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Could traditional dispute resolution mechanisms be the solution to reducing the volume of litigation in post-colonial developing countries – particularly in Africa?

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Abstract

This paper deals with the possible role that traditional dispute resolution mechanisms can play in reducing the burden of too much litigation in post-colonial countries – particularly in Africa. The importance of such mechanisms has been recognized by the United Nations and by the constitutions and laws of many African countries. The paper addresses the issue of the effect a paucity of lawyers in African countries might have on the litigation in such countries. The approach and methods of traditional dispute resolution in Africa are discussed and the question raised whether such traditional dispute resolution mechanisms can be integrated into the Western approach to dispute resolution in order to reduce litigation. The challenges facing such integration are also addressed. The article concludes that traditional methods of dispute resolution are already reducing the burden of too much litigation, but further research using statistical and empirical data should be undertaken to substantiate this.

Key words

Too much litigation; traditional dispute resolution; Africa; impact on litigation; integration into formal justice; challenges

Prefatory remarks**:** This paper is aimed at reminding policy makers and law reformers in post-colonial developing countries with few lawyers about the value of using pre-colonial dispute resolution mechanisms to supplement access to justice initiatives in their countries – provided such mechanisms are consistent with fundamental human rights. It is not aimed at social anthropologists and academicians and is not meant to be a comprehensive analysis of the large number of traditional dispute mechanisms that exist in other parts of Africa. The paper also does not provide a comparative analysis of community-based dispute resolution mechanisms in non-African jurisdictions because it is primarily concerned with building on African traditions. There is a dearth of statistical and empirical data on how the use of traditional dispute resolution mechanisms has reduced the need for litigation in the formal court structures in post-colonial African countries. Thus there is considerable scope for researchers in future to explore these avenues if they can solicit the necessary support from the relevant gatekeepers.

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Resumen

El presente artículo se ocupa del posible papel que pueden desempeñar los mecanismos tradicionales de resolución de conflictos para reducir la carga del exceso de demandas en países poscoloniales, sobre todo de África. La importancia de dichos mecanismos ha sido reconocida por Naciones Unidas y por constituciones y leyes de muchos países africanos. El artículo trata del efecto que la escasez de abogados en países africanos puede producir en los litigios de esos países. Se someten a debate el enfoque y los métodos de la resolución tradicional de conflictos en África, y se plantea la cuestión de si esos mecanismos pueden ser integrados en el enfoque occidental de resolución de conflictos, a fin de reducir los litigios. También se abordan los desafíos de esa integración. La conclusión a la que se llega es que los métodos tradicionales ya están reduciendo la carga de litigios, pero que ello debería ser respaldado con más investigaciones que utilicen datos estadísticos y empíricos.

Palabras clave

Demasiados litigios; resolución tradicional de conflictos; África; efecto sobre los litigios; integración en la justicia formal; desafíos

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1. Introduction

It is trite that developing countries, particularly in Africa, have a mixture of colonial-inspired formal justice systems and traditional dispute resolution practices which have been referred to as "a fabric of pluralism" (Aiyedun and Ordor 2016, p. 3).

Recognition of such traditional dispute resolution practices is often provided for in the constitutions and laws of African countries. For instance, the Constitution of Kenya (2010) states:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles (…) (d) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. (Constitution of Kenya, art. 159(2)(c))

Such recognition, however, is usually conditional on the traditional practices not violating the fundamental rights in the country's constitution (see Constitution of Kenya, 2010, art. 159(3); Constitution of South Africa, 1996, s 31(2)). This is a crucial component to obviate practices such as discrimination against women based on primogeniture (see below para. 7).

The formal justice system tends to take a punitive and deterrent approach in criminal cases, and a rights-based compensatory approach in civil matters (Elias 1956, p. 110), while traditional dispute resolution practices in both criminal and civil cases are usually based on restorative justice, reconciliation and reintegration into the community by transgressors of other people's rights. Occasionally, however, the traditional system may have had both punitive and compensatory elements, for instance, in Uganda where traditionally persons found guilty of murder were punished, and those found guilty of manslaughter or culpable homicide ordered to pay compensation (Elias 1956, pp. 130–131).

