional priest.

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<sup>45</sup> *Id.*

<sup>46</sup> *Agu v. Ikewibe* [1991] 3 NWLR 385, 412 (Nigeria).

<sup>47</sup> See also *Larbi v. Kwasi* [1952] 13 SJWACA 76 (Nigeria); *Owoseni v. Faloye* [2005] 14 NWLR 719, 740 (Nigeria); *Aribisala v. Ogunyemi* [2005] 6 NWLR 212 (Nigeria); *Awosile v. Sotunbo* [1992] 5 NWLR 51, (Nigeria); *Ohiaeri v. Akabeze* [1992] 2 NWLR 1(Nigeria); *Inyang v. Essien* [1957] SCNLR 112 (Nigeria); *Njoku v. Ekeocha* [1972] 2 ECSLR 199 (Nigeria).

<sup>48</sup> *Agu v. Ikewibe*, *supra* note 46.

### 1. Yoruba Dispute Settlement Process

The Yoruba dispute settlement process stands unique. It starts from the family lineage.<sup>49</sup> In the Yoruba tribal group, settling of disputes includes meeting of the elders in the community.<sup>50</sup> Three basic administrators exist: the *Baálé*,<sup>51</sup> *Mógàjí*,<sup>52</sup> and the *Ìgbìmò-Ìlú*.<sup>53</sup> The *Mógàjí* sits over disputes that occur within the community unlike the *Baálé* that sits over family disputes alone.

The *Baálé* is the chief lawgiver and magistrate of the compound.<sup>54</sup> He is held in high esteem within his compound whose judgments are well respected.<sup>55</sup> There is always a sense of urgency and desire to forgive after the resolution of any particular conflict. This is indeed the essence and important advantage of traditional means of settling disputes.<sup>56</sup> Further, the *Mógàjí* resolves disputes that go beyond the intervention of the *Baálé*. Such communal cases, if not quickly resolved, may break the chord that binds the community. Over the years, this role of the *Mógàjí* has come to be whittled down by the activities of the court system and practice. This has occasioned the rise in the overwhelming court cases that has even made it difficult for some crimes to be prosecuted. As a result, there is a recurring conflict between the *Mógàjí* system and the adversarial system of court practice.

Most African communities believe in the potency of supernatural deities. This has shown over time to assist in the resolution of post-conflict matters. In the adversarial court system, shortly before a witness testifies in court, he or she swears to an oath or affirms in the form of: "I do solemnly, sincerely, and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth. So help me God."<sup>57</sup> Sometimes, the witnesses are trained by their lawyers to subvert the course of justice by their lies and wrongful evidence. A day

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<sup>49</sup> TOYIN FALOLA AND MATTHEW HEATON, A HISTORY OF NIGERIA 23 (CUP 2008); DAVID LAITIN, HEGEMONY AND CULTURE: POLITICS AND RELIGIOUS CHANGE AMONG THE YORUBA 111 (U. Chi. 1986).

<sup>50</sup> FIONA MACDONALD ET. AL., PEOPLES OF AFRICA 385 (Cavendish Square P.R. 2001).

<sup>51</sup> "Head of the Family."

<sup>52</sup> "Eldest male in the family or the heir."

<sup>53</sup> "Chief-in-Council or Community Council."

<sup>54</sup> N.A. FADIPE, THE SOCIOLOGY OF THE YORUBA 106 (Ibadan U. Press 1991).

<sup>55</sup> The *Baálé* resolves generally family disputes: conflicts amongst wives, brothers, sisters.

<sup>56</sup> ISAAC OLAWALE ALBERT ET. AL., INFORMAL CHANNELS FOR CONFLICT RESOLUTION IN IBADAN, NIGERIA 13-35 (Institute français de recherche en Afrique 1995).

