

# Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities

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## **Abstract**

*Colonialism impacted the social, cultural, political and economic life of Africans in a very significant and radical manner. With it, a western legal tradition, premised upon an Anglo-American jurisprudential thought was imposed on Africans. African values, norms and beliefs, which provided the normative and undergirding framework for conflict resolution, were severely weakened, undermined and disregarded. Withal, the resilience of African justice systems across African States, illustrates that they still occupy a central place in the world of dispute resolution in Africa as exemplified by their recognition in laws and policies. The paper assesses the institution of elders in conflict resolution. Using examples across the African continent, the author examines some of the successes and challenges faced by elders, and opportunities offered by the institution in enhancing access to justice amongst African communities.*

## **1. Introduction**

Conflict is ubiquitous in all societies. It is a phenomenon that is inevitable in all human society due to differences in interests, goals, values and aims among people.<sup>1</sup> Most conflicts arise in the basic units of society such as within families, clans, villages, locations or other small units. Amongst most African communities, there are frameworks that are in place for the resolution of conflicts and for preventing their escalation into violence, thus threatening the social fabric.<sup>2</sup> Elders provide one of the most important conflict resolution institutions in African societies. Even in countries with no formal state recognition of the institution of elders, it has remained resilient and exists outside the spheres of state influence. In dispute resolution, the institution of elders can be organized in two main ways: the council of elders or a single elder. The council of elders usually consists of more than one elder and thus acts as a form of third party collegiate dispute resolution system.<sup>3</sup> The second form of organization is where a single elder presides over

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<sup>1</sup> Fayemi Ademola Kazeem, "Agba (Elder) as Arbitrator: A Yoruba Socio Political Model for Conflict resolution-A Review of Lawrence O. Bamikole" *Journal of Law and Conflict Resolution* Vol 1(3) pp 060-067, August 2009.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

the dispute resolution process. The most basic example of this organization is where a patriarch or the eldest individual in an extended family resolves the disputes relating to that family. In some communities, an elder has a position of authority such as chieftainship or kingship to resolve disputes among the members of the communities, clans, ethnic groups or tribes.<sup>4</sup> The paper aims to highlight the role of elders in resolving conflicts in Africa. The paper starts by laying out a conceptual framework for dispute resolution. It then, situates traditional justice systems within different epochs in the African legal history. Different case studies from Africa are discussed including dispute resolution in Kenya by elders.

## **2. Theoretical foundations for Conflict resolution by elders**

Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines. Being part of a community was important, if not downright necessary, due to the vicissitudes of life in primal or communal societies. Social ties, values, norms and beliefs and the threat of excommunication from society provided elders with legitimacy and sanctions to ensure their decisions were complied with. There are different social theories that explain why elders are able to resolve disputes in such contexts.

### **(a) The Social Capital Theory**

The social capital theory explains the formation of communal societies and the attendant social ties that bind them together. Putnam R.D., in theorizing social capital, posits that social networks, bonds, reciprocal duties and trust, bind people together and enable them to co-exist.<sup>5</sup> It is these social ties that guaranteed the existence and effective functioning of the society. Putnam outlines two types of social capital: *bonding social capital*, that fastens ties of individual members of a group, and *bridging social capital*, that allows interlinkage with other social groups.<sup>6</sup> The social capital theory can also explain the restorative nature of dispute resolution by elders in African Societies. In most of Africa, elders aim at restoring the social ties or social capital that had been broken by the wrongs done, committed or omitted.<sup>7</sup> Without strong social

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<sup>4</sup> *Ibid.*

<sup>5</sup> Robert D. Putnam, *Bowling Alone* (1<sup>st</sup> edition, Simon & Schuster, 2000), 19. See J. Kenyatta, *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

<sup>6</sup> *Ibid.*

<sup>7</sup> In an interview with the author, the Kipsigis Council of elders emphasised how it was difficult, for example, for a couple to undergo divorce in the community. They said that the elders had to give the couple time to ensure that they amend the situation and encouraged them not to divorce.

ties, communities could not exist and function effectively. Even in serious cases such as murder, the threat of excommunication from the society, and therefore exclusion from social ties, acted as a deterrent for wrongdoing.

### **(b) Social Solidarity Theory**

Emile Durkheim, in his book, *the Division of Labour*,<sup>8</sup> explains the society in terms of social order and social facts. According to Durkheim, individuals in a society are social actors who are restrained by social facts to stay in society. Social facts are functionalist in nature. They exist only if the society can derive utility or benefits from them. Extrapolating this theory to dispute resolution by elders, dispute resolution is viewed as a social fact from which society derives some benefit. Elders resolve disputes due to their long experience, wisdom and the respect they are accorded in society. The social solidarity theory, being a functionalist theory, explains the resilience of dispute resolution by elders even in modern societies that have embraced western legal systems. Where a community cannot access formal justice systems due to costs and other externalities, elders are there to resolve arising disputes. Therefore, the existence of elders in society is a social fact that provides a dispute resolution utility occasioned by the absence or low penetration of western legal systems.

