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Peacebuilding and Rule of Law in Africa

Just peace?

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An anthropological perspective

Juan Obarrio

Introduction: towards an anthropological approach

The African post-colonial state apparatus is profoundly handicapped in its ability to provide access to the provision of justice. The vast majority of the rural population in African states experience the lack of a working judicial system on a daily basis. Communities, families, and individuals often suffer injustice at the hands of a myriad of private and public actors, affecting their rights to property and inheritance, access to land, services, and most basic forms of nurturing. The barriers for posing claims on the formal system of justice are multiple and insurmountable. Throughout entire regions, the delivery of formal justice has been ravaged by a conjunction of internal conflict, patrimonialism, discretionary treatment, and corruption. In others, the official structures are dysfunctional, unreachable, or deemed illegitimate by the local population. Both the concrete application of justice, and indeed its juridical conceptualization, vary profoundly across geographic areas, ethnic differences, social class, and status. Social capital and various forms of affiliation to social and familial networks determine to a large extent the degree of successful access to the formal justice system, as well as the possibilities of obtaining due process and favourable judgments. Courts of law, as well as legal and paralegal structures, are mostly located in central urban areas. Funding and technical assistance for infrastructure and personnel in the formal judiciary are scarce. In any case, extreme poverty, lack of information, and deficits of infrastructure and transportation make it impossible for most citizens to attain justice at the formal level.

Facing the limits of the state system of justice, huge swathes of African populations, in particular, rural dwellers, seek the resolution of conflicts in informal, ‘traditional’, or ‘customary’ mechanisms of justice. Yet, in the broad juridical reforms of the state and transformations of the judiciary implemented in Africa since the 1990s, usually under the aegis of the World Bank, the relationship between ‘traditional’ justice actors and public sector institutions has not been addressed in a manner and at a level which takes into account the central role that traditional justice mechanisms based on various forms of custom play in the current social and political life of the continent.
Indeed, the spectacular contemporary re-emergence of a plurality of mechanisms of traditional justice in Africa may signal a divorce between the state apparatus proper and rural forms of governance. Recently, however, this disjuncture has been confronted by both the African post-colonial state and various transnational agencies in an attempt to bridge the gap between rural and urban spaces, between state and non-state actors, as well as between traditional justice and the rule of law; a gap which has often been the source of conflict and violence on the continent. State reform policies which have been implemented since the 1990s, often backed by and with technical assistance from international donors, through programmes such as structural adjustment, deregulation and decentralization, have also had an impact on the field of rural governance and rule of law.  

‘Traditional’ authorities and customary judicial mechanisms have been reinforced by such recent policies, albeit with paradoxical and ambivalent effects. Two central difficulties emerge in the elaboration of such policies across the continent. First, the tendency of legal reform programmes to view ‘traditional’ justice mechanisms from the point of view of positivist norms associated with Western juridical concepts and institutions. Conceptions about the nature of the legal subject, the content of justice, rights, community, harm, retribution, reparation, punishment and redress, as well as the institutional or technical aspects of the delivery of justice must be seen to be highly culturally specific, the globalization of Western juridical norms and rights notwithstanding. Local forms of traditional justice are thus understood by local and international policy-makers as exemplifying different fundamental concepts and values from those enshrined in Western law, yet in this process of recognition, there has been a clear and contradictory tendency to idealize, mythologize, and generalize these supposed specific values (the primacy of community over the individual, reconciliation before retribution, etc.), while at the same time attempting to bring these forms in line with modern conceptions of human rights and democratic principles. This may give rise to contradictory effects that undermine the possibility of developing emancipatory forms of citizenship and democratic values. At the same time, the historically developed context of radical juridical pluralism means that judicial practices in Africa are exceptionally unstable and fluid, revealing a complex relationship between justice and the rule of law. Finally, while considering particular forms of ‘traditional’ justice in given African settings, many policy programmes fail to take into account the complex local political histories of these institutions and forms, their roles in colonial and post-colonial practices of coercion and violence, and their ongoing roles in local games of power and sociologies of domination.

An anthropological perspective on justice in Africa provides not only access to myriad local forms of conflict resolution that have evolved out of a longue durée history of migration and exchange, but also provides access to the fundamental register of oral history and practice. This is crucial in order to analyze the scope and promise of traditional justice, given that one of its main
characteristics is its non-codified status, and that its enforcement is based on
the oral register of custom. Legal pluralism existing on the ground – *de facto*,
in those African states where it has not been sanctioned *de jure* – therefore
not only combines various legalities and codes but also a plurality of norma-
tive and cultural registers, both written and unwritten. Expressions such as
‘customary’ or ‘traditional’ law are thus merely convenient labels for what are
in fact highly complex and diverse sets of rules and practices developed within
particular localities or groups and that have, over time, acquired the force of
habit, backed by mechanisms of social coercion and, in many cases, state
power. While common or convergent principles may be discerned from a
comparison of rules across different communities, the manner in which they
are constituted, their content, and the mechanisms of their enforcement vary
considerably. This situation of complex normative and juridical pluralism and
the ongoing entanglement of ‘traditional’ justice mechanisms and authorities
within large- and small-scale political processes creates the need to draw upon
an anthropological and historical perspective in order to rescue ‘traditional’
or ‘customary’ justice from what are often oversimplified and ideological
or mythologized understandings on the part of both Western and African
policy-makers.

Indeed, rather than viewing the complex and often chaotic juridical
situation on the ground in terms of dysfunction or the failure of rule of law,
there are a series of opportunities for policy-makers in Africa. Yet in order to
engage productively with the crucial problem of justice in Africa, policy
workers will have to negotiate between their universalized concepts and
norms and a dizzying range of local games of power and the socio-cultural
idioms through which they are expressed. No generalized approach, no policy
‘toolkit’, to the consolidation of rule of law through traditional or customary
justice can or should be developed. Policy can only be elaborated on a case-
by-case basis, and should be grounded in careful, critical historical and
ethnographic research.