2. The impact of a paucity of lawyers on litigation in African countries

Developing countries with large rural populations often have very few lawyers (McQuoid-Mason 2018, p. 488 n. 9). A survey conducted by the United Nations Office on Drugs and Crime (UNODC), found in 2011 that Sierra Leone had a population of 5 million, of whom 60% were rural, and only 100 lawyers which meant a ratio of one lawyer to every 50,000 people; Kenya had a population of 37 million of whom 84% were rural and 3,817 were lawyers, yielding a ratio of one lawyer to every 9,693 people; and Uganda had a population of 32 million, of whom 86% were rural and 2,000 lawyers, resulting in a ratio of one lawyer for every 16,000 people (United Nations Office on Drugs and Crime 2011, p. 13). By comparison, also in 2011, South Africa had about 20,000 practising attorneys (Dewar 2011, p. 19) and 2,000 practising advocates for a population of about 50 million, which meant that in the case of attorneys who deal directly with the public there was a ratio of about 1:2,500, or if both categories of lawyers are included, a ratio of 1:2,273 (McQuoid-Mason 2013, p. 565).

The figures for the African countries are in sharp contrast to the statistics for Western developed countries. In 2011, Spain had 114,143 lawyers for 45 million people (a ratio of 395:1); the United Kingdom had 151,043 lawyers for 61 million (a ratio of 401:1); Italy had 121,380 lawyers for 59 million (a ratio of 488:1); Germany had 151,043 lawyers for 82

million (a ratio of 593:1); and the United States had 1,143,358 lawyers for 303 million (a ratio of 265:1). Even a developing country like Brazil had 571,360 lawyers for 186 million (a ratio of 321:1) which is a significantly better ratio of lawyers to population than Sierra Leone, Kenya, Uganda (UNODC 2011, p. 13) and South Africa (McQuoid-Mason 2013, p. 565).

While it is trite that both urban and rural communities may need the services of lawyers, when there are very few lawyers, and only a small percentage of the urban population can afford lawyers, such urban-based lawyers may be still be overcome by too much litigation, if the ratio of lawyers to the population is very low. This tendency towards over-litigation is manifested in both criminal and civil cases by crowded court rolls, long delays in cases being set down, frequently postponed hearings and delayed judgments (c.f. Iruoma 2005, pp. 22–31).

2.1. Criminal cases

A study in 2005 mentioned that in South Africa, despite attempts to solve the problem, the average time to dispose of criminal cases was between 18 months to four years, and in cases governed by minimum sentences and those required to be heard in the high courts the delays lasted up to five years (c.f. Iruoma 2005, p. 23). The study indicated that in Nigeria many accused persons spend between 6–8 years without being brought to trial, and even longer before they are convicted or acquitted (c.f. Iruoma 2005, p. 35). As a result such "accused persons often spend double the amount of time in prison or answering to a charge than they would have spent if they were immediately charged, convicted and sentenced to the maximum sentence applicable to crimes committed" (c.f. Iruoma 2005, p. 35).

Another indicator of too much criminal litigation and the impact of a paucity of lawyers is the percentage of awaiting trial prisoners in relation to a country's total prison population in correctional services facilities. For instance, in Sierra Leone the percentage was 29.5% in 2019, Kenya 48% in 2018, Uganda 49.8 % in 2019 and South Africa 29.3% in 2019 (World Prison Brief 2019). The previously mentioned 2005 study showed that the majority of awaiting trial prisoners in Nigeria spent an average of 20–47 months in custody before the case proceeded to trial (c.f. Iruoma 2005, p. 35). These delays fly in the face of, for example, the constitutional provisions in South Africa and Nigeria guaranteeing in criminal cases the right of everyone "to have his [or her] trial begin and concluded without unreasonable delay" (Constitution of South Africa, 1996, s 35(3)(d); c.f. *Moeketsi v Attorney General Bophuthatswana,* 1996) or "within a reasonable time" (Constitution of Nigeria, 1999, s 36(1); c.f. *Najiofor v Ukomu,* 1985).

