

**Respect of the right to a fair trial in indigenous African Criminal
Justice Systems: The case of Rwanda and South Africa**

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Declaration

I, **KAYITARE Frank**, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information used has been duly acknowledged.

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Dedication

To my parents for always being my best teachers. To my brothers and especially, to my little sister Vivian for their love and comfort. To my late Uncle, Emmanuel and all comrades and friends who lost or risked their lives in the struggle to establish human dignity in Rwanda in 1994;

I dedicate this Work.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
Art.	Article
CC	Constitutional Court
ECHR	European Court on Human Rights
HRC	Human Rights Committee
IACHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NGOs	Non-Governmental Organisations
N°	Number
Para.	Paragraph
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
U.N.Doc	United Nations Documents

CHAPTER 1

GENERAL INTRODUCTION

1.1 Background of the study

In some African states today, plural justice systems exist.¹ These systems are based on the Western and the indigenous African paradigms of justice. The Western paradigm is retributive, hierarchical, adversarial, punitive, and is guided by codified laws, written procedures and guidelines.² The criminal proceedings involve in most cases, four distinct phases: Identification of parties to a dispute; the discovery of the relevant facts; the finding of applicable rules and the application of the rules to the facts.

On the other hand, the unwritten laws, traditions and practices like inclusiveness, consultation and consensus guide indigenous African justice systems. These are learned primarily by example and through the oral teachings of elders. In any legal matter, every adult member of the community gets actively involved into solving a conflict and they all focus on the need to resolve issues so as to attain peace and social harmony. The community is involved in the entire process; from disclosure of problems, to discussion and resolution, to making amends and restoring relationships.³ Indigenous African courts have recently been recognised by the African Commission on Human and People's Rights (ACHPR) which, in its Declaration on Principles and Guidelines on the right to a fair trial and legal assistance in Africa, gave them particular attention. They are defined as "a body, which, in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition".⁴

The following examination of what constitutes the right to a fair trial and the subsequent statement of the problem this research intends to address give more insights into why this topic is worth exploring.

¹ Lawyers for Human Rights 'A basic guide to legal standards and practice' <<http://www.lhr.org>> (accessed on August 20, 2004).

² Falk 'International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order' (1959) 295.

³ Yazzie, R 'Decision Making in Tribal Courts' (1989) 31 *Arizona Law Review* 225.

⁴ Article S (I) of the ACHPR Declaration on the Principles and Guidelines on the right to fair trial and legal assistance in Africa (2003).

1.2 The right to a fair trial

Justice is based on respect for the rights of every individual and as such, every government has the duty to bring to justice those responsible for violation of others' rights. The suspected wrongdoer on trial is subjected to state power in the process of establishing their guilt or innocence. Therefore, a criminal trial tests the State's commitment to respecting human rights. Trials aim at rendering justice, but when people are subjected to unfair trials, justice cannot be served. For instance when suspects ill-treated by law enforcement officials, innocent individuals are convicted, or when trials are manifestly unfair or are perceived to be unfair, the justice system loses credibility. This makes the right to a fair trial a basic human right. The applicability of the right to a fair trial on a criminal charge does not start when charges are actually presented to court, but from the first contact between the suspect and State authorities that are involved in investigations. As such, the right to a fair trial must be observed through every phase of the criminal justice process.

Elements of the right to a fair trial embodied in article 14 of International Covenant on Civil and Political Rights (ICCPR) can therefore be grouped into pre-trial rights, rights during trial, and post-trial rights. Pre-trial rights include: The right to liberty and security of person and freedom from arbitrary arrest and detention (ICCPR, art. 9(1); the right to know the reasons for arrest; the right to legal counsel; the right to a prompt appearance before a judge and to be tried within reasonable time and the right to humane treatment during pre-trial detention. Rights during trial include: The right to a fair and public hearing by a competent, independent and an impartial tribunal established by law (ICCPR, art. 14 (1)); the right to be presumed innocent until proven guilty; the right to legal counsel; the right to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them and the prohibition on self-incrimination.

Post-trial rights include: The right to appeal to a higher authority⁵ and the right to compensation in case prior convictions are subsequently reversed on facts which show that there has been a miscarriage of justice or in case of pardon (ICCPR, art. 14(6)). It is on the basis of these standards that governments' treatment of people accused of crimes is made.⁶ Also, regional human rights instruments such as the African Charter (art. 7), the American Convention on Human Rights (art. 8) and the European Convention on Human Rights (art. 6) do guarantee

⁵ See article 14 (5) of the ICCPR.

⁶ Amnesty International report 'Fair trials' (2002)

<<http://www.amnesty.org/ajlib/intcam/fairtrial.indexftm/htm.intr>> (accessed on August 29, 2004).

this right. The rights to legal representation; to be heard by a competent, independent and impartial tribunal and to the equality of arms during trial are said to constitute the core of the right to a fair trial.⁷

1.3 Statement of the research problem

As already mentioned, guaranteeing the right to a fair trial aims at protecting individuals from unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. The fundamental importance of the right to a fair trial is illustrated not only by international instruments and the extensive body of interpretation it has generated, but most recently, by a proposal to include it in the non-derogable rights stipulated in article 4(2) of the ICCPR.⁸ Standards for a fair trial may stem from binding obligations that are included in human rights treaties to which a State in examination is a party, but they may also be found in documents and practices which, though not binding, can be taken to express the direction in which the law is evolving.⁹

One of the problems is that law and human rights have been viewed largely as Western concepts, and are therefore defined and valued by Western criteria.¹⁰ This leads to a number of difficulties. First, there are many non-Western societies in which law and human rights thus defined, is impractical and mechanisms of protecting human rights in non-Western justice systems are not recognised as comparable counterparts to those in Western societies.¹¹ Secondly, African states have failed to abide by their international fair trial obligations because, probably, these standards are impractical given the realities like poverty, illiteracy and strong cultural beliefs that characterise most African communities. As a result, the law applied by the Western style courts is felt to be so out of touch with the needs of most African communities and coercion to resort to them amounts to denial of justice.¹² This explains why communities

⁷ Andrew LE SUEUR 'Principles of Public Law' (1999) 271.

⁸ Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: "The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening," Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24 (June 3, 1994) 59-62.

⁹ Lawyers for Human Rights (n 1 above).

¹⁰ Laura NADER 'Law in Culture and Society' (1969) 12.

¹¹ See some of the aspects of the right to fair trial in the next paragraphs. If one goes by word and not their spirit, there is a likelihood of making a wrong conclusion that they are absent in indigenous African criminal procedures.