### **(c) Optimal psychology theory**

Optimal psychology theory uses culture to explain how people view reality, live and resolve disputes.<sup>9</sup> It is argued that there is optimal psychology in dispute resolution, when people use their cultures to resolve disputes. Consequently, dispute resolution and other real life conditions are sub-optimal when done through a foreign culture. 'Received'<sup>10</sup> justice systems such as courts are thus sub-optimal in the African context due to varying cultural context. For instance, while African traditional societies were and to a large extent are grouped communally, western societies are individualistic. This results in a cultural-conflict if western ideals are applied in dispute resolution. Moreover, while dispute resolution in African societies aimed at repairing social ties and restoring harmony; 'received' justice systems are mainly retributive with

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<sup>8</sup> 1<sup>st</sup> translated into English in 1933 and published by Macmillan publishers.

<sup>9</sup> Myers L. J, *Understanding an Afrocentric world view: Introduction to an optimal psychology*, (Kendall/Hunt, 1992).

<sup>10</sup> By 'received' justice systems I mean the dispute resolution mechanisms that were introduced and imposed upon African societies with the dawn of colonialism.

a winner-loser ideology. This theory is important in understanding the resilience of traditional dispute resolution in modernized and westernized African societies.

### **3. A General Overview on Dispute Resolution by Elders across African Societies**

#### **(a) The *Gacaca* Courts in Rwanda**

In traditional Rwanda, the basic and most important unit of socialization was the extended family. Status within the society was divided along gender and age lines. The family unit was not only a social unit but also a security system since almost everyone was dependent on lineage for socialization.<sup>11</sup> The initial conflict and problem resolvers were the headmen of the lineages or the eldest male or patriarchs of families. They resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts.<sup>12</sup> However, the main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities. With the advent of colonialism, western ideals and notions of justice influenced or limited some aspects of the *Gacaca* process. Although colonialists introduced Western legal systems in Rwanda, the *Gacaca* process operated at the lower levels, especially in most customary conflicts.<sup>13</sup> Moreover, after the Rwanda Genocide, the Rwandan Government institutionalized *Gacaca* courts as a means to obtain justice and deal with a majority of the genocide cases that the formal Courts and International Criminal Tribunal for Rwanda (ICTR) could not handle.

Institutionalization of the *Gacaca* Courts aimed at establishing the truth about the Rwandan Genocide, expedite proceedings against suspects of genocide, remove impunity, reconcile Rwandans and use Rwandan Customs to resolve their disputes.<sup>14</sup> Differences between the old traditional *Gacaca* and the new institutionalized *Gacaca* process abounds. First, the old *Gacaca* process entailed people sitting together and resolving disputes while the institutionalized *Gacaca* process is mainly accusatory and adversarial especially in the collection of information. The old version of the *Gacaca* emphasized on bringing people together to talk about their

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<sup>11</sup> Bert Ingelaere, "The *Gacaca* Courts in Rwanda" *Traditional Justice and Conflict Resolution After Violent Conflict: Learning From African Experiences*, Luc Huyse and Mark Salter (Eds)( IDEA, Stockholm, 2008), 33.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid*, 34.

<sup>14</sup> *Ibid*, 38.

problems and to foster social harmony and restoration.<sup>15</sup> Second, while the old Gacaca aimed at restoring social harmony between families the institutionalized Gacaca seeks to provide retribution by punishing those held liable for crimes during the genocide period. Last, in the old Gacaca, the umpires who resolved disputes were predominantly male elders while young people and elders of both genders constitute the new Gacaca. The change in composition of arbiters in the Gacaca process is due to the involvement of a large portion of Rwandans in the genocide, and even the elders who used to arbitrate or mediate disputes were accused of certain crimes.<sup>16</sup>

### **(b) The Tswana of Botswana**

Among the Tswana, customary dispute resolution runs parallel to the formal justice system.<sup>17</sup> Traditional dispute resolution in the Tswana society is based on their norms and practices of the people. There are different actors depending on the social organization of the Tswana community. At the lower family levels are the *batsadi ba lolwapa* (family leaders), the *batshereganyi* (headmen of records), *dikgosana* (headmen), *moemela kgosi-kgolo* (the chief's representative) and finally the *kgosi-kgolo* (paramount chief). Dispute resolution consists of elders working at a collegiate level (for example the *dikgosana* and the *batshereganyi*) or a single elder resolving a dispute alone (for example the *batsadi ba lolwapa* and the *kgosi-kgolo*).

Dispute resolution starts at the household (*lolwapa*) level.<sup>18</sup> If a dispute cannot be resolved at the household level, it is taken to the *Kgotlana* (extended family level) where elders from the extended family sit and listen to the matter. The elders emphasize mediation of disputes. If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court like procedures. It consists of the chief at the village level and the paramount chief at the regional levels. The chiefs are public officials and handle both civil and criminal matters. However, the customary court does not deal with land disputes as its role is merely advisory. The decision of the paramount chief is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the high Court.<sup>19</sup>

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<sup>15</sup> *Ibid*, 44.

<sup>16</sup> Linda James Myer and David H Shihn, "Appreciating Traditional Forms of Healing Conflict and in Africa and the World," *Black Diaspora Review* 2(1) Fall, 2010, 6.

<sup>17</sup> Kwaku Osei-Hwedie and Morena J. Rankopo, *Indigenous Conflict Resolution in Africa: The case of Ghana and Botswana*, 42.

<sup>18</sup> *Ibid*, 43.