**Informal justice, ‘traditional’ justice, and customary law**

The broad concept of ‘informal’ or non-state justice is often used
interchangeably with the notion of ‘traditional’ justice and customary law.
However, as it is employed in policy studies, the term ‘informal justice’
implies a distinction between the state-led or formal sphere and a non-state
sphere in which other logics and mechanisms are at work. As numerous
studies of African polities have shown, making a clear distinction between
the concepts of ‘formal’ and ‘informal’ is highly misleading. A certain degree of
‘informality’ pervades all ‘formal’ or state-controlled spaces and institutions,
in which cultural practices and a range of social norms often prevail over or
compete with those of the rational-legal state. At the same time, given the
excessive premium on access to the state and its resources in a context of
generalized deprivation, state logics and games of power are omnipresent;
both solicited from the bottom up, as actors attempt to gain access to the state and its resources, and imposed from the top down, through a politics of influence and clientelism. 

If one examines the ways in which ‘traditional’ justice has developed in its most institutionalized form as customary law throughout the colonial period, it becomes clear that these juridical forms are highly indebted to the politics of colonial conquest and control, legacies whose understanding is crucial for an evaluation of the role played by traditional or informal justice in the continent today. At the same time, many forms of ‘informal’ justice are relatively recent and are direct products of colonial activity, in particular missions and colonial forms of organization and control. In this chapter, a tentative distinction will be posited between customary law, as codified and deployed by certain colonial states, examining its historical development and relation to the colonial and post-colonial state, and considering the ways in which its deployment and codification by the colonial state have given rise to a dual system which presents challenges of unevenness and inclusion, and contemporary problems of citizenship, democratization, and other more informal and diverse practices of traditional justice which can be found implemented throughout the continent today.

Custom and dual systems of justice: from late colonial to post-colonial times

An anthropological perspective on traditional justice necessarily has to engage with the historical and present status of customary law, and its ramifications in terms of governance, citizenship, and equality in Africa. The system referred to in Anglophone post-colonies as customary law, or in Francophone and Lusophone states as droit coutumier, or usos e costumes, constitutes a hybrid composite of norms and institutions, including aspects of official state law processed at tribunals, colonial regulations, and autochthonous values from diverse groups and communities produced by a long history of migration and contact.

Amidst a plurality of local identities, rituals, practices, norms, and rules, the frameworks proposed by the late colonial and post-colonial state dichotomized juridical options. Indeed, the colonial systems of governance, through direct and indirect rule, tended to enforce binary oppositions: direct rule enforced race-based differential identity (settler/native); while indirect rule, in which local customary authority played a central role, multiplied ethnic ascription and atomized the loci of governance at the micro-level. 

Throughout the continent, colonial regimes of power maintained aspects of pre-colonial customary law and local forms of conflict resolution deemed not contrary (‘repugnant’) to Western forms of justice or morality, reshaping them in some instances through codification. This historical context, which forms a first, general frame of contemporary systems of traditional justice, generated dual legal regimes, in particular in former British colonies,
Traditionally, courts in Africa were currently governed through common law. This dualism found its expression in the creation of general courts enforcing civil law jurisdiction over criminal and civil matters, and the creation of a different tier of tribunals presided over by chiefs or groups of elders, labelled ‘African courts’, or, rather, ‘Native Authority courts’. These various tribunals enforced different customary laws according to region and ethnicity, and had jurisdiction over black Africans. Overseen by governmental officers, who appointed legal authorities, the courts precluded the possibility of plaintiffs being represented by formal lawyers.6

The enforcement of customary law was not the absolute privilege of statutory customary courts, which shared this jurisdiction with general courts to determine and apply customary law. The late colonial phase, particularly in British colonies, saw a progressive merging of both types of tribunal into a dual system, with general courts overseeing the functioning of customary tribunals. This transformation was accompanied by a correlated change in authorities in charge of customary courts, from chiefs to lay judges. Some mimetic exchange also took place at the procedural level, with the introduction of forms belonging to the formal legal liturgy into the restricted space of customary courts.

An excellent example of the dual juridical system in former British colonies is that in Ghana. The colonial regime split the judicial system into two systems of tribunals, one administering a reshaped form of customary law, and another enforcing common law and the legislation passed by local administrative colonial offices through general courts such as the High Court and the Court of Appeal, according to English formulations and procedures. The majority of the African population was placed under the jurisdiction of the reshaped form of customary law, administered through the native courts. To administer the latter, the British governor’s office mostly relied upon traditional chiefs. Personal jurisdiction of the native courts was based on ethnicity while subject-matter jurisdiction was limited to civil claims or minor offences falling under native customary law.7

After independence in 1957, the post-colonial state retained much of the previous dual system of justice.8 In 1958, the Nkrumah regime passed a Local Courts Act, renaming the native courts and dismantling the previous order of a hierarchical system, also loosening somewhat the principle of jurisdiction according to individual ethnic identity. At present, the constitution of the Fourth Republic of Ghana depicts a general juridical framework of common law, which specifically includes customary law.9 The latter is understood to comprise traditional norms applicable to particular communities in certain given areas. Slightly different illustrations from former British colonies are provided by Malawi and Zambia.10 In Malawi, a pyramidal system of customary courts is built in tiers going from lowest level tribunals, to district and regional courts, with a National Traditional Appeal Court at the top. Traditional courts exert both civil and criminal jurisdiction apart from the regional traditional courts, which maintain only criminal jurisdiction.
This system of jurisdictions offers interesting approaches to dispute settlement among members of different communities. The jurisdiction of traditional courts is exerted over complaints where the parties are Africans, but the governmental offices controlling the system of courts can expand this jurisdiction to include other citizens. As mandated by the national constitution, civil cases are heard according to a version of customary law prevalent in the tribunal's jurisdictional area.

In Zambia, British colonial legislation organized the system of traditional justice through the Native Courts Ordinance of 1939. This ordinance also tackled the nuances of racial and ethnic distinction vis-à-vis local governance and custom. Native courts established by the governor held jurisdiction over civil cases involving Africans and on criminal cases against Africans, except in cases where a non-African could be called as a witness or where the governor's sovereignty determined that certain parties could not be submitted to the jurisdiction of native courts. The procedural functioning of the courts was informed by customary law. Yet in the courts, the oral tradition encountered the strictures of written case records, which were reviewed by the Commissioner of Native Courts. As in Malawi, Zambia reorganized its system of native courts, in 1966. Re-labelled local courts, they were granted restricted civil and criminal jurisdiction. It is important to note that the local courts' decisions can be appealed to subordinate courts and to higher tribunals up to the Supreme Court.