¹² Peter STEIN 'Legal Institutions 'The development of dispute settlement' (1984) 16.

especially in the rural Africa resort to indigenous African justice systems irrespective of state recognition or otherwise.¹³

Upon realization that the Western style of justice did not respond to the prevailing post-genocide situation for example, the government of Rwanda re-established traditional courts to help deal with the crime of genocide and foster reconciliation. A *Gacaca* court is constituted of a panel of lay judges who coordinate a process in which genocide survivors and suspected perpetrators and the latter between themselves confront each other. They, and the community, participate by telling the truth of what happened; who did what during the genocide and then the judges, based on the evidence given to them, decide on the case. These judges are elected by their respective communities for their integrity, not their learning.¹⁴

However, human rights organisations argue that *Gacaca* proceedings violate the accused person's fair trial rights. They question among other things capacity of lay judges who make decisions in these courts, to conduct a fair trial. They also contend that *Gacaca* does not guarantee the right to be presumed innocent because it requires confessions and that defendants are denied legal representation.¹⁵

In South Africa, traditional courts (known as chiefs' courts) exist. They have played a crucial role in the dispensing justice in the indigenous communities and are prototypes of the kind of dispute-resolution mechanisms desirable in a modern society.¹⁶ They apply 'people's law'¹⁷ which developed as a result of lack of legitimacy of the Western system of justice among the indigenous South Africans. However, critics see them as conservative and unable to render justice in the modern social, economic and political climate in South Africa today.¹⁸ As a result, Western style court proceedings that are conducted in foreign languages to indigenous communities and thus have to rely on inaccurate and unreliable interpreters in addition to costs

¹³ Nabudere D.W 'Towards the study of post traditional systems of justice in the Great Lakes Region of Africa' (2002) 8 *East African journal of peace and Human Rights* 25.

¹⁴ Organic Law N°. 40/2000 of 26/01/2001 creating *Gacaca* jurisdictions, Organisation of prosecutions of crimes constituting genocide and crimes against humanity committed in Rwanda between October 1, 1990 and December 31, 1994 as amended by Law N° 16/2004 of June 16, 2004.

¹⁵ Rwanda: *Gacaca* tribunals must conform to international fair trial standards; Amnesty International Press release, AI INDEX: AFR 47/005/2002 (December 17, 2002).

¹⁶ JC Bekker 'Administration of justice by traditional leaders in post-Apartheid South Africa'.

¹⁷ Yazeed Kamaldien 'Righting the wrongs and restoring the balance in families and communities' (2001) <<http://www.cyc-net.org/today2001/today010202.html>> (accessed on August 10 2004).

¹⁸ Yazzie, R (n 3 above) 235.

for legal counsels and subjection to very technical and formal procedures are the only alternative in criminal matters.¹⁹

Briefly, the major problem is to ascertain whether indigenous African criminal justice systems do, or otherwise conform to fair trial standards. If they do not, according to who are they not fair? In other words, is there a universal measure of fairness or appreciation depends on people's environment and their socio-economic backgrounds, in which case, the beneficiaries of indigenous African criminal justice systems should be the ones to appreciate its fairness?

1.4 Objectives of the study

This study focuses at evaluating indigenous African criminal justice systems in as far as the respect of the right of the accused to a fair trial is concerned. The basis for evaluation is their features and attributes and the evaluation takes into account the philosophy upon which these systems are based. This research also intends to find out whether there must be a uniform measurement for the respect of the right to a fair trial irrespective of substantive differences inherent in Western and indigenous African justice systems.

1.5 Hypotheses

Our first hypothesis is that the right to fair trial is actually inherent in African indigenous criminal justice systems considering the way adjudication procedures were arranged. Secondly, Western styles of justice do not respond to the day to day experiences of many African communities and coercing these communities to resort to Western style courts amounts to denial of justice. Thirdly, depending on different perceptions of fairness, indigenous African criminal justice systems may be respecting fair trial standards though using a different approach from the Western systems. For example, the nature of the indigenous African criminal proceedings may justify the absence of some of the elements of the right to a fair trial as some scholars have argued.²⁰

¹⁹ BEKKER, JC 'Introduction to legal pluralism in South Africa customary law' (2002) 11.

²⁰ Michelo Hansungule 'Justice Brewed in African Pot' (2004) 5.

1.6 Literature review

Most scholars and commentators have either emphasized on the negativity of indigenous African justice systems or have focused on issues other their compliance with the right to a fair trial.

JC BEKKER, JMT LABUSCHAGNE and LP VORSTER²¹ in their work entitled 'Introduction to legal pluralism in South Africa', have done a very good analysis of how among other things, indigenous South Africans resisted the Western-imposed law and system of justice leading to introduction of 'people's law'. They do not however, address the issue of fair trial in the indigenous South African criminal justice systems. NJJ Olivier²² and Falk²³ discuss the Family Law as well as the law of delict and in particular issues of proof and dispute settlement. They do not question their conformity to fair trial standards.

D.W ARNOTT²⁴ in his article entitled 'Councils and courts among the TIV-traditional concepts and alien institutions in non-Moslem tribe of northern Nigeria', emphasises on the distrust by Africans in general and the *Munshi* (TIV) tribe in particular of a one-judge system introduced by the colonialists. This author does not, however, give account of how these communities conduct trials. D.W Nabudere²⁵ in an article entitled 'Towards the study of post traditional systems of justice in the Great Lakes Region of Africa', describes indigenous systems in almost all African Great Lakes Region countries. The emphasis is however on their advantages. The issue of fair trial standards is not addressed. Yazzie²⁶ wrote about the tribal justice systems but specifically discussed their modes of operation without linking them to fair trial standards. Alyward Shorter addresses the issue of the conception of African traditional justice systems. He does not show human rights implications.

The contribution of this research is that it discusses the indigenous African criminal justice systems with a particular emphasis on their compliance or otherwise with the international fair trial standards. On the contrary, this paper shows how the indigenous African courts are

²¹ BEKKER, JC (n19 above) 4.

²² Olivier, NJJ 'Indigenous Law' (1995) 12.

²³ Falk (n 2 above) 297.

²⁴ ARNOTT, D.W 'Councils and courts among the TIV-traditional concepts and alien institutions in non-Moslem tribe of northern Nigeria' (1958) 2 *Journal of African Law* 16.

²⁵ Nabudere, D.W (n 13 above) 26-29.

²⁶ Yazzie, R (n 3 above) 236.

capable of handling sensitive issues like genocide as opposed to how most literature has labelled them as courts that are only capable of handling civil cases and minor crimes.