<sup>19</sup> *Ibid*.

At every level, a council of elders (*bo-ralekgotla*) exists to advise the decision maker. Further, village committees exist to support and compliment the dispute resolution process. The parties may call their relatives during the hearings and their relatives participate in the dispute resolution process. A spiritual dimension exists in dispute resolution mostly due to the centrality of the spiritual agency in all human spheres. Traditional healers, diviners, herbalists, spiritual seers and healers also play an important role in conflict resolution. Due to the respect, fear and reverence that these experts have in society, they play a crucial role in truth seeking. They also mediate between the living, ancestors and God. Conflicts arising from witchcraft are not resolved by the customary courts. They are regarded as private matters and hence privately resolved by traditional healers and affected parties. Consequently, the role of the spiritualists, especially in helping to identify suspected ritual murderers is prohibited by law.<sup>20</sup>

### **(c) Dispute Resolution by Elders in South Africa**

South Africa, like most African countries has a pluralistic legal system. The legal system has allowed customary law, based on customs and practices of the people, to be used in traditional courts.<sup>21</sup> Unlike formal courts, the arbiters or elders in traditional courts are not trained judges. Moreover, there is no legal representation or recording of proceedings, and the trial follows the customs and practices of a particular ethnic group.<sup>22</sup> The main aim of the traditional courts is dispute resolution in a manner that restores social equilibrium. The main actor in the traditional justice system is the traditional leader of the community, who is often an elder.<sup>23</sup>

Before colonialism, dispute resolution in South Africa was governed by customs and practices of the various tribal communities.<sup>24</sup> Customary dispute resolution was used to resolve all disputes and conflicts. After Colonization, the White rulers enacted the Black Administration Act of 1927. The Act has been repealed several times and although it does not create a traditional court, it allows both civil and criminal powers to be vested in traditional leaders who use customary law to resolve disputes. It allows chiefs and headmen to try civil matters. However,

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<sup>20</sup> *Ibid*, 45.

<sup>21</sup> Christina Rautenbach, "Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa" *SSRN*, 290.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*, 292.

<sup>24</sup> *Ibid*, 296.

the traditional leader must have the Minister's authorization to resolve civil disputes; the claim must be based on customary law; the race of the parties must be African; and the parties or the defendant must be residents within the traditional leader's area of jurisdiction. Examples of civil disputes heard by traditional leaders are return of dowry (*lobolo*) or damages for adultery. A traditional leader can, however not determine divorce, nullity or separation matters.<sup>25</sup>

Chiefs, headmen and other traditional leaders can deal with certain offences with the Minister's authorization. The crimes they can handle include common law, statutory and customary law.<sup>26</sup> The exceptions to these crimes for which the traditional leaders have no jurisdiction are listed in the Third Schedule to the Act. The traditional leaders only have jurisdiction if both the offender and the victim are African. Traditional leaders may impose any punishment under customary law except fines exceeding R100, death, imprisonment or corporal punishment.<sup>27</sup> The traditional leaders may report a defaulter to a magistrate within 48 hours and the magistrate will order the defaulter to comply.<sup>28</sup> A person aggrieved by the decision of the traditional leader may appeal to a magistrate under Section 20(8) of the Act.

After attainment of black rule in South Africa, a new Constitution was promulgated. Questions arose as to whether the Constitution recognized traditional courts as they were not expressly listed under Section 166 of the Constitution that lists the courts. The matter was laid to rest in the Constitutional court decision in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*,<sup>29</sup> where the court read the provision of section 166(e) and Section 16(1) of Schedule Six of the Constitution to find that section 16(1) included traditional courts.

In spite of the recognition of the judicial powers of traditional leaders by the law, there is unofficial dispute resolution. The first level of unofficial dispute resolution is usually the family council and if the dispute is not resolved, the matter is heard at the ward level by ward leaders and their advisers. The methods of dispute resolution at these levels are negotiation and mediation.<sup>30</sup> If the matter is not resolved at these levels, it proceeds for resolution by traditional

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<sup>25</sup> Section 12(1).

<sup>26</sup> Section 20.

<sup>27</sup> Section 20(2)

<sup>28</sup> Section 2(5) (a) and (b), Black Administration Act.

<sup>29</sup> 196(4) SA 744(CC).

<sup>30</sup> Rautenbach (note 21), 315.

leaders recognized by law. In all of these levels, the main actors are elders who try to resolve the disputes either officially or unofficially.

#### **(d) Karamajong and the Teso in Uganda**

Traditionally, disputes among the Karamojong and Teso communities in Uganda, are resolved by a council of elders. The council of elders among the Karamojong is called the *Akiriket* while among the Teso it is called *Arriget*.<sup>31</sup> Amongst the two communities, the council of elders play a crucial role in maintaining social order by preventing the violation of community rules. This is important because these communities are far removed from formal justice systems. Conflict resolution in the Karamoja region is through age sets: the eldest age set listens and resolves disputes and a high age set plays the role of bringing offenders from lower age set before the eldest age set for conflict resolution in a system known as *ameto*.<sup>32</sup> The challenge of this system is that it is only applicable at the village level.