<sup>57</sup> All court witnesses swear or affirm under oath before giving evidence in court.

before the court sitting and such affirmation, the lawyer has already prepared the witness about what to be said and what not to be said. The swearing or affirmation is a mere formality. However, if the witness comes before the court and swears as follows: "I swear in the name of Şàñgó/Ògún/Obàtálá/or any known deity,<sup>58</sup> that the evidence I shall give in this place and before this honourable body shall be the truth, the whole truth and nothing but the truth," two scenarios will emerge. Firstly, cases will be quickly decided as truth will be the guiding factor. Nobody would like to offend the gods by spewing falsehood to justify a conflict. Secondly, it will be difficult to find witnesses eager to testify for fear of the unknown, even when they believe their testimonies are truthful. Most African communities believe that the repercussions of offending the deities are insurmountable. It will demand a daring witness who believes in the veracity of the claims to come out and testify in a reconciliation process. People fear these deities and the repercussions of subverting the course of justice. Their judgment is usually catastrophic and calamitous without any remedy. Thus, cases will end quickly and speedily in an informal judicial administration processes. This process significantly assisted the *Gacaca court* system.<sup>59</sup>

## 2. *The Hausa Dispute Settlement Process*

The Hausas are a deeply religious people. They believe in the divine power of Providence. Wherever they are congregated, they usually appoint a *Sarkin Hausawa*.<sup>60</sup> His main responsibility is to settle disputes amongst Hausas and between Hausas and their host communities. The *Sarkin Hausawa* also delegates responsibility to his appointees, who address issues according to wards or districts. Such a delegate is called the *Mai ungwá*.<sup>61</sup> Where the *Mai ungwá* finds it difficult to resolve a particular dispute, he refers it to the *Sarkin Hausawa* who will now call his *Ubangari*.<sup>62</sup>

<sup>58</sup> These are deities representing the gods of thunder and iron.

<sup>59</sup> There are various instances, though largely undocumented, where these oath traditional methods have worked successfully. For example, where two women quarrel over a property, the *Mógàjí* can order that the clothes worn by the women should be seized and affixed to the regalia of the family masquerades (*egúngún*). If the women do not come from families that revered *egúngún*, their clothes might be burnt. When people think of these processes or the repercussions of willingly submitting to these processes, people will learn to live in harmony.

<sup>60</sup> "Ruler of the Hausa people."

<sup>61</sup> "Owner of the ward."

<sup>62</sup> "Committee of Elders."

Due to their religious nature, cases are resolved according to the dictates of Islamic law. Interestingly, an average Hausa sees life's occurrences as an act of God which is unquestionable. Thus, whatever decisions are given are not subject to debate because they believe in the institutions that give those judgments.

### *3. Role of Traditional Rulers in Conflict Resolution*

Undoubtedly, African kings and chiefs, and indeed the elders, played a significant role in conflict resolution. The king was next in command to the gods. He was the revered representative of the mystical on the planet and was seen as the messenger of the gods to man. For instance, in Yoruba chieftaincy hierarchy, one of the revered kings, the *Alāāfin* of Òyó is always referred to as *Ikú Bábá Yèyé, AláṢhe Igbákejì ÒrìṢsà*.<sup>63</sup> Thus in settling disputes, traditional rulers were feared and respected. Their words sometimes become law. Lemarchand sums it up wisely when he claims that to facilitate peace in his jurisdiction, the African king was imbued with:

enduring sense of history of the norms and nuances of the kingdom, unwavering wisdom of distilling facts from falsehood in the treatment of issues of conflict, high level of epitomizing moral order, peace process and classical demonstration of harmony; and Broader legitimization of the vital link between the universe and the supernatural order.<sup>64</sup>

However, dishearteningly, the advent of colonial rule has eroded this respect accorded the African traditional rulers. With the coming of the colonial powers also came their religious affiliation who saw the religious practice of the natives as repugnant and abhorrent. They perfected their supremacy over the kings by imposition of courts with their rules and practices which was alien to African practice. The Western-styled pattern of formal court procedure has not reduced crime or corruption. In the alternative, it has aided it. The ease at which perjury is committed

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<sup>63</sup>The second in command to the gods, he who decides who lives and who dies. Significantly, the king has the power to make a decree which was unquestionable.

<sup>64</sup> RENE LEMARCHAND, *AFRICAN KINGSHIPS IN PERSPECTIVE – POLITICAL CHANGE AND MODERNIZATION SETTINGS GREAT BRITAIN* (Frank Cass Pub. 1977).

unnoticed in court attests to this fact. Even where the accused blatantly commits the offence, the lawyer, out of financial inducements, frustrates the immediate termination of the case by seeking for unnecessary adjournments or delay tactics. Given the respect accorded elders in an African setting, the elders, with the careful selection of lore, could persuade a hitherto recalcitrant party to compromise and ensure the settling of any dispute.