1.7 Methodology

This study is generally based on desk research. The sources of information include International human rights instruments that embody the right to a fair trial; domestic legislations like the constitutions of Rwanda and South Africa; books relevant to this topic; Case law; internet resources and media as well as human rights organisations' reports.

1.8 Scope of the study

Due to factors of time and space, thorough examination of indigenous legal systems in all African countries cannot be covered. This research attempts to give a general overview and evaluates how indigenous African criminal justice systems comply or otherwise with international fair trial standards. It however concentrates on Rwanda and South Africa in subsequent chapters. These two countries were chosen because: Rwanda has since 2001 re-established traditional justice system in a bid to deal with a sensitive crime of genocide and in South Africa, the study examines procedures in chiefs' courts and how they conform to South African Constitution and other sources of South Africa's obligations to respect the right to a fair trial.

1.9 Overview of Chapters

This work is divided into five chapters organised as follows: Chapter One is the General Introduction. Among other issues, the background of the study, content of the right to a fair trial, the research problem, objectives of the study and hypotheses are discussed. Chapter two is an overview of indigenous African criminal justice systems in relation to the right to a fair trial. It discusses in general terms, their procedures and values. It paves way for Chapter three which discusses the Chief's Courts in South Africa by specifically looking at their relevance, their constitutionality and compliance with international standards for a fair trial. Chapter four discusses *Gacaca* courts in Rwanda. It describes *Gacaca* courts from their historical context and like the previous one, looks into the issue of compliance with standards of a fair trial. Then Chapter five gives general concluding remarks and recommendations.

CHAPTER 2

AN OVERVIEW OF INDIGENOUS AFRICAN CRIMINAL JUSTICE SYSTEMS AND THEIR COMPLIANCE WITH FAIR TRIAL STANDARDS

Introduction

Until 1960s when most African countries became independent, the mechanism of resolving disputes amongst African communities was their traditional justice systems. Because colonialists imposed their style of justice, however, the indigenous African ones have since been informal, operating especially among rural African communities. Despite their significance to these communities, however, the colonial legacy sowed the belief that these systems are obstacles to the promotion of justice and human rights.²⁷ This stigmatization ignores the fact that justice has meant different things in different societies and different historical times. In the context of European history for example, conceptions of justice have radically changed as societies transformed from primitive, communal through feudal to capitalist order.²⁸ According to the available literature, in primitive, communal societies justice was hardly a virtue (the main virtues being generosity and sociability) whereas in feudal societies, justice became a priority, generally being understood as observance of, or respect for, established rights.²⁹ In today's advanced capitalist society, justice may be defined as giving to people what they deserve.

This perception of African justice systems implies that indigenous Africa was insensitive to human rights and as such, the concept of human rights and its protection originated from Western civilization. On the same basis, human rights have been misappropriated and patented as an organic attribute of Western society and values; this has portrayed the West as the mode, the yardstick and arbiter over human rights concerns in the world.³⁰ We argue that, the fact that Africans had a different perception of human rights and fairness from the Western should not mean that it was a society without rights.

A community perspective of human rights should be the guide to determine whether a given society respect them and this calls for grounding human rights in people's day to day life.

²⁷ Nina and Schwikkard 'The soft vengeance of the people: Popular justice and legal pluralism in South Africa' (1996) 36 *Journal of Legal pluralism* 69.

²⁸ Yusufu .Q.L 'Justice administration outside the ordinary courts of law in Mainland Tanzania: The Case of Ward Tribunals in Babati District' <<http://web.africa.ufl.edu>> (accessed on 22 August 2004).

²⁹ As above.

³⁰ Babuuziwa Mukasa Luutu 'International Human Rights and African Traditions of justice: The quest for connection and meaning' (2002) 8 *East African Journal of peace and Human Rights* 142.

A human rights view which does not cope with people's mechanisms remains outside their social fabric as well as their ethical and moral systems.³¹ The assertion that the concept of human rights did not exist in indigenous Africa should instead be seen as a Western strategy to colonise Africa. How could colonialism succeed if Africans were not made to believe that their ways of social life were so savage and therefore had to adapt the European 'human way' of life? After all this is what colonialism means.³²

Human rights are universal and belong to everyone equally. The principles of human rights embodied in the Universal Declaration of Human Rights (UDHR) have existed and evolved in all civilizations, including African, before the adoption of this instrument.³³ No society therefore has a right to patent them as its moral legacy with exclusive rights over their origination, perfection and interpretation. We agree with Luutu that for non-Western societies today, certain liberal virtues make sense only to the extent to which a society has undergone or is undergoing social and cultural transformations in the image of the West.³⁴

In order to provide a background for the discussion that will follow, it is necessary to first describe the operation of justice and law in indigenous African societies in very general terms.

2.1 Modes of operation

The judicial process of a particular social system is normally the sum total of the peculiar circumstances of that particular society. Its mode of operation is dictated by the fundamental values and necessities of the society and should therefore be viewed as an aspect of its social control and dispute settlement processes.³⁵ In most traditional African societies, less serious crimes went through a number of stages of dispute settlement. The disputants could call upon family members, co-residents, co-lineage members, age-mates, or senior and influential people in the community to assist in resolving a dispute before turning to a more public

³¹ As above, 48.

³² As above, 43.

³³ As above, 44.

³⁴ As above, 48.

³⁵ Van Velsen 'Procedural Informality, Reconciliation and False comparisons' in Max Gluckman 'Ideas and procedures in African Customary law' (1969) 137.

forum.³⁶ As such, the family or the council of elders represented the lowest level in the court systems of traditional African societies.

Because African communities were bound together by inter-family intimacy, the judicial system had the obligation to maintain this relationship by being fair and neutral to ensure the social cohesion and progress of a group. This special mode exactly fitted the need to nurture the collective life style of Africans. The jurisdiction of the family head was normally over civil matters between members of his extended family, and his authority was persuasive and moral compared to the compulsory and legal decisions of chiefs and/or the King. The primary concern at the stage of family head court:

...was not so much to administer justice as to reconcile the quarrelling members of his group; and in attempting to achieve this he appealed to their family sentiments rather than to strict legal principles.³⁷

In some jurisdictions, the king or the chief directly got involved in the proceedings and directed the adjudication process. At the face of it, one may argue that the right to be heard by an independent and impartial tribunal was violated in these cases since the King/chief belonged to the executive. This issue is addressed later in this paper. In other jurisdictions like the Lozi court in Zambia, the King was an overseer and did not take part in the proceedings. It was instead the work of the councillors to direct the whole process.³⁸

2.1.1 Procedure

In some jurisdictions, at a gathering of village members, elders and judges, the injured party or their representatives opened proceedings by stating their complaint. In other jurisdictions, it was the presiding judge who opened the proceedings by narrating how he was seized with the matter before calling on the plaintiff to lay their claim, followed by the defendants.³⁹ There were no fixed sessions. The court only met when there was a matter to be settled and generally, no adjournments and cases were heard as soon as the chief was seized of the matter.