In relation to crimes such as murder, the offender undergoes a cleansing ceremony before reintegration into the community. When the disputes are interethnic, the main methods used to resolve the conflicts by elders are negotiation and compensation.<sup>33</sup> The residents in the Karamoja and Teso areas prefer dispute resolution by elders because it is free and thus accessible to most people. Decisions by elders are easily complied with due to strong communal ties, and commitment to customary norms. Elders are also able to address all the causes of the commitment. With colonialism and modernity, younger educated people are becoming leaders affecting dispute resolution negatively. Under the age set system, elders were not supposed to report to younger people and this is threatening the role of elders in dispute resolution.<sup>34</sup> Nepotism and corruption among elders have reduced the legitimacy of the council of elders in the Karamoja and Teso regions. Moreover, poverty and accumulation of wealth by young people have reduced the influence and power of elders, reducing their sphere of influence.<sup>35</sup>

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<sup>31</sup> Chris Chapman and Alexander Kagaha, *Resolving Disputes using Traditional mechanisms in the Karamoja and Teso Regions of Uganda*, Minority Rights International 2009, 3.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 4.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*



### **(e) Dispute resolution by elders in Ethiopia: Some examples**

Dispute resolution by elders in Ethiopia presents a rare case from other African countries. Ethiopia, unlike most African countries, was not colonized. The expectation, therefore, is that dispute resolution by elders would be free from western influences. However, it is argued that dispute resolution by elders among the different tribes in Ethiopia was largely influenced by the Abrahamic religions of Christianity, Judaism and Islam.<sup>36</sup> These religions are monotheistic in nature and are against the reference to ancestral spirits in dispute resolution. Due to the influence of these religions, dispute resolution by elders in Ethiopia has adopted a religious dimension. Some elders in Ethiopia insist that they use spiritual mediums and spiritual connections to the ancestors in reconciliation. The use of religion or spiritualism caught up again with the introduction of the Abrahamic religions in Ethiopia with different religious elders performing their religious rituals in cases of serious crimes such as murder.

It is also reported that the Gumuz, the Oromo and the Amhara living in the Metekkel region of Western Ethiopia have adopted a mechanism of *Michu* or friendship to resolve land disputes due to many immigrants in the area.<sup>37</sup> The aim of traditional dispute resolution by elders in Western Ethiopia, a tribal milieu, is not to punish the wrongdoers but to restore social harmony seeing that different tribes live side by side. The types of conflicts in the area include land boundary disputes, disputes over grazing area and cultural disputes especially due to intermarriages.<sup>38</sup> The nature of these disputes is that they are not amenable to government intervention as most formal dispute resolution mechanisms pass judgment and mete out punishment without resolving the underlying causes of conflict. Resolution of disputes by elders thus provides an alternative dispute resolution that is wholesome and responsive to the living conditions of the disputants.

### **(f) Dispute Resolution by elders among the Agiriama of Kenya**

The Giriama had two main dispute resolution institutions: the council of elders and the oracles. Two sets of council of elders existed. The first set was the senior age set known as the

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<sup>36</sup> Gebreyesus Tekla Bahtu, *Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects*, p.109.

<sup>37</sup> Linda James Myers & David H Shinn, "Appreciating Traditional Forms of Healing Conflict and in Africa and the World," *Black Diaspora Review* 2(1) Fall 2010, p.7.

<sup>38</sup> *Ibid.*

*kambi* that listened to normal and day-to-day complaints and resolved them.<sup>39</sup> The most revered set of council of elders was known as the *vaya*, which consisted of a few select elders who operated as a secret society. The *vaya* governed the whole of the Giriama community by determining planting and harvesting seasons, praying for rain, initiating of youth into age-sets.<sup>40</sup> The *vaya* also presided over trial by ordeals as oracles. Supernatural and superstitions played a great role in dispute resolution, especially in seeking and finding the truth. The Giriama used ordeals to determine the guilt or innocence of parties to a dispute through their reaction to the ordeals.<sup>41</sup> Two ordeals were common among the Giriama: ordeal by fire and ordeal by poison. The ordeal by poison made the guilty person sick while the ordeal by fire caused the guilty person to blister. The accused and the accuser often went to the ordeal together but sometimes the accused went alone to prove his innocence. The jurisdiction of elders among the Giriama was not physical but psychological.<sup>42</sup> Elders did not force anyone to appear before them, but such non-attendance was viewed as an admission of guilt. Parties were only subjected to trial by ordeal by their consent. The council of elders and trial by ordeals often operated as one process where ordeals and oracles determined who to blame and then the council of elders imposed duties and enforced rights.<sup>43</sup> After colonization and independence, the government eliminated the powerful *vaya* but retained the less powerful *kambi* to aid local administration. The *kambi* were exclusively composed of elders in pre-colonial days. However, the *kambi* is now increasingly being accused of corruption by disputants.<sup>44</sup>

#### **(g) Pokot, Turkana, Marakwet and the Samburu of Kenya**

These communities have similar lifestyle and way of life.<sup>45</sup> They live in areas with inter and intra-ethnic conflict arising from cattle theft, cattle rustling, grazing areas and watering areas. Being pastoralist communities they live in arid and semi-arid areas with little access to courts, or even modern facilities and amenities. Traditional justice systems play a great role in

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<sup>39</sup> Marguerite Johnson, "Giriama Reconciliation," *Afr.L.Std.*, 16:1978, 95. Retrieved from <http://heinOnline.org> on 16.03.2015