The implementation of these statutory customary courts did not eliminate pre-colonial forms of justice. Rather, the local tribunals stylized facets of traditional justice that were deemed useful for the prosecution of colonial governance. Nevertheless, a parallel, resilient space of relatively autonomous local authority and customary justice continued functioning beyond the orbit of direct state control. These practices of traditional justice constituted non-statutory mechanisms that have informed aspects of contemporary African traditional justice. An anthropological perspective on contemporary customary law and traditional justice must thus emphasize not only its historicity, the genealogies of its inception and reshaping, but also its enduring flexibility and adaptability. While most legal regimes oscillate between standardization through general rules of enforcement and discretionary dynamics of specific cases, this is also the case with customary law procedures. These are not set in stone, but subject to constant negotiation and deliberation according to contingent circumstances, where changing landscapes of local power play a most significant role. Furthermore, this elasticity is present in general in most juridical structures based on codification, in which many rules considered as though they were universally 'applied' are in practice much more local and selective in scope. The same principle functions in oral systems of traditional justice in Africa, where contingency is an important feature, and the repeated enforcement of a rule is more a pragmatic act than an indication of the hidden logic of any given customary system.
While anthropology played an important role in high colonial times in research into and codification of customary law, certain later Africanist ethnographic research, on the contrary, identified more or less formalized local rules and regulations, yet also observed their flagrant absence in any systematic manner in the procedures of West African customary courts. This research portrayed local judges as deeming the knowledge of formalized rules as of lesser importance, privileging instead a fair assessment of circumstances and negotiated complaints. This did not necessarily generate some sort of communal reconciliation, but on the contrary, served as a mechanism for channelling coercive norms and formulations expressed by groups of power among the locality.

In post-colonial rural Southern Africa, many researchers observe that in areas where customary law is supposed to be the rule, the settling of conflicts takes place outside of statutory traditional courts. With regards to issues of inheritance, for example, a complex yet loose array of expectations has framed many processes, as opposed to a fixed set of rules. If the former were not met, no formal legal punishment was enforced; instead recourse would be taken to ‘levelling’ socio-cultural forces such as witchcraft or rumours carrying accusation. In order to maintain social order, local juridico-political authorities such as chiefs would impose sanctions in spaces beyond that of the statutory tribunal. However, such measures involved the patient negotiation between enmities rather than the strict enforcement of customary rules. Conflict thus does not represent a particular offence against a universal norm, but rather, a latent threat against a collective dynamics perceived as always unstable, perennially on the verge of dissolution through disorder. ‘Custom’ as the locus of traditional justice, seems therefore not so much a body of norms which may be clearly delimited or strictly applied, but rather an invisible cement which holds an edifice together, a historical repository of norms that do the work of narrating the life of the community and its reproduction.

The ‘bifurcated state’ of high and late colonial regimes, divided between a central apparatus of power organized through civil law and mostly located in urban spaces, and a plethora of local groups in rural areas ruled though chieftaincy and organized through custom, constitutes the central and complex legacy of colonialism for post-colonial states. Contemporary systems of traditional justice must necessarily be interpreted through the prism of these formations of power, legality, and violence, in which custom occupies a crucial centre-stage location. Direct colonial rule deployed civil law to differentiate a political minority or ‘civilized’ (civil law in parallel with civilization and even citizenship) from a political majority of uncivilized native subjects. Indirect rule, at a later stage, employed a divide-and-rule policy, which further demarcated distinctions among ethnic groups, ascribing to each of them a separate set ‘customary law’, enforced by different ‘native authorities’ administering home areas.

It is this legacy of a bifurcated state in terms of entitlements to citizenship, dividing post-colonial citizenry into civic and ethnic, that the post-colonial
state (or current transnational humanitarian/legal intervention) has not been able to fully reform. Given that customary law and traditional authority were located at the centre of these conundrums related to local governance, this historical framework must be taken into account when analyzing the pitfalls and potentials of contemporary systems of traditional justice in Africa. Formal state juridical systems have jurisdiction over those minority portions of the population that enjoy, as full members of the state, individual entitlements to civic citizenship, enshrined constitutionally. Opposite to this, traditional justice, mostly located in rural and even peri-urban areas, belongs in a local history of allegiance and subjection to native authorities. This historical bedrock constitutes the source of socio-economic rights that are granted collectively, based on membership of a distinct ethnic community as defined by the state and governed through customary law.

Contemporary status of customary law and ‘traditional’ justice

Customary law

Contemporary African state legal systems thus present various degrees of plurality, based on sources from diverse juridical backgrounds. They also vary with regards to the status of customary law within the general juridical regime. These variations are due to the legacies of former colonial regimes and their differential inclusion and assimilation of custom. Former British colonies maintain to a large extent the dual systems formed during the late colonial phase, managing, through a system of common law, the recognition of customary law by judiciary tribunals that brings them into a systematic doctrine of judicial precedent, through which customs are norms enforceable across a diversity of regions and groups, despite cultural variation. Francophone post-colonial regimes have opted for an associational regime that includes customary law within the general civil law of Napoleonic roots. Droit coutumier is usually considered extraneous to formal systems of civil law, based on aspects of Roman Law and the Napoleonic Code. A particular colonial trajectory – local governance through assimilation policies – explains the imperviousness of legal systems in former French colonies to custom and forms of traditional justice. Yet in some Francophone West African post-colonial states, such as Senegal and Guinea (Conakry), local politico-religious authorities enforce adjudicatory justice at the level of local conflict resolution, based on a theologico-political and charismatic source of sovereignty applied across diverse ethnic cleavages and tolerated by the formal state apparatus.