³⁶ Penal Reform International 'Access to Justice in Sub-Saharan Africa: The role of traditional and informal justice systems', report of 2001<<http://www.grc-exchange.org/info>> (accessed on September 25, 2004).

³⁷ As above.

³⁸ As above.

³⁹ Michelo Hansungule (n 20 above) 13.

During the hearing, each party was required to bring its witnesses but there was no confrontation, instead witnesses helped each other to recall the facts.⁴⁰

The underlying principle was that everyone present at the proceedings was entitled to have a say and the public had to listen attentively and not interrupt. After the plaintiff and the defendant had stated their case, they could be questioned on their statements by anybody from the crowd, and after a long debate, a decision was taken right there in the full view of the public. Judges pointed out the rights and wrongs of each party based on testimonies and the King/chief pronounced the public consensus. Collective decision reflected both the common need of the community to render justice, and the distrust of one authority because it was believed that plurality of members drawn from different kinship groups rendered fair and objective verdicts as opposed to a-one-man verdict.⁴¹

2.2 Compliance with fair trial standards

It has already been mentioned in the introduction of this work that human rights organisations view indigenous African criminal justice systems as not conforming to standards of the right to a fair trial.⁴² In this section, some of the aspects of the right to a fair trial namely, the right to be heard by an independent and impartial tribunal established by law; the right to a fair and public hearing; the right to legal representation and the right not to incriminate oneself will be discussed.

2.2.1 Independence and impartiality of courts

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in criminal and civil cases are to be conducted by a competent, independent and impartial tribunal established by law.⁴³ This research is concerned with criminal proceedings. The law, it can be argued, intends to avoid the arbitrariness and bias that would arise if criminal charges were to be decided upon by a political body or an administrative agency.

⁴⁰ As above.

⁴¹ ARNOTT, D.W (n 24 above) 22.

⁴² See Amnesty International (n16 above).

⁴³ Article 14 (1) of the ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children".

Competence refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case. As such, the court, including the delineation of its competence, must have been established by law. On the other hand, independence presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive. On a whole, there must be a combination of courts' independence, establishment by law, and conducting trials in accordance with a pre-determined set of rules.⁴⁴ These organizational measures, without which procedural guarantees of fairness will not be effective ensure the independence of the judges individually and the judiciary as an institution. Primarily, independence rests on mechanisms aimed at ensuring a court's position externally whereas impartiality refers to its conduct of, and bearing on, the final outcome of a specific case. It thus relates to the course of the trial and indicates that the judge will not favour one party or other and that the parties will have equal opportunity to present their positions.⁴⁵

The fact that members of the executive, namely the King and the chiefs were at the same time judges is not enough reason to discredit the independence and impartiality of indigenous African justice systems. Their impartiality was secured by crosscutting ties which linked them to both parties. Also, their personal knowledge of the community, the dispute, the nature of previous settlements and the disputants, including personal histories and reputations was vital to their ability to fairly resolve the dispute.⁴⁶ These factors are absent in Western justice systems. Also, Kings and chiefs were only overseers in the proceedings, their role being only to pronounce decisions taken by the public. An example is Holleman's description of the trial in a *shona* court in Southern Africa:

The traditional hearing lapses into stages in which the court seems to disintegrate into a free-for-all debating society without rules of precedence, speech or conduct. Everyone chimes in and gives his opinion – and the one who sits back, seemingly powerless, is the chief himself... He is a good chief when he knows how to listen patiently and watch faithfully...and the solution emerges as the common product of many minds. The chief's decision is then as undramatic and uneventful as a full-stop after a long paragraph.⁴⁷

⁴⁴ Commission on Human Rights, Final Report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (n 8 above) 67.

⁴⁵ As above.

⁴⁶ Igbokwe, Virtus Chitoo 'Socio-cultural dimensions of dispute resolution: Informal justice process among the Ibo speaking peoples of Eastern Nigeria and their implications for community Justice system in North America' (1998) 10 *African Journal of International and Comparative Law* 456.

⁴⁷ Holleman, J.F 'An anthropological approach to Bantu law: With specific reference to shona Law' (1949) 10 *Rhodes-Livingstone Journal* 53.

In addition, judges were not remote persons to the parties but men in the next hut who knew most, if not all, of the facts of a dispute before it even came officially to them as a constituted forum. They were aware of the previous histories and relationships between the parties; that A was always quarrelling, that B beat his wife and so on.⁴⁸ Therefore, the gap between legal truth and actual fact almost did not exist. This is in stark contrast to the rigid notion of separation of powers in Western justice systems and underscores their jurisprudential underpinnings.

As for the requirement that tribunals apply law and rules of procedure that were prescribed prior to the commission of a crime, customary rules of procedure existed in indigenous African justice systems but were not rigidly followed. As Derrett put it,

...under traditional African justice system, outcomes are generally compromises rather than zero-sum decisions and take into account the total relationship between the parties...Thus the concept of justice is derived from what the society considers to be fair and just in light of the overall context, and not what is fixed in advance by law. This does not mean that there are no rules. Rather, the rules are seen as bargaining counters—a framework for the discussion—in the process of reaching an outcome...⁴⁹

The guiding principles and precedents in the indigenous African criminal justice systems therefore formed no more than a starting point for negotiation of the suitable settlement of a dispute and a court could allow a deviation from the rule in the interests of a lasting social harmony. This re-emphasizes their higher degree of flexibility compared to Western style of justice.

2.2.2 Fair and Public Hearing (Equality of arms)

We agree with Aristotle that:

The people in their gatherings have both a deliberative and a judicial capacity...Any individual member of these assemblies is probably inferior to the one best man. But the state is composed of many individual members and just as a feast to which many contribute is better than one provided by a single person, so, and for the same reason, the masses can come to a better decision, in many matters, than one individual.⁵⁰

Article 14(1) of the ICCPR spells out the basic components of due process of law and is supplemented by Article 15.⁵¹ Equality of arms implies that both parties are to be treated in a

⁴⁸ Derrett, J.D 'An introduction to legal systems' (1968) 137.

⁴⁹ Merry, Sally 'The social organisation of mediation in non-industrialised societies: Implications for informal community justice in America', in Abel (Ed) 'The politics of informal justice' (1982) 19.

⁵⁰ Peter STEIN (n 12 above) 17.