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, 96.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Ruto Pkalya, Mohamud Adan & Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet* (ed. Betty Rabar & Martin Kirimi, Intermediate Technology Development Group-Eastern Africa, 2004), 89-95.

managing conflicts and maintaining social order among the communities. Elders play a great role in preventing and resolving disputes among these societies. Elders determined the use of water and grazing areas as well as migration patterns.<sup>46</sup> Elders also took part in arbitration, mediation, dialogue, negotiation and other dispute resolution process both within and with other ethnic groups. Elders can enter into peace pacts with other communities. Among the Samburu and the Pokot, the peace pact is known as the *Imumai* for peace and military alliance.<sup>47</sup> The Marakwet and the Pokot have peace pacts known as the *miss* among the Marakwet.<sup>48</sup>

Belief in superstitions, charms, sorcery and witchcraft formed a great part of dispute resolution and prevention mechanisms in these societies. For instance, among the Samburu witchcraft could be used to blind or disable enemies. Belief in these superstitions served to reduce conflicts. Among the Samburu, Turkana and Pokot communities there are indigenous warning systems about conflicts by looking at goat intestines and studying stars in the sky.<sup>49</sup> Among the Pokot, there is trial by ordeal in cases of murder where the suspects are made to drink water after washing their clothes. Other witchcraft practices in resolving disputes among the Pokot are the *Muma* and *Mummat*.

#### **(h) Kamasian Council of Elders in Kenya**

The Kamasian is a council of elders among the Kipsigis community. It deals with disputes ranging from land, matrimonial disputes to murder disputes. In this part the author highlights some of the rules and procedures that the elders apply in resolving disputes. Regarding family disputes, the elders say that such disputes are resolved depending on whether it is a monogamous or polygamous family. Disputes arising from a polygamous family are resolved by elders who are in a polygamous union. A monogamous man or woman cannot preside over such a dispute. For example, if a man in a polygamous union has a dispute with one of his subsequent wives, the parents of that particular wife would be asked by the elders to correct their child. The rationale being that it is the subsequent wife who is troublesome and not the man, as the man has lived peacefully with all the other wives.<sup>50</sup>

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<sup>46</sup> *Ibid*, 94.

<sup>47</sup> *Ibid*, 85.

<sup>48</sup> *Ibid*, 72.

<sup>49</sup> *Ibid*, 84.

<sup>50</sup> Based on an interview the author had with the Kipsigis Kamasian Council of Elders on 4<sup>th</sup> July 2015 in Kericho town.

Where a man has committed adultery with another man's wife, it is the latter's parents who would be asked to pay a penalty of a heifer to the husband's family. The rationale being that the wife had caused shame to her husband by sleeping with another man. The man, who committed adultery with another's wife, could only be beaten up or if he was a respected man his status lowered. However, if a man had slept with an unmarried woman there was no dispute as married men were allowed to sire out of marriage. Traditionally, this was regarded as a blessing to the community.

In relation to family land, disputes are minimal because an old man normally makes a customary oral will before he dies. The old man normally calls all his children and states how he wishes the property to devolve. Each child's share depends on respect towards his parents and whether or not he took good care of his father. Once the property is shared, and if it is land a boundary has been set, the old man would ask the children if there is any objection. If there is no objection at that time, then customarily none of the children could raise an issue regarding the distribution of the property when the old man dies as it is said that he is still watching over the living. Consequences for violating a customary will range from curses or even being struck by lightning. If there is any property, in the form of dowry that is paid to a polygamous family, such would only go to the girl's mother and co-wives cannot have claims to it. Such rules, according to the elders, ensured that there were very few or no disputes at all over family property.

Divorce cases, can be lodged by either the wife or husband. The wife can file for divorce for beatings, if the husband is not caring for the family or does something that can haunt the family in future, for example if he is a thief. The divorce procedure is that the matter is handled by elders. Each party presents its case. After hearing each side, the elders do not make any determination at all but allow room for reconciliation. If the elders realize that reconciliation is not possible, the divorce procedure is initiated.<sup>51</sup> Divorce involves both parties standing outside the house of the man's parents and near a shrine. Each party applies fat derived from cow's milk on the hands. The man is then asked to apply the fat on the woman's face while reciting the surnames of the girl (that are demeaning to her) 3 times and while declaring divorce. The woman does the same thing and recites the man's surnames 4 times.<sup>52</sup>

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<sup>51</sup> It was reported that divorce is a rare occurrence and is viewed as a curse because of the vows people take at marriage.

<sup>52</sup> It is said that the surnames recited that mostly childhood names that were used to refer to boys and girls and that were demeaning to a man or woman.

If one killed another, such disputes were resolved by elders. However, for elders to hear such disputes it depended on whether the killing was intentional or not. For unintended killing, the elders would seat with the offender and both families and forgiveness would be sought. This would relieve and minimize bitterness on the part of the deceased family. If there was no bitterness, parties would talk and forgiveness sought. It was also reported that the elders can also write to the prosecutor or court (if a matter is already before a court of law) to have the matter withdrawn and resolved by the elders,<sup>53</sup> or to refer a matter to court if they find it is beyond their capacity. If one admits that he killed unintentionally a cleansing ritual is usually conducted by elders to deter recurrence.<sup>54</sup> The ritual involves the slaughtering of a spotless ram in a nearby river. Reconciliation is then done with the deceased family and compensation agreed upon. If it is a man who has been killed, 9 cows are paid to the bereaved family and 11 cows if the slain person was a woman. Elders indicated that they currently do not deal with intentional killing or murder and such is handled by formal courts. However, it was reported that traditionally and in the early years, murderers would face mob justice or banishment from community.