Former Portuguese colonies have to some extent followed the Francophone system, within a Roman Law general framework, yet it must be noted that MPLA and FRELIMO in Angola and Mozambique, respectively, engaged in radical reform of local governance and citizenship through an official ban on chieftaincy and customary law enforced in the immediate post-independence period. Transitions to democracy in the 1990s further reformed
judicial systems. Other radical regimes such as the Ethiopian one have also attempted to abolish various facets of customary law through legislative reform. Yet, despite these few localized projects, customary law continues to be the subject of a renewed politics of recognition enforced throughout the continent. Many national constitutions acknowledge the status of custom as a source of law, to be interpreted and enforced in formal juridical procedures when it is claimed by the disputing parties.

'Traditional' justice

Deeply entrenched in pre-colonial history and largely reformed during high colonial times, mechanisms of traditional justice had been considered by some elite politicians and intellectuals at the immediate post-independence moment to be barriers to future-oriented democratic and development policy. Certain state programmes envisioned a near future in which these practices would fade out and give way to an absolutely formalized single juridical system. The resilience and transforming creativity of traditional justice practices have to be recognized and taken into account in any debate on democracy, rights, and justice in Africa. The pervasiveness of these forms of dispute settlement is related to both political issues of citizenship and ideology as much as to material issues of development and infrastructure. Beyond the simple implementation through the post-colonial state of forms of customary law, some of the most prominent actors conducting justice in Africa today are:

Customary courts: most often led by customary authorities. In certain countries, or on certain areas of law, mostly civil, they enjoy state recognition as legitimate sources of jurisprudence and legal authority.
Councils of elders: groups of notable members of the community linked by age and lineage, exerting charismatic authority, and influence through social pressure and kinship rules.
Vigilante groups: organized according to geographical, ethnic, professional, political, or security concerns. Usually armed, these groups, which range from neighbourhood watch organizations to small private armies, may enact forms of traditional or summary justice, alongside their functions of security and/or coercion. They often lay claim to local cultural forms and rituals, sometimes expressing a nativist or ethno-nationalist agenda. In some cases, these forces occupy spaces left vacant by non-existent or corrupt and inefficient state law enforcement forces deemed as illegitimate by the communities, and at others they work in criminal collaboration with politicians and state officials. Communal hearings and accusations, beatings and Lynchings, have recently constituted some of their most public and spectacular practices, for instance, in Southern Africa. In Nigeria, vigilantes in the Niger Delta commonly administer 'traditional' forms of justice, such as the poison ordeal, and practices of divination for identifying perpetrators, as well as summary forms of justice on those deemed guilty.
Local semi-urban mechanisms of conflict resolution: neighbourhood or street committees and peace committees enforce security and reconciliation in minor civil matters in the peripheries of large urban conglomerates.23

Religious institutions: enjoying various degrees of state recognition, customary spiritual leaders (holding rituals of cleansing and reconciliation involving spirits and elements) as well as mission-based Christian churches, African and Pentecostal churches and fellowships, as well as mosques and confessional organizations or associations, provide spaces for a theologicopolitical type of justice.24 In some parts of West and East Africa, Shari‘a law is the hegemonic norm.25

Kinship networks: in vast rural areas, extended families, and age and lineage groups enforce customary law and forms of social pressure and surveillance, kinship rites, and reconciliation mechanisms, as well as performing initiation rites and cleansing ceremonies that restore social order and re-organize cycles of reproduction within the local community.

Community courts/popular tribunals: in Southern Africa (Mozambique, RSA) as well as in areas of East Africa, former forums informed by revolutionary justice continue to exist and enforce a type of restorative justice based on communal reconciliation. These entities, led by lay judges or notables in peripheral neighbourhoods, express socialist norms and ideology, and scattered aspects of official state legality, alongside customary law and kinship rules. They mostly deal with civil offences, which can include issues involving magic, spiritual practice, or witchcraft accusations.26

Traditional justice mechanisms: main characteristics

- Practitioners originate in kin-based authority groups, as well as by lineage and inheritance. On occasion, they are also selected collectively due to their notable status among communities.
- Individual conflicts involve a communal ethos, and are conceived as affecting the general group order.
- The families of parties involved and other closely related social groups are expected to be guarantors of agreements and decisions reached, through further counselling and social control.
- As derived from this ethos, dispute settlement is generally based on reconciliation and arbitration, rather than punishment and retribution. The aims are usually understood as healing offences and restoring an agreed concord.
- Procedural regulations and evaluation of evidence are extremely malleable. The sense of precedent is ambiguous and similar offences may not be solved in similar manner, but dealt with in a more contingent way.
- Dispute argumentation and negotiation involve public participation of families and clan members, as well as groups of neighbours, and elders.
- There is no official legal counselling and representation, customary law being usually prominent, but not always the hegemonic frame for
settling disputes. Often custom is articulated with many other registers of
normativity, social pressure and control, and local surveillance.

Traditional mechanisms of conflict resolution such as chieftaincy offices,
custodial courts, spiritual institutions, and kin-based or age/lineage-based
groups are found across the continent, mostly in rural areas, but also in a
grey, indistinct zone of semi-urbanized peripheries surrounding small and
large urban conglomerates. These areas, which are central to conceptualiza-
tions of governance and provision of justice in Africa, are often left under-
analyzed by sharp divisions between the urban and the rural.

In certain countries, where traditional justice is recognized by the state as
legitimate, or even where a dual system has been established with informal
mechanisms being increasingly formalized and linked with official judiciary
systems, the state apparatus has to fund and support both formal and infor-
mal (or traditional) legal structures. Despite being increasingly supported by
governmental policy and multilateral agencies’ programmes in the context of
state reforms of decentralization and, in particular, post-conflict intervention,
traditional justice mechanisms develop and are reproduced most often as
adjacent systems, located in parallel to the orbit of the formal judiciary.27

Wherever informal justice mechanisms are articulated with the formal
judiciary, the level of articulation is very uneven. Examples of a fuller in-
gregation of traditional justice into state systems are constituted by the cases of
chieftaincy customary courts found in Southern Africa, including Botswana,
Lesotho, and Swaziland.28 In Botswana, local level customary courts enforce
its statutory jurisdiction even over criminal matters.29 In post-war Sierra
Leone, chiefdoms offices are being reinforced by the state as local instances of
juridical authority.30 In general, in African post-colonies ruled by common
law, mediation through customary authorities is legally enshrined as a form of
judicial settlement, and decisions are recognized by the formal system
through incorporation into legal jurisprudence, forbidding appeals on com-
plaints and cases that have been adjudicated in those spheres. Faith-based
mechanisms are a different issue altogether, usually poorly articulated within
the realm of the formal system.