⁵¹ Lawyers for Human Rights (n1above) 12.

manner ensuring their procedurally equal position throughout the trial. It has been indicated how, in indigenous African criminal proceedings, both parties were in fact given equal treatment throughout the case. The fact that judges were bound to pronounce public opinion, which, always focused at maintaining harmony and justice reflects the possibility of higher degree of fairness than in Western criminal justice systems in which one or a few judges decide on the cases.

Another element of a fair hearing is the right to public hearing. The right to a public hearing requires that the hearing be conducted publicly and the court or tribunal makes information about the time and venue of the hearing available as well as adequate facilities for attendance by interested members of the public. Indigenous African criminal justice systems respected this right more than the Western style proceedings. Public participation was actually conceived not only as a right, but also a duty of every adult member in the community to participate in problem solving. This right extended to everyone, even the passers-by. According to Chimango:

Although judgment was delivered by the chief on the advice of the elders, everybody had a right to speak in an orderly manner, to put questions to witnesses, and to make suggestions to the court. This privilege was extended to passers-by who, although they might have been complete strangers, could lay down their loads and listen to the proceedings. The chief and his wise elders would sit for hours listening to what by Western standards might be considered a mass of irrelevant details. This was done to settle the disputes once and for all so that the society could thereafter continue to function harmoniously.⁵²

2.2.3 Right to legal representation

Apart from the provisions of the ICCPR and other binding human rights instruments, principle 1 of the Basic Principles on the Role of Lawyers⁵³ stipulates that:

All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

Also, the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and the European Court on Human Rights have emphasized on the need for legal representation in criminal cases. The Human Rights Committee has stated that "all persons arrested must have immediate access to

⁵² Chimango, I.J 'Tradition and Traditional courts of Malawi' (1997) 10 *Comparative and International Law Journal of Southern Africa* 40.

⁵³ Basic Principles on the role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N Doc.A/CONF.144/28/Rev.1 (1990) 118.

counsel".⁵⁴ The Inter-American Commission decided that a law which prohibited a detainee from access to counsel during detention and investigation seriously impinged upon defence rights.⁵⁵ In its Resolution on the Right to Recourse and Fair Trial, the African Commission on Human and Peoples' Rights reinforced the right to legal representation guaranteed by article 7(1)(c) of the African Charter. It held that "in the determination of charges against them, individuals shall in particular be entitled to communicate in confidence with counsel of their choice" and on the basis of this, it found a violation of this right in the case of *Media Rights Agenda (acting on behalf of Mr. Niran Malaolu) v. Nigeria*.⁵⁶

Representation of the parties by lawyers is not a feature of Indigenous African justice systems, nor can it be regarded as necessary. As noted earlier, prior to a formal court hearing, the judge carries out the work normally performed by lawyers. He listens to the whole story as it is poured out, analyses the legal issues involved and marshals the evidence.⁵⁷ On the other hand, provision for legal representation would be irrational since the judges themselves were laymen and the process involved no complicated procedures that were alien to parties as it is the case with Western style of criminal justice.⁵⁸

More importantly, the proceedings in indigenous African criminal justice sought compromise rather than the strict application of intricate rules and aimed at maximising direct public participation which was essential given the lack of official enforcement mechanisms. As Derrett put it, it was important for the guilty parties to be counselled and reintegrated into society by their kinsmen. He states:

At the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court is less to find the facts, state the rules of law, and apply them to the facts than to set right a wrong in such a way as to restore harmony within the disturbed community...But the party at fault must be brought to see how his behaviour has fallen short of the standard set for his particular role as involved in the dispute, and he must come to accept that the decision of the court is a fair one...⁵⁹

⁵⁴ Concluding Observations of the HRC; UN Doc.CCPR/C/79/Add.74, 9 (April 1997) Para. 28.

⁵⁵ Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, (1986) 154.

⁵⁶ ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, Para. 55-56.

⁵⁷ Van Velsen (n 35 above) 142.

⁵⁸ The procedures and rules applied in western-style of criminal justice (or western-style of justice in general) are even alien to the 'western people' themselves as long as they have not dedicated part of their life time to study law. This is very different from the African system where people learn by experience (participation in proceedings) and stories of the elders.

⁵⁹ Derrett, J.D (n 48 above) 145.

In Western style of justice the accused is more likely to have a criminal record and penal sanctions including loss of liberty for life (like life imprisonment). This, coupled with the fact that rules applied in the proceedings are sophisticated explains why there is a need for a professionally competent judge and legal representative who are acquainted with these rules on the basis of which such a serious penalty can be given. As Sachs put it:

Where the penalties may be severe and deprivation of liberty involved, there is a great need for...the matter to be adjudicated upon by a team of persons including at least one professionally trained lawyer.⁶⁰

The rules of procedure under the Western systems of justice also limit the scope for public participation and make it necessary for the accused to seek professional representation. The presence of the public is less meaningful since they are just observers.

Having said the above however, it should be noted that representation in a criminal case did exist in some indigenous African jurisdictions. Bearing in mind that judges themselves were laymen, it is logical that representatives in these jurisdictions were not trained lawyers. Among the Arusha in northern Tanzania for example, in cases involving criminal charges, each disputant recruited a body of supporters and they would meet in a peaceful assembly to discuss the matter.⁶¹ Supporters were recruited on the basis of patrilineal affiliation and neighbourhood, and acted as advocates on a disputant's behalf.

These representatives, like the judges, had to take into consideration the whole range of linkages, interests and relationships among the parties and the community. This makes the rationale behind representation in indigenous African criminal justice systems different from modern legal systems where legal counsels simply focus on interests of their clients.⁶²

This feature of representation also existed among the Talensi and Asante ethnic groups of Ghana.⁶³

It is however submitted that even in those jurisdictions where the parties were not represented, it cannot be said that they were denied their right to a fair trial. A conflict between two members

⁶⁰ Sachs, Albie 'Liberating the Law: creating popular justice in Mozambique' (1990) 22-23.

⁶¹ Gulliver, P.H 'Dispute settlement without courts: the Ndendeuli of Southern Tanzania' in Laura NADER (n 10 above) 26.

⁶² As above, 31.

⁶³ 'Criminal justice in Ghana' <<http://www.unitedway.org>> (accessed on August 5, 2004).

of a community was regarded as a problem which afflicts the entire community. That is why community members had to act as representatives of both parties by maintaining neutrality throughout the proceedings and the judgment had to be accepted by both the parties and community members.⁶⁴ This public consensus which was necessary to ensure enforcement of the decision through social pressure justifies the absence of legal experts to represent the parties. In general, penalties were not imposed and abiding by a court decision was not subjected to state force as it is the case with Western style of justice.