The Kamasian elders pointed out that they were not paid anything at all for the work they did. It was upon the disputants to determine whether to pay anything. To be the chairman of the council of elders no election is done. One is chosen based on his outstanding ability, respect or calling hence duties not worth of money. However, the council of elders comprises of both the elderly and educated people. Young men are members of the council so that they can be trained to take up roles in future. Women are also involved in dispute resolution and mostly act as a go-between conflicting parties.

#### **4. Analysis and Findings**

##### **(a) Principles undergirding Dispute Resolution by Elders**

Conflict resolution by elders is based on social or cultural values, norms, beliefs and processes that are understood and accepted by the community. For that reason, people are able to abide and comply by their decisions. It is said that as a man grows old, his prestige increases

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<sup>53</sup> This has happened in Kenya in the past in a number of cases to wit: *R v. Mohammed Abdow Mohammed* [2013] eKLR.

<sup>54</sup> Those who participate in the cleansing ceremony must be men of good social standing. Moreover, not everyone is allowed to attend the ceremony. It was also reported that those involved in traffic offences such as killing by reckless driving, must also undergo the cleansing ritual as outlined above. Similarly, warriors involved in cattle raiding must be cleansed after raids.

according to the number of age-grades he has passed. An elder's seniority makes him almost indispensable in the general life of the people. As such, the presence or advice of elders is sought in all functions<sup>55</sup> including in dispute resolution. Elders hold supreme authority and customs demand that they be given due respect and honours, not only when they are present, but even when absent.<sup>56</sup>

Respect for elders, ancestors, parents, fellow people and the environment is cherished and firmly embedded in the mores, customs, taboos and traditions amongst Africans. According to Bujo the admonitions, commandments and prohibitions of ancestors and community elders are highly esteemed, they reflect experiences which have made communal life possible up to the present.<sup>57</sup> Due to the respect accorded to elders, people avoid being in conflicting situations. For example, Kenyatta documents how a man could not dare interfere with a boundary mark amongst the Gikuyu people, for fear of his neighbour's curses and out of respect. Boundary trees, lilies and demarcation marks were ceremoniously planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it. But if they could not agree as to the actual place where the mark was, they could call one or two elders who after conducting a ceremony would replant the tree or lily.<sup>58</sup>

The spiritual agency imbues all spheres of traditional African communities. Even in dispute resolution, spirituality occupies a central place in resolving disputes and in the search for truth. Traditional healers, diviners, herbalists, spiritual seers and healers also play an important role in conflict resolution. Commenting on the mediating role of elders, Kenyatta notes that:

*“The function of an elder, both in his own family group and in the community, is one of harmonising the activities of various groups, living and departed. In his capacity of mediator his family group and community in general respect him for his seniority and wisdom, and he, in turn, respects the seniority of the ancestral spirits.”*<sup>59</sup>

As the literature review reveals, spiritual experts like seers, diviners and mediums complimented the role of elders in dispute resolution. They were helpful in the search for truth and some of

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<sup>55</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 253-258.

<sup>56</sup> *Ibid.*

<sup>57</sup> B. Bujo, *The Ethical Dimension of Community-The African Model and the Dialogue between North and South*, (Paulines Publications Africa, 1998), 198-202.

<sup>58</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

<sup>59</sup> *Ibid*, 255.

them were involved in cleansing rituals and slaughtering ceremonies, underscoring their usefulness in dispute resolution.

Reciprocity, in the sense that there is a mutual exchange of privileges, goods, favours, obligations, amongst most African communities also fosters peaceful coexistence.<sup>60</sup> This eliminates the likelihood of disputes and conflicts. Again, because of reciprocity conflict resolution mechanisms must foster relationships and the sense of togetherness. Reciprocity fosters a sense of communal living.

Communal setups provide necessary impetus for conflict resolution and peaceful co-existence. Conflicts and disputes have the potential to disrupt the social fabric holding society together. In essence, disputes and conflicts are a threat to the existence of society and are thus avoided. Social values, norms and beliefs in place aim at avoiding conflicts, and ensuring that if they arise they are resolved amicably.

In line with the writer's interview with the Kamasian elders who said that they are not paid for their work, Kenyatta also documents that among the Gikuyu people 'an elder in a community renders his services freely.' In this regard he observes as follows:

*"He receives no remuneration in the way of a salary, but helps the community with his advice and experience in the same way as he directs the management of his own homestead and family group. In recognition of these services he receives public tributes ceremonially, and is regarded specifically as the father and officiating priest of the community."*<sup>61</sup>

Other principles that aid elders in conflict resolution are social cohesion, harmony, openness/transparency, participation, peaceful co-existence, respect, tolerance and humility. Virtually all African communities depict adherence to these values explaining why the African model of dispute resolution using elders fostered reconciliation and social justice. This sharply differs with the western models of dispute resolution such as litigation and arbitration, which are individualistic and adversarial in nature.