In regions dominated by Islam, religious and customary norms and insti-
tutions coexist in varying degrees of cohabitation. In some cases, Islamic
codes are well articulated with customary practices, while in others, especially
under the impetus of reformist movements, customary norms and laws
are seen as anathema to correct Islamic practice and contrary to Shari’a.
Disputes over juridical norms often give rise to bitter internal conflicts within
and between communities. Traditional justice in these locales thus encom-
passes a diversity of theological and customary rules and regulations enforced
by figures of authority whose legitimacy is rooted in spiritual practice,
kin-based and lineage rules, or warfare. For instance, in the area of the
Sahel, leaders of religious brotherhoods exert a theologico-political form of
local sovereignty that includes rule over judicial matters and communal
conflict resolution. Consensus over norms thus depends on the political power and charisma of these leaders, and can give rise to growing divisions, such as those between Sufi groups, the Tijaniyya and the Mourides, in Senegal. In Nigeria, the simultaneous use of Islamic law, common law, and customary law, in the context of a constitution which proclaims the secular basis of the nation-state, has given rise to ongoing debates and inter-religious violence, even if the disputes have not been as explosive as some observers initially feared.  

Several dynamics underpin the salience of these mechanisms. First, the fact that the majority of the African population live in rural areas, where informal mechanisms of traditional justice are extremely prevalent and where formal state justice systems function in a milieu of extreme scarcity and lack of infrastructure, making it impossible to serve the myriad scattered, isolated rural villages. The oral nature of traditional justice, with uncodified custom, and conversational, expedited procedures, is well adapted to a rural population with very high levels of illiteracy. Furthermore, the jurisprudence and procedural forms of formal state justice, which are individualistic, extremely normative, and formalized, do not sit well with local forms of staking claims and solving disputes, which are usually framed as offences affecting a sense of communal order and equilibrium which goes beyond the scope of a particular quarrel.

However, there is a highly ambiguous potential enclosed within the plurality of mechanisms which make up traditional justice, linked as I have argued, to the most complex history of pre-colonial formation and integration and high colonial reform. At present, the debate on whether to transform certain features of traditional justice, adapting them to novel realities, and redefining the relationship between them and formal state juridical systems, remains controversial. Challenges presented by emergent local forms of citizenship, inflected by customary practice, must be part of any analysis of the capacity of traditional mechanisms to advance the promotion of justice, democratic rights, or social peace. Traditional justice often includes features that violate not only national constitutions and legislation, but also international law, particularly human rights. Practices may involve discrimination on the basis of gender or age (informal justice being usually controlled by older men); physical punishment; trials under coercion or in the absence of the defendant; or improper trials for higher crimes such as rape or murder.

At the same time, central contradictions relating to citizenship and equality can be seen in the ways in which, across a large variation of cases and inflections of traditional justice and its articulation with formal state judiciary systems, a dual system of justice develops. The contradiction may be present both in countries that enforce a system linked to common law (which would appear more readily suitable for constant incorporation and variation of custom) and those enforcing civil law systems, apparently poised towards an alienation of customary law and informal mechanisms of justice from the sphere of state-sanctioned law. There exist countries, including former British
colonies in Southern Africa, in which a hegemonic common law framework acknowledges the legitimate status of customary law yet limits it to civil matters. Even within this category of countries, the nature and relationship of customary to civic law vary, for instance, in Zimbabwe, custom is not regulated by constitutional bans on discrimination.\textsuperscript{33} With regards to this case, as in some West African Anglophone countries, it could be argued that two types of citizen are being shaped constitutionally, reproducing aspects of what could be labelled the ‘Mamdani dilemma’, which refers to the legacy of colonial dualistic rule: the juridical creation of a small group of citizens and the vast population of subjects.\textsuperscript{34} With customary law being located outside of the orbit of the fundamental norms of the modern state, the majority of the poor and mostly rural population find themselves locked within the intrinsic arbitrariness of custom’s mechanisms of enforcement. A small, usually urban, elite is presented with a choice of appealing to either customary or statutory civil law. The exact opposite of this condition would be that in South Africa, where constitutional regulation subjects customary law to standards of equality and non-discrimination.\textsuperscript{35} The Nigerian Constitution expressly prohibits discrimination in civil matters. Hence, this constitutional ban is understood to include discriminatory practices entrenched within customary law. In Nigeria (as well as in Mauritania) the application of Shari’a extends to faith-based moral offences regulated by Islamic theology, which is enforced by the state as criminal law.\textsuperscript{36} There are also some Anglophone post-colonies, such as Botswana, in which the application of customary law extends to criminal matters.\textsuperscript{37} In some other restricted cases, traditional justice, as a regime of regulation of issues related to the individual legal subject and of issues pertaining to autochthony, has jurisdiction over the subjects of custom despite displacements and regardless of their actual location, even overcoming rural/urban divides.

\textbf{Between autochthony and universality}

Over and above the contours of these various cases, we can identify a central dilemma that may be found in different systems of traditional justice across the continent. Grounded on an alternating play between notions of autochthony and foreignness, and particularity and universality, customary law and traditional justice reflect the post-colonial attempt to reform the dualistic juridical structure of the state apparatus. This general political engagement with a renewed, contemporary form of customary law developed at a local level implies a more general movement towards a situation of autochthony and even in some cases autarchy, making it increasingly difficult to reconcile these forms with universal notions of human rights, equality, and other democratic norms. At the same time, such strategies are pursued by elites, who instrumentalize custom and its institutions as yet another informal technology of power, which may serve their personal ambitions. Customary law offers autochthonous groups in power or indigenous elites the ability to
play upon various different normative and juridical registers and to appeal to different jurisdictions, turning legal pluralism into a powerful political bargaining tool. In a context where checks and balances on the abuse of power are weak, this opens the possibility for the delivery of justice to become a highly politicized affair. As some in rural Africa say, justice is not for the people, but for the powerful. This situation also tends to blur the distinctions made between state and non-state spheres, as well as rural and urban divides.