Briefly, legal representation is necessary in complicated forms of dispute resolution like the Western style of criminal justice than in less procedurally complicated mechanisms like the indigenous African criminal justice systems. In the latter case, the court has to ensure that both parties' witnesses are heard and that the public actively participates in the proceedings and deliberations.

2.2.4 The right not to incriminate oneself

The right not to be coerced to incriminate oneself probably lies at the heart of the notion of a fair trial because it requires the prosecution in a criminal case to prove guilt of the accused without resort to evidence obtained through coercive means. Article 14(3) (g) of the ICCPR guarantees the right of the accused not to be compelled to testify against himself or to confess guilt. The African Charter contains no similar provisions. Also, Guideline 16 of the Guidelines on the Role of Prosecutors⁶⁵ requires prosecutors to refrain from using unlawful methods to obtain evidence. The right not to be compelled to confess guilt is also contained in articles 55(1)(a) of the Statute of the International Criminal Court and 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

The effective protection of this right is of particular importance in the course of the preliminary investigations, when the temptation may be greatest for the state to exert pressure on the accused persons to confess guilt.

The European Court on Human Rights pointed out in *Murray v. the United Kingdom*⁶⁶ that the right to silence and the right not to be forced to incriminate oneself are generally recognised

⁶⁴ Holleman, J.F (n 47 above) 53.

⁶⁵ Guide lines on the role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana-Cuba, 27 August to 7 September 1990, U.N Doc.A/CONF.144/28/Rev.1 (1990) 189.

⁶⁶ ECHR; *Murray v. The United Kingdom* (14310/88) 1994 ECHR 39; Judgment Ser. A n° 300-A (1994) 90.

international standards which lie at the heart of the notion of a fair procedure. It stated that their rationale lies, *inter alia*, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice.⁶⁷ The court interpreted this right as presupposing that the suspect shall not be forced to talk, but his body and documents 'may be forced to'.⁶⁸

In the indigenous African criminal justice, the accused voluntarily confessed, well aware of the outcome of confessions namely, that the court will mitigate the sentence if they do not complicate the matter by denying the wrongs they actually committed. The most important point to note is that parties were not coerced to confess.

International human rights instruments do not prohibit *per se* that the accused confess before courts of law, they are only to the effect that confession should not be as a result of duress by the state authorities.⁶⁹ It therefore follows that since confessions were purely voluntary in indigenous African criminal justice, they did not, and still do not where they exist today, violate the accused's right not to incriminate themselves on condition that the voluntary nature is guaranteed by the procedures.

2.3 The principle of individual criminal responsibility

International human rights instruments and particularly the statutes of a number of international judicial bodies including the International Criminal Court provide for the principle of individual criminal responsibility.⁷⁰ This principle has human rights implications and the right to a fair trial in particular because it aims at holding accountable only those who have actually committed crimes, thus condemning arbitrary prosecutions. It embodies two terms which address different

⁶⁷ As above.

⁶⁸ As above.

⁶⁹ For example, the Principles and Guidelines on the Right to a fair trial and legal assistance adopted by the African Commission on Human and Peoples' Rights (Paragraph N (6) (d)) states that: "Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or as probative of any fact at trial..."

⁷⁰ For example, article 7 (1) of the statute of the International Tribunal for former Yugoslavia (ICTY) stipulates that: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime". Article 25 (2) of the statute of the International Criminal court also provides for individual criminal responsibility.

facets its concern. 'Individual responsibility' is about tracing responsibility whereas 'criminal responsibility' addresses the nature of the responsibility.⁷¹

In indigenous African justice systems, legal rights and duties were primarily attached to groups not individuals and therefore scholars have inferred from this that even liability for criminal offences was collective.⁷² This is not true, individuals were legal subjects. The collective nature of rights and duties in indigenous African justice only means that a person was inextricably linked to a family, clan and culture. This is why there was the notion of collective injury and responsibility. The concept of collective injury and responsibility itself connotes from the perception of justice in these systems as aiming at rehabilitation of the offender and compensation of the victim by the community, but does not suggest that criminal acts were imputable to the whole family or community of the offender. On the contrary, crimes were imputable to individual offenders, but in case they were unable to personally repair the harm, then the community would intervene as contributors to reparation of harm but not as principal offenders. As Elias argued:

While there is a measure of truth in this view of the idea of liability for wrongs, it is inaccurate in so far as it assumes that jurisprudence in Africa does not distinguish between primary and secondary liability for offences against the law. No doubt, African sentiments attach great weight to the solidarity of the group as a necessary condition of the maintenance of the social equilibrium of the local community...and it is also natural that, if one of their number should incur the penalty of the payment of blood-money or compensation, other members of his group or family would come to his aid in meeting such an obligation. There is no doubt whatsoever in the minds of these other members, and certainly not in the customary law on the subject that the primary liability is that of the wrongdoer himself alone, and that the other members are merely assuming secondary liability if he fails to pay either in part or as a whole. It is considered by the wrongdoer's kith and kin a matter of family pride that none of their members' legal obligations be allowed to remain outstanding in relation to the wronged family.⁷³

This philosophy of justice explains why no party was totally at fault or completely blameless. Also, compensating the injured party was very much respected value that intended to avoid the severance of social relationships. Since people had to live together in a communalistic environment, they were prepared to give all they could for the sake of relationships and thus the Western winner-takes-all or winner-loser model of justice was inappropriate in their circumstances.⁷⁴

⁷¹ Steven R. Ratner, Jason S. Abrams 'Accountability for Human Rights Atrocities in international law: Beyond Nuremberg legacy' (2001) 16.

⁷² Igbokwe *et al* (n 46 above) 449-450.

⁷³ Elias, T.O 'Traditional forms of participation in social defence' (1969) 27 *International Review of Criminal policy* 19.

⁷⁴ Igbokwe *et al* (n 46 above) 457.

2.4 Brief comparison of the two systems

2.4.1 Similarities

Many scholars tend to define the two systems only by their differences⁷⁵, and they ignore the fact that the two do have some common features. In both systems for example, the alleged wrongdoer and the person wronged are heard in most case, in a geographical area where the wrong was committed. They both also intend to restore the victims to their original situation, though the approaches are different. The differences therefore, are of degree and not so much of substance and how fair each of them carries out the hearing, is subjective.