#### IV. TRADITIONAL DISPUTE RESOLUTION IN KENYA

Kenya, like many African countries, has a diverse ethnic composition with communities having cultures that have been acquired over long periods. Prior to the establishment of colonial domination in Kenya, communities living in the country had their own conflict resolution mechanisms which were guided by the respective cultures of the different communities. There existed certain institutions, principles, values and traditions that were critical in dispute resolution and resolution of disputes was guided towards fostering peaceful coexistence among members of the communities.<sup>65</sup> Kinship ties were also crucial in ensuring harmonious coexistence even after disputes had been resolved. As Okoth-Ogendo aptly puts it, there existed a social hierarchy within the communities that were responsible for making decisions and ensured social harmony within the community.<sup>66</sup>

It is notable that due to the fact that traditions are not static, traditional dispute resolution mechanisms in Kenya are always in a state of flux and may differ from one ethnic community to another.<sup>67</sup> It is, however, notable that certain salient characteristics are identifiable in most traditional dispute resolution mechanisms among different communities in Kenya. One key characteristic is the fact that most communities resort to

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<sup>65</sup>Kariuki Muigua, *Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010*, <http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> (last visited Jul. 7, 2016).

<sup>66</sup>Hwo Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*. Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, USA River-Arusha, Tanzania, in CIEL/LEAT/WRI/IASCP, 5-7, Oct. 2002.

<sup>67</sup>Francis Kariuki, *Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology*, 12, <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> (last visited Jul. 7, 2016).

elders in solving disputes that arise among them. Further, traditional dispute resolution mechanisms among communities in Kenya have been seen to be key in fostering harmonious relations among disputants even after the dispute has been resolved.

In Kenya, the Constitution recognises the place of traditional dispute resolution mechanisms in resolving disputes. Article 159(2)(c) of the Constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. However, there are certain conditions that must be met by the traditional dispute resolution mechanisms adopted. The Constitution provides that traditional dispute resolution mechanisms shall not 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 and morality, or is inconsistent with the Constitution and other written law.<sup>68</sup> The Constitution thus takes cognisance of the fact that certain practices may be harmful and may lead to the violation of the rights of certain groups, hence they ought to be prohibited.

Traditional dispute resolution mechanisms have been useful in solving various types of disputes that have arisen among members of different communities in Kenya and this has particularly been seen in disputes concerning ownership and use of natural resources. These kinds of disputes are usually complex and have certain underlying cultural dimensions, hence traditional dispute resolution mechanisms are known to work best in resolving them.<sup>69</sup> Further, traditional dispute resolution mechanisms in Kenya are largely driven towards promoting restorative justice as opposed to retributive justice and hence these mechanisms are widely acceptable among many communities.<sup>70</sup> The use of traditional dispute resolution mechanisms in solving criminal cases has also been recognised in Kenya as it was seen in *Republic v Mohamed Abdow Mohamed*.

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<sup>68</sup> CONSTITUTION art. 159(3) (2010) (Kenya).

<sup>69</sup> Miguel (n. 83) 6.

<sup>70</sup> Francis Kariuki, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed*" 2 Alt. Dis. Res. J. 202, 202-228 (2014).

## CONCLUSION

This work has highlighted the importance of the need to activate the traditional mechanisms of dispute resolution in Africa, such as rebranding the witnesses' statement in the law courts before they take an oath, and the need to revisit cultural values in decision making. Traditional methods of social control, such as traditional oaths, rewards, vigilantes, informal settlements, checks and balances, decentralisation, effective communication, and good governance, remain strong and have been informally used successfully for conflict management in many communities in Nigeria.<sup>71</sup>

The *Gacaca* system provides an innovative and practical blend of retributive and restorative justice. Since *Gacaca* is based on local culture, it is likely to create from the beginning a greater sense of familiarity, respect, trust, and commitment to the process than the Western judicial system. There is room for the Rwandan government and the international community to improve *Gacaca* and establish accountability for all the past and ongoing human rights abuses in Rwanda.