Patrimonial elite practices that criss-cross urban and rural divides, as well as the spheres of civil/common laws and customary law, generally affect personal civil status, or matters of property such as land claims. At times, urban elites might appeal to customary law and traditional justice instances to appropriate ancestral land in their rural areas of origin. This makes it possible for the rich to enjoy the benefits of statutory property law for their urban, personal property, while simultaneously using customary law mechanisms to grab ancestral lands in rural communities. Some of these practices of land seizure and tenure justified with reference to customary law reinforce the arbitrary, oppressive power of traditional chieftaincy over its subjects or, rather, the power of elders over a youth deprived of jobs, land, or means to cultivate or herd cattle, and jeopardize the legitimacy not only of traditional justice, but also of the formal legal system enforced by the state apparatus, insofar as the latter recognizes and legitimizes tradition.38

Indeed, the arbitrary and illegitimate aspects of traditional authority have been reinforced by demographic changes, massive rural-urban migration, and population displacement over the past several decades. Urbanization, demographic shifts and globalization, along with the experience of war, undermine many of the socio-cultural grounds upon which the legitimacy of traditional authority rested, particularly from the point of view of youth, which today comprise the majority of Africa’s population. Traditional forms of authority and adjudication thus must struggle for legitimacy with other increasingly powerful forms of normative regulation and conflict resolution, particularly those of religious movements that often explicitly condemn ‘tradition’ and its institutions. Both Pentecostalism and reformist Islam are extremely successful movements, largely driven by urban youth, which seek to fundamentally undermine traditional authorities and the socio-cultural forms associated with them, treating their authority as illegitimate, if not violent and arbitrary.39 At the same time, ‘re-traditionalization’ has been undertaken by other urban youth as a means to gain access to rural resources; in these cases the institutions and cultural forms are not questioned, but rather mythologized and revalorized. However, traditional authority holders themselves, such as chiefs and elders, have become objects of severe criticism by youth for their betrayal of ‘tradition’ and its values. In the conflict in Côte d’Ivoire, youth militias in concert with urban politicians have managed to fundamentally restructure rural institutions of traditional authority, gaining access to land and shifting the balance of power between generations. Traditional authority thus
becomes a tool in the hands of violent youth and an even more violent state apparatus.40

Uneven local milieus of power and hierarchy often compromise the fairness of solutions reached through informal justice mechanisms. Collective argumentation and witnessing involving relatives and members of the community as warrantors of judgments and agreements do not, nevertheless, erase social disparity in terms of gender and generation. This endangers the provision of order and justice at the local level by deepening inequity and destabilizing the balance of justice. Traditional justice is often conducted without oversight, by customary leaders and other members of local hierarchies, elected through inheritance, who tend to privilege lineage ties, or other such social bonds, as well as positions of power and wealth among the community in the provision of justice. Physical punishments are a frequently possible outcome of certain mechanisms of traditional justice in Africa. Women and young men are among those most affected by these measures, which generally go against the legal frames of international law and the norms of human rights, as well as the dictums of courts throughout Africa, which have deemed them unconstitutional on several occasions.41

In considering transitional justice in post-conflict situations, it is also very important to recognize the use of renovated versions of traditional mechanisms such as custom and sacrificial ritual purporting to promote reconciliation.42 Most of these practices take place in isolated rural polities, or through semi-secret forms of associational life, beyond the gaze of state officers and international actors, as well as the scope of their legal programmes, policies of juridical reform, and judicial institutions. Sometimes parallel, informal, and elusive practices of everyday reconciliation or rituals of belonging and restoration of identity and trust, occur in the shadows of the legal structures (courts, etc.) implemented by official forces of transitional justice such as truth and reconciliation commissions, or retributive/restorative justice agencies.

Practices of reconciliation at the local level thus often take place along paths that are parallel to, or even divergent from, official policy at the national, central level. An example of this is the centrality of religious and spiritual matters to these processes. Issues of physical and spiritual health are combined with questions of hygiene, taboo, purity, truth and innocence, or culpability, hence paving the way for traditional healers to interact with spiritual leaders in the pursuit of rituals of restorative justice. There is a growing impact of faith-based organizations in these activities, and even national theatres of reconciliation have an important theological content. Local customary leaders and mechanisms of traditional justice also emphasize spiritual aspects in the delivery of judgment or achievement of reconciliation among aggrieved parties and restitution of social order. However, religious ritual, liturgy, and doctrine are not easily accommodated by the modernist, secularist discourse of both state and transnational actors, as well as by the newly emergent regime of international law, or the discourse of human rights.
When the state or international actors deliberately employ traditional justice institutions and practices in post-conflict resolution, the results may be ambiguous. The case of Rwanda and the implementation of gacaca courts is the most famous example; their functions, jurisdiction, and effects on local reconciliation and the delivery of justice have generated intense debate and a certain degree of disappointment in outcomes. It is also helpful to analyze the precise place of customary courts within a post-conflict transitional legal/judicial system that includes renovated local and national courts (with the election and training of judges), alongside transnational instances such as UN courts, or ICC prosecutions (implying aspects of international law, human rights and global jurisdiction).

In northern Uganda, elders consulted on the potential of traditional justice rituals and institutions to reconcile protagonists and communities expressed doubts on their efficacy. Two central reasons were cited: first, the rituals in question were culturally specific and not shared by all protagonists, and second, and perhaps more importantly, the elders emphasized the unprecedented and extreme nature of the violence, claiming that these traditional forms had never been deployed to cope with such excessive forms of harm and violence in the past. One of the central elements of traditional justice is the shared conviction on the part of participants that it has the power to restore order and group solidarity, and an important aspect of its legitimacy is based on the spiritual power of such rituals, a power which is not necessarily understood as inherent in the institution per se but which can only be verified by past performance. Confronted with absolutely unprecedented occurrences, communities often lose faith in ritual and traditional forms of practice understood as both protecting the community and providing the means for reconciling it.