2.4.2 Differences

There are however some differences in substance, particularly those related to the means of enforcement, the independence of courts and qualification of lawyers and judges. The Western system relies on state coercion whereas the indigenous African justice system relies on social pressure to enforce their decisions. More public participation and informality in procedure characterise indigenous African criminal procedures. In as far as the independence of courts, competence of judges and the requirement for legal representation, it has already been mentioned that Western style system of justice relies on state coercion. Though the accused persons who, in rare cases, refused to appear before the court in indigenous African criminal proceedings would also be forced to, the source of force in two systems differ. In Western style it emanates from the state while in indigenous African criminal justice systems it was mostly from families and peers.

2.4.3 Advantages

Compared to Western style of criminal justice, indigenous African criminal justice systems have the following advantages: They are easily accessible because their proceedings are carried out within walking distance from the parties and the public; conducted in local languages; have simple procedures that do not require the services of lawyers and trials are conducted without delays associated with the Western style system of justice.

In indigenous African criminal justice systems, there is no repressive approach. They address the underlying causes of crime and judges are bound by social ties and morality.

⁷⁵ Griffiths, Anne 'Between Paradigms: Differing perspectives on justice on Molpolole Botswana' (1996) 36 *Journal of Legal Pluralism* 195.

In Western style of criminal justice on the other hand, matters are dealt with by state officials who are not necessarily interested in relationships of the parties and impose penalties that are repressive.

Indigenous African courts' type of justice emphasizes on reconciliation, compensation, restoration and rehabilitation. The need for social belongingness which is a direct consequence of this type of justice still exists in especially rural African communities where families are not self-sufficient. This is why they are more participatory, both parties and the community being central in finding a solution to the matter in dispute. In Western style on the other hand, the law dictated by the state is the only point of reference in deciding cases.

Regarding the penalties, sentences in indigenous African criminal justice systems avoid problems of prison overcrowding. More importantly, absence of prison sentences allowed both parties to continue to contribute to the economy and the wrongdoer in particular, to pay compensation to the victim and thus prevented the economic and social dislocation of the families.

2.4.4 Disadvantages

As much as there are advantages accruing from indigenous African criminal justice systems, it cannot be ignored that some shortcomings did exist and to the extent that they compromised fundamental human rights, we submit that the Western style of criminal justice is preferable. Some of these shortcomings are: Firstly, factors such as the past conduct of the accused, or even that of the accused's family, could be considered in determining the case and were likely to compromise the principle of presumption of innocence. Secondly, under some indigenous African courts, corporal punishment was, and still is administered.⁷⁶ Although such punishments are usually soft and confined to boys and young men, corporal punishment is, nevertheless, an inhuman and a degrading punishment prohibited by most international human rights instruments.⁷⁷

⁷⁶ Igbokwe *et al* (n 46 above) 51.

⁷⁷ For Instance article 5 of the African Charter according to which: "Every person shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly...cruel, inhuman or degrading punishment...shall be prohibited."

CHAPTER 3

CHIEFS' COURTS IN SOUTH AFRICA

Introduction

Western Law in Africa has been described as the cutting edge of colonialism⁷⁸ and therefore, the introduction of the legal systems of the colonial powers was central to the 'civilizing mission' of colonialism in Africa. The introduction of the British law into British colonies, and South Africa in this particular case, was considered as an exciting shift from the savage customs of the colonized to the modern justice. As Fitzpatrick put it, the colonial law was considered as an exceptionally important gift to the colonies.⁷⁹ However, the British by their divide and rule tactic did not discard at once all the indigenous African law in their colonies. They recognized some elements of indigenous law that did not violate British law or were not "repugnant to natural justice, equity, or good conscience".⁸⁰ In South Africa, customary law remained applicable to certain classes of black South Africans who were said to live according to African tradition or custom and those who were sufficiently "Westernized" were exempted from its application.⁸¹ 'Westernized' black South Africans and South Africans of non-African descent were governed by the Roman-Dutch Law imported from Europe. Even to black, non-Westernized South Africans however, indigenous law was almost solely applied in civil matters.⁸²

From the foregoing, the fact is that indigenous African laws and procedures were allowed to coexist with the newly introduced systems in South Africa to the extent that they were compatible with European notions of justice. Nonetheless, there has since been a parallel system of purely distinctive laws and courts.⁸³ The Western style courts staffed with legal experts and the indigenous South African courts presided over by traditional local chiefs or elders who apply the customary law of their jurisdictions.

⁷⁸ Martin Chanock 'Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia' (1985) 4.

⁷⁹ Fitzpatrick, P 'Custom as Imperialism', in Sally Engle Merry 'Law and Colonialism' (1991) 6 *Law and Society Review* 25

⁸⁰ Merry, Selly (n 49 above) 23.

⁸¹ Yvonne Mokgoro 'The Customary Law Question in the South African Constitution' (1997) 41 *Saint Louis University Law Journal* 1279.

⁸² As above.

⁸³ As above.

In terms of Transkei Regional Authority Courts Act 13 that came into force in 1983, traditional courts were formally established in South African legal system. They are presided over by chiefs or headmen. Prior to this Act, all chiefs' courts had been at the lowest level of the administration of justice and subject to appeal to the magistrates' courts but the new Act created a new type of courts that were essentially equivalent in status to a magistrate's court and subject to appeal to the Supreme Court. In order to retain customary-law nature of a chief's court, the Act expressly provided that all proceedings should be in accordance with the recognized traditional laws and customs of this community (section10).

Today, the chiefs and headmen of black South African communities have their own courts. These courts hear civil and some criminal cases applying customary law. Apart from the Transkei Regional Authority Courts Act, there are other statutes that provide for the operation of these courts, some dating from the apartheid era⁸⁴ and others resulting from the organisation of the former homelands and self-governing territories.⁸⁵ The continued operation of homeland statutes is sanctioned by item 2 of Schedule 6 of the 1996 Constitution.

3.1 Jurisdiction and key features

In addition to jurisdiction over civil cases, chiefs' courts have jurisdiction over criminal offences at customary law and statutory offences of a less serious nature.⁸⁶ More serious offences are excluded in terms of schedule 3 to the *Black Administration Act* and similar provisions in the relevant statutes of the former homelands and self-governing territories.⁸⁷ Some of the offences under their jurisdiction are wife beating, petty theft and child abuse.

Regarding their features, Chiefs' courts can be summarised into two major characteristics: inclusion (or community participation) and reintegration of offenders.

⁸⁴ The *Black Administration Act* 38 of 1927.

⁸⁵ For instance the *Bophuthatswana Traditional Courts Act* 29 of 1979; the *KwaNdebele Traditional Authorities Act* 8 of 1984, the *Chiefs Courts Act* 6 of 1993 (Transkei), the *KwaZulu Amakhosi and Iziphakanyiswa Act* 9 of 1990.