2.2. Civil cases

In civil cases the delays are shorter – probably because most are settled beforehand, and in many developing African countries the majority of the disputes are settled using traditional mechanisms. In South Africa, for instance, the 2005 study reported that the average length of time for civil cases in the high court ranged from between 18 months and three years, and in the magistrates's courts only six months. (c.f. Iruoma 2005, p 25). One exception is where a divorce case "was delayed for 15 years" (*Christas Sanford v Patricia Haley,* 2003; c.f. Iruoma 2005, p 25). In Nigeria the average period to commence

and complete civil litigation was six to ten years, and that in some instances the litigation period was even longer. An extreme example was *Ariori v Muraimo* (1983) which took 23 years to reach the Supreme Court of Nigeria (c.f. Iruoma 2005, p. 1).

While these delays may be a factor in dissuading people with legal disputes from litigating, the main obstacle is likely to be the high legal costs involved which are beyond the reach of most of the population, as has happened in South Africa (McQuoid-Mason 2011, pp. 172 and 190–191). The result is that the majority of the population in post-colonial developing countries cannot afford to litigate in the formal justice system, and resort to traditional methods of resolving their disputes, particularly those in rural area. For example, a Kenyan study showed that 75% of people in one district preferred to use the traditional justice system instead of the formal courts because it was "cheap, quick, accessible and fair" (Sone 2016, p. 63; see generally Kegoro 2012). The United Nations Office on Drugs and Crime (UNODC) has estimated that rural populations in 13 African countries constitute over 70 per cent of the total population (UNODC 2011, pp. 11–12), most of whom would be too poor to afford the services of lawyers.

The United Nations Commission on Legal Empowerment of the Poor has recognized the importance of using non-formal dispute resolution mechanisms with which the public are familiar, when broadening access to justice for developmental purposes:

> Although much of the focus of the legal empowerment agenda is on how to achieve empowerment through the formal institutions of the state, the vast majority of the world's poor rely on non-state, informal justice systems. Therefore, it is vitally important to consider non-state justice. Appropriately structuring the relationship between state and non-state systems is crucial. Reforms in pluralistic legal systems might include combining formal or tacit recognition of the non-state justice system with education and awareness campaigns that promote evolution of the informal legal system. (United Nations Commission on Legal Empowerment of the Poor 2008, p. 64)

Traditional dispute resolution practices have existed in most developing countries for hundreds of years before colonialism (Aiyedun and Ordor 2016, p.2), and before alternative dispute resolution became fashionable in the developed Western world. Such practices have also included restorative justice (Nhlapo 2005, pp. 3, 6 and 17) – another comparatively recent concept adopted by Western criminal justice systems.

3. The traditional approach to dispute resolution

Traditional dispute resolution processes tend to adopt a "communal" rather than the Western "individualistic" approach to dispute settlements. In traditional societies great emphasis is placed on reconciliation and reintegrating the disputing parties back into their communities. The purpose of traditional dispute resolution processes is to not only reconcile the relationships between individuals, but also the relationships of the individuals with their communities.

> Dispute resolution mechanisms also enabled the disputants to express themselves fully, without complexity or formality, and yet assured them of a knowledgeable and just resolution that would maintain communal relations. (Roberts 1979, p. 14, Aiyedun and Ordor 2016, p. 2)

Thus the concept of *ubuntu* in African culture has been described as a "communal value" where "the emphasis is on co-operation with one another for the common good as

opposed to competition that could lead to grave instability within any community" (Masina 2000, p. 181). As a result, in traditional courts, when there is conflict between individuals in the community, the entire community is involved in trying to resolve the dispute because "conflict between individuals would automatically affect the whole community" (Cappelletti and Garth 1978, p. 271). This informal approach contrasts sharply with Western dispute resolution tribunals, particularly in the formal justice system, where tightly enforced technical rules govern the processes in both criminal and civil matters – rather than processes designed for "social healing" (Nhlapo 2005, pp. 3, 6 and 17; see below para. 5).