Recommendations for addressing the dilemmas of contemporary traditional justice

From a thorough analysis of African countries in which a progressive incorporation of traditional justice mechanisms into the formal state legal system has taken place, development of unified legal systems offers the greatest potential for releasing the positive contribution of traditional justice. In a single system, traditional justice could occupy the lower echelons and still maintain a distinctive legitimacy based on local history and social dynamics, which would place it beyond major failures or deficits attributed to the state by local communities.

This implementation depends on developing connections between both types of justice (local and customary, on the one hand, and central and legally formalized, on the other hand), under the auspices of distinctive yet related jurisdictions and appeal mechanisms. Also, programmes should be developed towards the training of prosecutors and judges. Despite the lack of appropriate infrastructure, and the deficit in entitlements and legal provisions,
measures should be taken by states and support should be provided by international actors in order to ensure as much as possible that members of local communities recognize traditional justice mechanisms as a primary means of access to other levels of the formal judiciary system.

I would argue that mechanisms of traditional justice should constitute a voluntary system, one in which participation is decided freely on an individual basis, and the agreements and judgments of which can be checked through other instances of the judiciary. While traditional justice is based on elements of communal regulation and control for the sustainability of its decisions, legitimate coercion and physical force should remain under the aegis of formalized state regimes and institutions.

It is important to consider jurisdictional scope when assessing the potential and relevance of contemporary forms of traditional justice. Jurisdiction, in terms of authority over both spatial domains and of legal matters, even if meticulously regulated, needs also to be adequately expanded in order to provide justice to those sectors of the population unable to seek recourse from the formal state sector. It is important to recognize the continuity and disjunctions between criminal and civil matters. Various African legal forums and jurists acknowledge that from the perspective of most traditional justice mechanisms, the distinction between criminal and civil offences cannot be absolutely and clearly demarcated. If criminal matters were to be barred completely from the jurisdiction of traditional forums, a very important aspect of retributive justice would be denied to vast sectors of the population, in particular those living in rural areas. For instance, in so-called semi-urban peripheral ‘community courts’ in Southern and Eastern Africa, the distinction between these matters is blurred.46

With regards to such liminal legal entities, official control of procedures and decisions needs to be stipulated in legislation, regulating constraints both on the type of crimes for which judgments can be passed and on options for punishment in customary processes. While traditional justice mechanisms should exercise broad jurisdiction with respect to disputes occupying unclear boundaries between civil and criminal issues, a range of serious crimes, including rape or murder, should always be excluded from their jurisdiction. The scope of criminal punishment should also be limited. Some customary processes address criminal acts without resorting to extra-legal force.47

Communal demands and surveillance are social forms of securing submission to a customary court’s jurisdiction as well as acquiescence to the authorities’ decisions, which are reached in accordance with the participation and judgment of elders, families, or notable members of local hierarchies.

A unified juridical system of interconnected jurisdiction would also enhance the legality and legitimacy of the coercive power of traditional justice by making it possible to appeal sentences in official state courts, in particular in cases where agreements reached at the community level have not been fulfilled or honoured. Official jurisdiction over matters (criminal and civil) moving between levels of the judicial system would provide traditional justice with a
higher degree of legitimacy, both in the eyes of local community actors, and in those of agents external to them. The official state system of justice should have jurisdiction over matters suitable to be punished by imprisonment. Also, the possibility of redress or appealing cases by means of taking complaints from the traditional system to lower formal courts should be guaranteed for the majority of the population. Efforts made towards recognition and support of mechanisms of traditional justice need to be implemented in coalition with other programmes reinforcing anti-discriminatory stances in favour of women, youth, etc.; providing legal aid counselling methods, as well as education and literacy programmes.

Such efforts made towards a deepening of the incorporation of certain facets of traditional justice into the formal state regime must take into account not only the complexities of the histories of citizenship and rights in Africa, but also, fundamentally, the fact that these ‘traditional’ mechanisms are continuously being transformed, relentlessly displacing themselves across a scale of possibility and adaptability vis-à-vis new social realities and demands. In this regard, it is important to distinguish between a system of local courts existent in certain Anglophone post-colonies, inheritors of colonial ‘native courts’ and enforcing a colonially-codified written summary of ‘customary law’, and the myriad forms of informal traditional justice that are constantly incorporating new issues and norms, albeit not in any linear or evolutionary way.

An enhanced jurisdiction for traditional justice mechanisms could foster citizenship rights and access to justice, despite the difficulties discussed above. Modalities of traditional justice, which aim at reconciling parties and restoring social links by means of mutual compensation, gift-giving, and collective cleansing and reincorporation of individuals, function relatively well in communities where sociality is based on permanent, complex forms of symbolic and economic reciprocity and circulation. Disputes, complaints, and their resolution have long-lasting social effects, not only for the implicated individual parties and their immediate circles, but also for broader, extended networks of sociality. Thus, the evaluation of testimonies and evidence, and the conceptualization of offence, as well as the search for suitable agreements, need to be both voluntarily accepted and followed by the opposed disputing parties and also by a more general, social, communal context. This factor underlines the need for a flexible application of norms based on custom, in a context where precedent is constantly invoked only to be reshaped. Past-oriented normativity is always understood and reinterpreted in terms of current predicament and antagonism as well as future expectations, thus similar cases are seldom adjudicated in an analogous manner.

Beyond enabling extensive public participation further than the disputing individuals, mechanisms of traditional justice usually also involve a sort of pedagogy. Certain procedural aspects pertaining to dealing with cases, such as speeches, admonitions, negotiations, and punishments, involve educational features both for local moral economies as well as, potentially, for the
imbrications of traditional processes with state citizenship, legal rights and entitlements, and social obligations.