Africans have helped sharpen the economies of present day developed nations through the dark days of imperialism and inglorious slave trade. In sporting activities, Africans have excelled brilliantly. The resilient spirit and dogged determination to excel in whatever is being done is replicated in the numerous achievements of the continent. Africa is indeed the bedrock of cohesion and commonality. Garbed by its rich cultural relativism, the history of ADR cannot be written without stating the classic and exemplary models of conflict resolution in Africa. The inhibiting factor in positioning Africa as the origin of ADR is hinged on the fact that most of the practices are not well documented for future generations. Its deep cultural values are well suited for positive development strategy.

Growth and development demands a conflict-free society. Justice in all ramifications, restorative, criminal, and civil, thrives in societies that resolve conflicts in unique ways and have a well-established mechanism that guarantees delivery of justice to all, including the poor, vulnerable,

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<sup>71</sup> Akeem Akinwale, *Integrating the Traditional and the Modern Conflict Management Strategies in Nigeria*, ACCORD (Dec. 16, 2010), <http://www.accord.org.za/ajcr-issues/%EF%BF%BCintegrating-the-traditional-and-the-modern-conflict-management-strategies-in-nigeria/>.

and marginalized members of the society. Transitional justice addresses the critical questions of what happens in society at the end of hostilities. What solutions are applicable to contextual situations where communities are emerging from bitter conflicts seeking ways to restore rule of law, peace, reconstruction, and development? What punishment could be meted to perpetrators of the conflict in a manner that will leave the community, victim, and accused more satisfied than the status quo had the conflict not arisen? If perpetrators are not punished, what happens to the rule of law? What message is sent to criminals world-wide if heinous crimes cannot be punished? It is evident in all these scenarios that the victims stand out in the hierarchy of post-conflict reconstruction. Is there a need to compensate victims, to rehabilitate them, to re-integrate them into society, or reparate them into the society? This work has sufficiently addressed these concerns.

Truth, justice, and reconciliation sometimes find themselves at odds with one another. Those who would rather have criminals prosecuted, run the risk of never being able to arrive at the truth of what happened. This has been the single reason for the failure of the received colonial procedure of the criminal justice system. Courts are, by all accounts, not the best mechanism at discovering the truth. For a myriad of reasons, court administered judicial process is no longer viable for African societies. Successive governments have shown a glaring path towards ineffective adjudication of cases bordering on post-conflict diatribe. Some of these include: lack of political will, lack of capability and resources, length of time that prosecutions would take amongst other reasons.<sup>72</sup>

No doubt, prosecutions create bad blood between victims and accused. Indeed, justice is meted to the accused, but the victim and community are never satisfied in this process. Reconciliation is not achieved. The context of this work is not to throw the baby with the bath water. The concept of traditional dispute resolution is to be an alternative to Western conflict resolution. It can only thrive in a culture of stable societies where the rule of law is respected and court systems are operational. It simply re-emphasizes that a stepped up approach to traditional means of resolving disputes, which involves oath taking that pre-dates colonial rule, should be re-considered in our body of laws,

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<sup>72</sup> Some of the reasons that can pit the tent of court system as against local traditional means of administering justice include: costs, ineptitude, slow pace, corruption, ethno-racism, no real infrastructure, no jurisprudence to inform legislation to try genocides.

especially in the criminal justice system. This traditional mechanism can be developed into a body of laws to become a vital social function with a number of benefits. It could assist in developing African constitutional principles and general jurisprudence. It can also serve as a case precedent for future cases and thus serve as a deterrent for the would-be criminally minded and the disposal of cases requiring complex legal reasoning.

To put to rest the question whether some cases are not suitable for this type of process, the words of the London-based Centre for Effective Dispute Resolution is effective here:

No easy assumptions or assertions can be made over whether or not a case is unsuitable for mediation. It is wise to assume that practically every case is likely to be suitable for mediation at some time in its life cycle and that the right question to ask is not “is it suitable” but “is it ready?”<sup>73</sup>

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<sup>73</sup> COURT REFERRED ADR: A GUIDE TO THE JUDICIARY 9 (CEDR ED., 2<sup>nd</sup> ed., 2003).