4. Traditional methods of dispute resolution

Customary law dispute resolution mechanisms can play a valuable role in reducing litigation in both criminal and civil cases. Such mechanisms involve negotiation, mediation, conciliation, adjudication and reconciliation (Otieno 2016, pp. 19–20). The first three are common to Western notions of alternative dispute resolution used to reduce litigation. The informal and flexible processes of traditional courts and arbitration mechanisms with their emphasis on reconciliation and re-integration are not. It is not intended to undertake an in-depth analysis how these different dispute resolution mechanisms operate but merely to show the similarities between them and traditional dispute resolution approaches.

4.1. Negotiation

Negotiation, as in Western systems, is an interest-based mechanism whereby the parties "voluntarily attempt to reach a mutually satisfactory agreement through informal and unstructured discussions" (Sone 2016, p 54), unlike litigation which is rights-based. The parties control the process and the outcome and attempt to reach a solution regarding their future relationship which satisfies everyone concerned. Negotiation has been said to be "the most widely used traditional mechanism for conflict resolution (…) and the customary values of tolerance and co-operation are often applied" (Sone 2016, p. 54). For example, in some traditional societies, such as the Wimbums of Cameroon and the Yorubas and Igbos of Nigeria, it is said to be common "to see disputing parties sitting down informally, discussing and agreeing on certain issues amicably without resorting to the courts" (Sone 2016, p. 54).

Negotiations during marital disputes in traditional societies are often conducted by family members of the disputants. This is because in many African societies marriage is a relationship between the families of the marriage partners rather than the individual spouses, and all disputes are handled by the families to restore social equilibrium between all parties – not just the spouses (cf. Sone 2016, p. 57; *Mabuza v Mbatha* 2003).

In traditional societies negotiations are aimed at:

> The recovery of a dissident member (…) [which can] be seen as the restoration of the harmony and integrity of the community, as the assertion of value consensus and social cohesion, so that the management of the conflict favours the concerns of both parties. (Olaoba 2005, pp. 220–221, Ajayi and Buhari 2014, p. 151)

Thus, for example, amongst the Yoruba in Nigeria, negotiations conclude with an apology for wrongs done to the individual and the community as a whole, which is

"channeled through Yoruba elders, compound heads and chiefs of high calibre in society" (Ajayi and Buhari 2014, p. 151; cf. Olaoba 2005, pp. 220–221).

Negotiations in traditional African societies follow much the same format as in Western societies, save that the traditional customary law processes are linked to attempts to reintegrate the parties into the community to restore the equilibrium, and not merely to solve the problems of the individuals concerned.

4.2. Mediation

Mediation, in both traditional and Western societies, is a confidential process, whereby a third party assists the parties in conflict to reach a mutually agreeable solution to their dispute. In Western society mediators play a strictly neutral role, ensuring that the parties arrive at their own agreement – even if the mediator disagrees with it. In traditional society the mediator plays a role more like that of a conciliator (see below para 4.3). This is because in traditional societies the mediators try to ensure that as a result of the agreement "peace and harmony reign[s] supreme in society". This is encapsulated in the saying "no victor, no vanquished" which means that if "we apportion blame to the guilty person we must do the same to the other party in the conflict" (Ajayi and Buhari 2014, p. 149).

In some African ethnic groups such as the Pokot and Marakwet in Kenya and the Zulu and Batswana in South Africa, the mediators, who are family or community elders freely chosen by the parties, play a strictly neutral role as in Western systems (Sone 2016. p. 54). The mediators listen to each party's version and encourages them to understand and appreciate the interests of the other party. The mediators do not impose a solution on the parties, and facilitate the process to enable them to find a solution that is satisfactory to both. In most cases the process "is usually effective, efficient and fair and the outcome is often acceptable to the parties and is long lasting" (Sone 2016, p. 54).