Traditional mechanisms may also support official law enforcement and formal regimes of legal punishment because they deal with minor offences before they evolve and deepen; and they enforce sanctions in a way that avoids incarceration, hence avoiding a great increase in prison population. Indeed, among the targeted communities, the imprisonment of an individual constitutes most often a harsh economic disciplinary sanction against his extended family. Relatives in these cases deal with income loss and the need to support the person held in custody. In cases in which traditional justice mechanisms are linked with the official formal state system, the family of the offender is required to compensate both the aggrieved person and his or her family as well. Further economic and social-symbolic sanctions can be exerted on the relatives if that payment and reparation are not delivered.

An anthropological perspective on these mechanisms would encompass both the labyrinthine – yet centralized – bureaucracies of the African post-colonial state in its dealing with law and justice, as well as the most stylized forms of locally-based sanction of measures for partial restorations of order, which are more personalized and diffused. Modalities of coercion supporting the implementation of measures vary, going from the highly formalized channels of state units and law enforcement agencies, to the elusive yet powerful networks of communal control, sanctioning that might include elders’ admonitions and counselling, as well as family advice and surveillance, kinship rules, ritual and sacrifice, or even communicational modes such as gossip and rumour. Moreover, modalities of enforcement within local communities operate through articulations of various different vectors: ethnic, social, age, and kinship and relatedness, which are processed in an inter-subjective manner and hence are not mediated by complex, distant institutions, but rather, through a delicate texture of interconnected social cleavages.

**Future anthropological research on traditional justice**

An adequate assessment of the predicaments and potentialities of traditional justice in contemporary Africa in terms of policy-making needs to be informed by archival research, judicial records, oral history and detailed, grounded ethnographic fieldwork. This research is of the essence in order to historicize genealogies of customary law, local authority structures, and traditional conflict resolution, tracing their pre-colonial origins, and colonial and post-colonial transformations. Customary norms and indigenous forms of justice, while making reference to the past, are constantly being adapted and transformed. Policy-oriented research is most often conducted over short periods due to constraints on both national and international researchers and practitioners. This kind of research, which informs most efforts towards broad legal reform, usually takes into account only the most recent forms of emergent local, communal rules, regulations, and forms of authority.
Field investigations informing policy-making often examine only the current manifestations of local legal and political forms, uprooting them from long-term historical processes that have given them their current shape and significance. In order to understand these forms, the long history of state governance, ethno-genesis, violence and conflict over consumption of resources or the sphere of production, and transformations in local structures of relatedness and reproduction needs to be taken fully into account. Instances of legitimate authority are disputed and scattered throughout uneven territories and layers of sociality and culture. Only long-term field research supplemented by thorough historical analysis can move beyond the first apparent tiers of customary authority to reveal more meaningful and deeper sources of authority, sovereignty, and jurisdiction. Accuracy on issues such as the role played by kinship rules in traditional conflict resolution, or practices of violence and punishment, is also difficult to establish through short-term, narrowly-focused investigations, and hence these issues are seldom taken into account in the elaboration of policy-making and juridical reforms.

Another important area for further research and scholarship on traditional justice is its specific role in post-conflict situations and its complex relationship with transitional justice. Detailed, localized, and extensive research is crucial in this realm, which has grown exponentially as national and transnational actors seek to advance the rule of law, secure sustainable and strong democratic institutions, and provide access to justice by means of restoring, or reinforcing, the authority of customary chieftaincy, reviving ancient stylized forms of local courts under new guises, and supporting ritual forms of sacrifice and cleansing as well as social and spiritual recovery at both communal and individual levels.

Future research on these matters in Sub-Saharan Africa will encounter an emergent field of action and a proliferation of practices raising issues of locality, autochthony, belonging, indigeneity, and collective memory. These novel movements and processes, taking place with various degrees of intensity and under different political and cultural forms throughout the continent, present new challenges to academic scholarship and policy-making research concerned with expanded issues of citizenship rights and democracy that go beyond previous categories and conceptions. Indeed, these movements, which enact a politics of memory and a reification of attachment to territory, claiming an immemorial history linked to a given soil as a source of rights, do not merely constitute the return of previous cultural forms. Rather, they signal the emergence of renewed forms of custom in the service of future-oriented ethnic, nativist and political claims, which rewrite the past from the viewpoint of the conflictive political and economic present. Research should be conducted on the ways in which these movements of autochthonous identity currently unfolding across the continent are shaping new, emergent, types of citizenship, which combine aspects of membership to a state with new aspects related to membership in local communities.48
There exists indeed a vast space for research into and experimentations with new approaches and concepts in regard to the role of traditional justice mechanisms amidst this proliferation of local claims to vernacular and nati-
vist identity and entitlements. Within an endangered landscape of communal
and ethnic conflict over territory, access to land and resources, and struggles
over rights, traditional justice and customary law hold the potential to play
opposite roles, on the one hand, restoring order, but also, on the other
hand, of fuelling violent conflict. Ongoing collaboration among researchers
with in-depth local knowledge, local stakeholders, and national and inter-
national elites and donors is crucial in order for traditional justice to release
its potential in the continent.
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69 Ibid., para. 22.
72 Guidance Note of the Secretary-General: UN Approach to Justice for Children (2 September 2008).
75 A discussion of the programme is available at the UNDP Burundi website, http://www.bi.undp.org/fr/Parlement.htm.
78 Paris, At War’s End, pp. 44–6, elaborates on this point.
79 Ibid., pp. 179–211.
80 A brief examination of the mandate of the UN Peacebuilding Commission, discussed above, should suffice to illustrate this claim.

2 Traditional justice as rule of law in Africa


11 Ibid.

12 Ibid.


15 Mamdani, *Citizen and Subject*.


Sub-Saharan Africa, at the Centre for Contemporary Islam, University of Cape Town, 2002.
34 See Mamdani, Citizen and Subject.
3 The rule of law in liberal peacebuilding


2 See Oliver Richmond, *The Transformation of Peace* (Basingstoke: Palgrave Macmillan, 2005), among many others, for more on this evolution.


6 For a development of this line of thought, see François Debrix, *Re-Envisioning UN Peacekeeping* (Minnesota: University of Minnesota Press, 1999), p. 56.

7 *An Agenda for Peace*, UN Doc. A/47/277-S/24111, para. 55.