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<sup>60</sup> J. Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), 38-41.

<sup>61</sup> *Ibid*, 254-255.

### **(b) Methods of Traditional Dispute Resolution by Elders**

Conflict resolution amongst African communities has since time immemorial taken the form of negotiation, mediation, reconciliation or ‘arbitration’<sup>62</sup> by elders. Communally, disputing parties would sit together informally and resolve disputes and conflicts to maintain social harmony and restore social bonds. Thus, all the methods of dispute resolution had the aim of restoring social order. Conflict resolution was wholesome and tried to resolve all the underlying causes of conflict by ensuring that the parties to the conflict participated and reached a settlement. In some cases, fines and compensation were used but only as means to acknowledge the wrongs done and restore the parties. The fines and the compensation were not retributive in nature but compensatory. The social bonds and social ties referred to as social capital, enabled elders to resolve disputes since the threat of exclusion from the community made parties willing to settle.

Additionally, the concept of social harmony and peace applied not only among the living but also between the living and the dead. For some wrongs such as murder, rituals and cleansing had to be carried out to allow the spirit of the dead to rest in peace and not disturb the living. Some dispute resolution mechanisms involved reference to ancestors and spirits due to the importance of lineage and ancestry among Africans. Reference to spirits, trials by ordeal, rituals and cleansing in dispute resolution were the preserve of traditional healers, diviners and seers, who complimented elders in the dispute resolution process.

### **(c) Pre-Colonial and Post-Colonial Influences on Dispute Resolution by Elders**

Cultural worldview has a great impact on how people live their lives and resolve disputes. In pre-colonial Africa, the dominant cultural worldview was the traditions, customs and practices of specific ethnicities. Most African societies were communal, depending greatly on social capital to maintain social order and harmony. Dispute resolution was the preserve of elders, diviners, healers and other respected members of the society. Conflict resolution aimed at restoring social harmony, mending breached social ties, performance of rituals and offering apologies or compensation to ensure that the status quo before the dispute is restored. The process involved getting the parties and their families together, and getting to the root of the dispute to ensure underlying causes of conflict were resolved and the parties reconciled.

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<sup>62</sup> The writer uses the terms negotiation, mediation and arbitration not in the western usage where the same have been formalized and are now legal processes but in their informal sense.



Colonization brought a cultural conflict between the African and western cultures. The western culture was viewed as superior and dominant, thus subjugating African cultures. Cultural imperialism was extended to the world of dispute resolution.<sup>63</sup> African cultures were allowed to guide courts so long as they were not repugnant to justice and morality, yet repugnancy was measured by western senses of justice and morality and not African. Even in Ethiopia, which was not colonized, traditional dispute resolution has been influenced by the Abrahamic religions.

Myers optimal psychology theory views westernized justice system as sub-optimal in the African context. The westernized justice system is retributive in nature as it emphasizes a winner-loser paradigm in dispute resolution that does not resolve the underlying causes of the conflict. The adoption of the Westernized justice system in African societies has made many traditional societies to revert to their own traditional dispute resolution by elders.<sup>64</sup> Moreover, modernization and westernization have impersonalized conflict making it difficult for elders to resolve disputes through traditional means. In Africa, dispute resolution by elders brings parties together to resolve their disputes. Formal justice systems are adversarial and dispute resolution is a form of destructive warfare between conflicting parties.

Interestingly, it is not only the western justice system that is sub-optimal in the African context but also the worldview of most Africans. At independence, most African countries adopted the justice system left by colonialists and continued the work of subjugating their own cultures and traditional justice systems. Therefore, the process of colonization did not only bring about the alienation of land and natural resources; it left an indelible cultural inferiority among Africans that few if any society has been able to escape.<sup>65</sup>

#### **(d) Interface between conflict Resolution by Elders and Formal Justice Systems**

There is a marked resiliency of African justice systems in spite of the onslaught and subjugation by formal justice systems. Many reasons abound for this resilience. First, the Western Justice System is in principle very different from the African justice System. The Western system is individualistic, retributive and emphasizes a winner-loser paradigm.<sup>66</sup> Moreover, the African justice systems focus on the restoration of social harmony and social

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<sup>63</sup> Section 3(2) of the Judicature Act, Cap. 8, Laws of Kenya.

<sup>64</sup> Myers and Shinn (note 37), 4.

<sup>65</sup> *Ibid.*

<sup>66</sup> Myers and Shinn (note 37), 3-5.

bonds between disputants, while the formal mechanisms are destructive and leave wounds unhealed while causing new ones.

Second, and more often than not, African justice systems have a spiritual component. Traditional healers, diviners and seers take part in the process to seek the truth at the core of the dispute. The spiritual nature of dispute resolution is because Africans are still beholden to their ancestors and the dead; and they seek to make peace with them. In contrast, the Western-style justice systems are secular and do not countenance rituals. In fact, the Western justice system criminalizes certain acts such as witchcraft and sorcery.