In other African societies the role of a mediator is much more active like that of a conciliator (see below para 4.3), in order to move the parties toward reconciliation between themselves, and reconciliation between the parties and their communities, which includes:

> [P]ressurizing, making recommendations, giving assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules, envisaging the situation if agreement is not reached, or repeating of the agreement already attained. (Ajayi and Buhari 2014, p. 150)

4.3. Conciliation

Conciliation is not often referred to as one of the mechanisms that traditional societies use to settle disputes – the four most quoted methods are negotiation, mediation, adjudication or arbitration and reconciliation (see, e.g. Taiwo 1998, pp. 214, 216, Ajayi and Buhari 2014, pp. 149–151, Sone 2016, pp. 54–55, Otieno 2016, pp. 19–20). However, as mentioned above in respect of mediation (para. 4.2), sometimes the mediator in traditional mediations plays more of a conciliatory role by actively trying to move the parties towards a settlement that will satisfy both themselves and their communities.

In conciliation the conciliator plays an active role in suggesting solutions to the parties that will reconcile them. Conciliation in Western systems is sometimes used where the disputing parties wish to avoid litigation, and need to preserve an ongoing relationship. It is common in labour disputes mechanisms that are usually dealt with through bodies using conciliation, mediation and arbitration, for instance, like the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa, established in terms of the Labour Relations Act 1995, s. 112.

In summary, while conciliation is practised in Western-style legal systems, the traditional approach is different, in that it places particular emphasis on reconciliation between the individuals themselves, and the individuals and their communities (see below para 4.5).

4.4. Adjudication

Adjudication in African societies is much more informal and less rigid than in Western tribunals. African people for centuries have "relied on the wisdom and judicial skills of their local leaders to resolve disputes" (Cappelletti and Garth 1978, p. 270, Aiyedun and Ordor 2016, p. 2). Such adjudication was never regarded as a formality-bound method of dispute resolution. Traditional tribunals are commonly used because they are "simple, understandable and flexible (…) and (…) popular, speedy inexpensive and accessible" (Cappelletti and Garth 1978, p. 271, Aiyedun and Ordor 2016, p. 2). They play an important role in reducing litigation through the formal courts in African developing countries.

It has been said that post-colonial Africa indigenous dispute resolution tribunals are still perceived to provide a fair and quick hearing with a consensual outcome based on the principles of "community participation, consultation, consensus and [an] acceptable level of transparency through the village council or open consultative meetings" (Bennett 2004, p. 4, Holomisa 2009, p. 136). This is in sharp contrast to the time-consuming formality-bound adjudication procedures in Western-style courts, and is more informal than Western rule-bound arbitration procedures. In South Africa, in traditional tribunals based on customary law "the principles of natural justice lie at the heart of fairness as opposed to the constitutional requirements of separation of powers and the rule of law, as articulated in Western jurisprudence" (Bennett 2012, p. 21).

Customary law practices are not written in stone and vary from community to community – they are "neither homogenous nor static" (Aiyedun and Ordor 2016, p. 1). This enables traditional adjudicators to be more flexible and informal than their Western counterparts, as they are not bound by the strict formal processes that tend to exist in the Western systems. For instance, in traditional courts "the traditional leader asked questions, sought advice from the audience and gave judgment to reconcile the disputants, after the parties to the dispute had given a detailed account of the conflict" (Aiyedun and Ordor 2016, p. 2; cf Allott 1970, pp. 6 and 18).

There are no requirements of formal pleadings or rigid rules of evidence, excluding hearsay or other forms of evidence that would be inadmissible in a Western-style court of law. The flexible approach also enables traditional leaders to incorporate compliance with the provisions of a country's modern constitution should this be required, particularly when directed by the formal court systems in order to ensure "good faith,

humanity and equality" (Sone 2016, p. 61), as has happened in Nigeria (*Mojekwu v Mojekwu*, 1997), Ghana (*Akrofi v Akrofi*, 1965), Cameroon (*Lum v Fru*, 1993) , Zimbabwe (*Magaya v Magaya*, 1998) and South Africa (see e.g. *Bhe and Others v Magistrate, Khayelitsha*, 2005).

4.5. Reconciliation

As has been indicated, reconciliation is a reoccurring theme throughout all the above methods of traditional dispute resolution. Reconciliation, not only between the parties, but also between the parties and their communities, is a unique feature of traditional African dispute mechanisms. It has been described as being "done by an authority selected from the community who mediates between conflicting parties and is empowered to make binding judgments" (Sone 2016, p. 55; c.f. Obarrio 2011). As previously mentioned, reconciliation is the objective of all the traditional dispute resolution mechanisms: negotiation, mediation, conciliation and arbitration. The objective is not to punish one or other of the parties, but rather to reconcile them as individuals, as families and as a community:

> [T]he essence of dispute settlement and conflict resolution in traditional African states include to remove the root-causes of the conflict; reconcile the conflicting parties genuinely; to preserve and ensure harmony, and make everybody involved in the resolved conflict happy and be at peace with each other again. (Ajayi and Buhari 2014, p. 154)

5. Western-based legal processes versus traditional dispute resolution processes

Western-based formal adjudication processes tend to adopt a "win or lose" rights-based approach, as opposed to the reconciliatory approach of traditional processes (Aiyedun and Ordor 2016, p. 5). Western systems also often tend to rely on a formal rights-based approach to settle legal disputes rather than the interest-based approach of traditional systems (c.f. Sone 2016, p. 59). The Western-style courts are usually accessible only to those who can afford them, and are formal, rule-bound, time-consuming and expensive, instead of the easily accessible, informal, flexible, expeditious and cheap traditional systems (Aiyedun and Ordor 2016, p. 4). The formal courts are also located mainly in urban areas and are not accessible to many people living in rural areas – unlike the traditional structures that operate at grass roots levels in the communities.

Western-type processes in the courts require strict adherence to procedural rules regarding pleadings and evidence, rather than the flexible adjustable approach of traditional systems (Aiyedun and Ordor 2016, 4). Furthermore, proceedings are conducted in the official language of record of the State – through translators if necessary – unlike traditional systems where the local language or vernacular of the community is used (c.f. Sone 2016, p. 60; Hinz 2006, p. 39). The formal criminal justice systems also tend to focus more on punishing and retribution than restoring and reconciling social harmony between the parties as is done in traditional systems (c.f. Sone 2016, pp. 59–60; Elias 1956, p. 110).

In summary, many African people prefer the more flexible, adaptable, cheaper and accessible traditional dispute resolution mechanisms, which have the societal benefit of reducing the burden of litigation in the formal sector.

6. Can traditional dispute resolution mechanisms be integrated into Western-based legal processes?

Despite the differences mentioned above (see para. 5), there is some common ground between Western formal and traditional legal processes. For instance, there has been an increasing trend in the formal justice system to reduce litigation by encouraging the use of alternative dispute mechanisms such as mediation, conciliation and arbitration, as has been the case in traditional systems since time immemorial (c.f. Aiyedun and Ordor 2016, p. 9).

In the formal criminal justice sector there is a movement towards more widespread use of restorative justice, and in the case of children in conflict with the law, towards diversion programs by removing them from the criminal justice system and using restorative justice mechanisms to reconcile them with their victims and reintegrate them into society (see generally, Gabagambi 2018). This again is congruent with the customary law values of social harmonization and reconciliation.

The formal justice system in civil matters recognizes the *amicus curiae* concept that acknowledges the usefulness of opinions from persons who are not parties to the case and intervene as "friends of the court" (Aiyedun and Ordor 2016, p. 8). Although much more restrictive, the *amicus curiae* approach is not unlike traditional adjudication procedures where the adjudicator takes into account the comments, questions and other interventions by members of the local community who are not parties to the dispute, but "have a vital interest in the successful outcome of the case" (Holleman 1974, p. 19).