Third, traditional justice systems are informal, cost-effective and expeditious. The parties often sit together and resolve their dispute within a sitting or two. Formal justice processes involve complex and technical procedures that consume a lot of time and resources. As such, the poor and indigent clients are locked out of the formal justice systems as they cannot afford. Thus, in poor rural areas and informal settlements in urban areas, informal, non-state justice systems fill up the void. An interesting example is seen in South Africa where traditional leaders have been given authority to try both civil and criminal matters, yet most disputes are resolved unofficially.<sup>67</sup>

#### **(e) Challenges of Dispute Resolution by Elders in Modern Societies**

The first key challenge of dispute resolution by elders or any form of traditional justice system is the negative attitude they receive from ‘modernized’ Africans. In Ethiopia, Christians and Muslims alike have criticized the Borana-Oromo-Gadda ritual system as paganism.<sup>68</sup> Traditional practices such as rituals, cleansing, and trial by ordeals which are central in resolving disputes have been declared illegal under most legal systems. Similarly, in most countries in Africa including Kenya, South Africa and Ethiopia, there are laws proscribing witchcraft and traditional African practices despite their complementary role in dispute resolution.

Secondly, African justice systems are regarded as inferior in comparison to formal justice systems. The inferiority is as a result of the subjugation of African customary law, which is the undergirding normative framework providing the norms, values, and beliefs that underlie traditional dispute resolution. The repugnancy clauses which aimed at limiting the application of African customary law remain in the statute books of most African countries even in the post-

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<sup>67</sup> Rautenbach(note 21), 314-315.

<sup>68</sup> Bahtu(Note 36), 109.

independence era. In Kenya, for instance, Article 159(3) of the Constitution limits the use of traditional dispute resolution mechanisms using a repugnancy clause. The Article prohibits the use of traditional justice systems in a manner that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any other written law. In South Africa, Sections 12 and 20 of the Black Administration Act, limits the use of traditional dispute resolution in civil and criminal cases respectively. This subjugation is a feature that is invariably common to virtually all African countries;<sup>69</sup> and acts as a fetter to their effective utilization in enhancing justice among Africans.

Thirdly, modernity has had its fair share of negative impacts on African justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and in most cases, older people rely on the younger people. This has enabled dispute resolution by elders to be affected by bribery, corruption and favoritism. For instance, there are reports that the *Abba Gada* elders of the Borana-Oromo and the *Sefer* chiefs of the Nuer community have been corrupted by bribes therefore limiting people's faith in them.<sup>70</sup>

Apart from corruption and bribery, modernity and westernization have broken down the close social ties and social capital between families and kinsmen. In contrast to pre-colonial days when the most important family system was the extended family, in modern times the main family system, especially in urban areas, is the nuclear family. Migration to urban areas and an increasingly individualistic society have broken down the communal or extended family system and thereby reducing the influence of elders. In addition, the superiority of the Westernized judicial and legal system has further reduced the influence elders have in resolution of disputes. Furthermore, inadequate or unclear legal and policy framework on traditional dispute resolution mechanisms poses a major challenge to their application in contemporary African societies. Most African countries lack clear policies and laws on traditional dispute resolution mainly due to plurality of their legal systems. Even in countries such as South Africa where there is a legal

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<sup>69</sup> HWO Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, (Programme for Land and Agrarian Studies, School of Government, University of the Western Cape, Cape Town, SA:2002), 7-8.

<sup>70</sup> Bahtu (Note 36), 115-116.

framework for the application of traditional dispute resolution, there are still challenges and limitations in their usage.<sup>71</sup>

The unclear legal and policy framework extends to matters of appeal of decision of elders and enforcement of these decisions. Among the Samburu, Pokot, Turkana and Marakwet for example, it is difficult to enforce the decision of elders unless all the parties agree with the decision.<sup>72</sup> Formal justice systems are backed by government sanction and disputants easily comply with their decisions easily.

## **5. Recommendations**

- (a) There is need to develop a clear legal and policy framework for the application of traditional dispute resolution by elders. In this regard, we can learn from the challenges and successes of the Black Administration Act in South Africa.
- (b) Emphasis should be placed on traditional dispute resolution, as the first port of call where applicable and relevant, in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt to traditional dispute resolution before approaching the formal legal system. This has been well used in Botswana and South Africa though with a lot of limitation on areas of application.
- (c) There is need to give elders engaged in the process adequate remuneration to prevent chances and opportunity for corruption.<sup>73</sup> This would prevent corruption as has been observed that corruption of elders among the Karamoja, Teso, Oromo, Borana and Nuer communities have influenced the dispute resolution process.
- (d) There is need for a framework for appealing the decision of elders in the traditional dispute resolution mechanisms. For instance, among the Tswana, the hierarchy of traditional dispute resolution mechanism begins at the household level, then goes to the extended family level, the a formal customary court, and lastly to the customary court of appeal, with the status of the High court.
- (e) There is need to develop an enforcement mechanism for traditional dispute resolution mechanisms by elders. For instance, in South Africa, if a person fails to obey the decision

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<sup>71</sup> Rautenbach (note 21), 312-315.

<sup>72</sup> Pkalya, Adan & Masinde (note 45).

<sup>73</sup> This has to be done cautiously since it is clear that traditionally elders were not paid at all for their work.

of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished.

- (f) African traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.
- (g) Need for codification of key concepts, practices and norms of traditional dispute resolution to protect them. Further, such codification increases uniformity and consistency of application of traditional dispute resolution mechanisms by elders.