In summary, there are several traditional processes that are similar to the comparatively recent developments in Western alternative dispute resolution mechanisms. These include the increasing use of mediation, conciliation and arbitration to resolve disputes to reduce the burden of too much litigation in the formal justice system. Another mechanism that is common to both the formal and traditional justice systems is the increasing use of restorative justice – particularly in criminal cases.

7. Challenges when integrating traditional dispute resolution mechanisms into Western-based legal processes

A statement in which the United Nations Commission on Legal Empowerment of the Poor recognized the value and importance of traditional dispute resolution mechanisms was quoted earlier (see above para 1). In addition, the Commission has observed that:

> [T]o improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems. (United Nations Commission on Legal Empowerment of the Poor 2008, pp. 42–43)

Most African constitutions "have recognized and incorporated traditional values into the formal systems of conflict resolution" by "trying to ensure that good faith takes centre stage in their decisions" (Sone 2016, p. 61). A good example is the *Bhe* case (*Bhe v*

Magistrate, Khayelitsha, 2005), where the South African Constitutional Court held that the customary rule of male primogeniture was in conflict with *ubuntu* (c.f. Sone 2016, p. 61). As previously mentioned, a similar approach has been adopted, for example, by the courts in in Nigeria (*Mojekwu v Mojekwu*, 1997), Ghana (*Akrofi v Akrofi*, 1965), Cameroon (*Lum v Fru*, 1993) and Zimbabwe (*Magaya v Magaya,* 1998).

While such recognition is given by the apex constitutional or supreme courts, the challenge is when the value of such cultural mechanisms in reducing litigation is not always acknowledged by the legal profession, the judiciary and legal drafters. For example, when the present writer has drafted clauses in legal aid legislation to include references to the role that traditional dispute resolution mechanisms could play in diverting minor crimes from the formal courts to the traditional courts, or in diverting serious crimes from the traditional courts to the formal courts, such provisions have been removed by the legislative drafters – apparently at the request of the judiciary (McQuoid-Mason 2018, pp. 495–496).

In respect of rural persons accused of minor crimes such matters "could be settled expeditiously through traditional mechanisms involving restorative justice (…) [a] lack of confidence in traditional dispute resolution mechanisms means that justice is delayed and the courts may become clogged up with unnecessary minor criminal cases" (McQuoid-Mason 2018, p. 495). For example, in Mongolia minor crimes are diverted from the criminal justice system using mediation. The Criminal Procedure Law of Mongolia (2002) provides: "If victims of minor crimes provided for by the Criminal Law of Mongolia reconcile with the accused or defendant, the case shall be terminated" (Criminal Procedure Law of Mongolia, 2002, art 25(1)).

A major challenge seems to be that in post-colonial societies even though the legal systems and ordinary people recognize the value of traditional dispute resolution mechanisms – provided that they are congruent with fundamental human rights – there is still a certain degree of scepticism by the legal profession and the judiciary when attempts are made to integrate them into the formal justice system (McQuoid-Mason 2018, p. 495).

8. Conclusion

This paper is aimed at encouraging policy makers and legislators to consider formally incorporating traditional dispute resolution mechanisms into their justice systems – subject to such practices being consistent with fundamental human rights. In developing countries in Africa with small legal professions in relation to comparatively large populations, the legal profession and those persons who can afford their services may find themselves the victims of too much litigation. The result is expensive legal fees and delays in set down dates, court hearings and judgments in both the formal criminal and civil justice systems, and especially in the criminal justice systems.

The use of traditional dispute resolution mechanisms, particularly for African people in rural areas, and those who live in urban areas but still owe allegiance to traditional leaders, their extended families and their communities, such mechanisms can play a valuable role in reducing the volume of litigation in the formal sector.

At present there is a dearth of statistical and empirical evidence reflecting how traditional dispute resolution practices may reduce the level of litigation in civil and criminal cases in the formal justice systems of African developing countries with few lawyers. It is recommended that further research, involving the gathering of statistical and empirical data, is conducted in this field to strengthen the arm of policymakers and legislators wishing to broaden access to justice in post-colonial African countries.

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