⁸⁶ South African Law Commission (SALC) 'The harmonisation of the common Law and indigenous Law: Traditional Courts and Judicial function of Traditional leaders', Discussion paper 82 (May 1999).

⁸⁷ Act 38 of 1927, section 20; See also Section 6 of the *Bophuthatswana Traditional Courts Act* 29 of 1979 and First Schedule to the *KwaZulu Amakhosi and Iziphakanyiswa Act* 1990 for similar restrictions.

3.1.1 Inclusion

The Black Administration Act provides that the procedure in chiefs and headmen's courts "shall be in accordance with recognised customs and laws of the tribe..."⁸⁸ As per the custom already indicated therefore, a court is presided over by a chief or headman and their councillors or advisors who only pronounce judgments agreed upon or approved by the community members that actively participate in the proceedings. It can actually be argued that the inclusive nature of the criminal proceedings is an essential reason for the acceptability and popularity of this process among the indigenous communities. The customary procedures in the chiefs' courts are not different from other indigenous African criminal justice systems described earlier. Also features like simplicity, informality and flexibility that put the parties at ease, making them in turn willing participants in seeking a resolution to a dispute, characterise chiefs' courts.

However, women's participation is denied or highly restricted in some communities.⁸⁹ Communities or chiefs who are still tied to conservative cultural beliefs that women do not have the same capabilities as men should be rectified through sensitisation to make them realise the potentials of women in a society. The existence of such perceptions in some of the communities among the many that are progressive should however not be a basis for undermining these courts' relevance in modern South Africa.

3.1.2 Reintegration of offenders

Like Western style courts, chiefs' courts aim at holding the offenders personally accountable for their behaviour. Their particularity is that they emphasise on the human impact of crime; give offenders the opportunity to take responsibility for their actions by facing their victims and making amends; promoting active victim-community involvement in the justice process and enhancing the quality of justice in which victims and offenders are reconciled and the latter reintegrated into society.⁹⁰ There are underlying principles in the rehabilitation and reintegration of offenders. Firstly, the need for the offender to acknowledge responsibility for the offence, confront the consequences of their action, and see the victim as a person with feelings and needs, with a view to make it possible for the court and community to resolve and

⁸⁸ Rule 1 of the Chiefs' and Headmen's Civil Courts Rules R2082 of 29 December 1967 (as amended).

⁸⁹ SALC Report (n 86 above).

⁹⁰ Umbreit, M 'Victim meets offender 'The impact of restorative justice and mediation' (1994) 5.

reconcile the parties. Secondly, the emphasis is on addressing inequity that came about as a result of the commission of the offence. The court insists on rehabilitation of the relationship between the parties and their respective communities. Victims and their families are given time to speak and be heard by the offender, expressing their needs and concerns. Thirdly, the court has to develop an appropriate and concrete solution accepted by the parties. As such, the chiefs' courts address symbolic as well as material needs of the victims.⁹¹

It is on the basis of foregoing principles that the examination of the compliance by the chiefs' courts with certain minimum standards of a fair trial as provided for by South African Constitution⁹² and other human rights instruments will be made.

3.2 Chiefs' courts and South African constitution

South Africa is a multicultural society and its Constitution provides for respect of unity in diversity.⁹³ It hence gives importance to the indigenous law, which is part of cultural and social identity of some South Africans that form part of the said diversity. This is in line with South Africa's transformation process from black marginalization by the legacy of apartheid into the new era of freedom and equality for all. With the adoption of a new Constitution in 1996, came a new recognition of and respect for customary law. In fact, indigenous South African law is considered as an independent source of South African Law. This recognition was done at the constitutional, legislative and judicial levels. At the judicial level for example, the South African Constitutional Court in the case of *Alexkor Ltd and Another v Richtersveld community*⁹⁴ held that:

...the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system...In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African Law.⁹⁵

⁹¹ Amanda Dissel 'Restoring harmony: piloting victim-offender conferencing in South Africa', Paper presented at De Montfort University, Leicester (20-21 March 2002) 5.

⁹² See the list of the components of the right to a fair trial in section 35 (3) of South African Constitution, Act 108 of 1996.

⁹³ As above, section 1 (a).

⁹⁴ *Alexkor Ltd and Another v Richtersveld community* <<http://www.concourt.gov.za/files/alexkor/pdf>> (accessed on August 17, 2004) 53.

⁹⁵ As above, 51.

Since its initial stages, the South African Constitution through various references in the Bill of Rights⁹⁶ and its body recognised indigenous South African Customary courts. They were elevated in status as illustrated in the Constitutional Court case of *S v Makwanyane*⁹⁷ where the court recognized the African concept of '*ubuntu*'⁹⁸ as a constitutional value. Sachs J. stated:

The secure and progressive development of our legal system demands that it draw the best from all the streams of justice on our country....it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice.⁹⁹

Section 185 sets the legislative and institutional framework to ensure the protection of indigenous cultures and law. It provides for the establishment of the Commission on the protection of rights of cultural, religious and linguistic communities. More explicitly, Section 211 recognises the institution, status and role of traditional leadership according to customary law and authorises traditional authorities to function by virtue of applicable legislation and customs.¹⁰⁰ Section 211(3) in particular requires that courts apply customary law "when that law is applicable".¹⁰¹

Nevertheless, all Constitutional provisions that directly or indirectly recognize South African indigenous Law as part of national law are all to the effect that it must conform to the Constitution and particularly to the Bill of Rights. The Constitutional court declared in *S v Makwanyane* that:

...Indigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.¹⁰²

The discussion above has mostly embarked on the recognition of customary law which chiefs' and headmen's courts apply. It should be noted that the courts themselves are constitutional in terms of section 16 (1) of schedule 6 of the Constitution according to which:

⁹⁶ For example Section 31.

⁹⁷ *S v Makwanyane and Another*, 1995 (3) SA 391 (CC).

⁹⁸ The concept of ubuntu is a philosophy of life, which represents personhood, humanity, humaneness and morality.

⁹⁹ *S v. Makwanyane* (n 97 above) 365.

¹⁰⁰ Section 211 (2) stipulates: "A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs".

¹⁰¹ It states: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

¹⁰² *S v. Makwanyane* (n 97 above) 366.

Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it...¹⁰³

Since section 211 (1) also recognises the institution, status and role of traditional leadership, it protects their judicial functions in courts too. Also, section 34 of the Constitution implicitly recognises that chiefs' courts are capable of respecting the right to a fair trial. It states in relation to the right of access to courts that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial forum.

In course of this research, we have not been able to find any authoritative interpretation of this provision. We therefore argue that the term 'where appropriate' be interpreted as meaning situations in which the courts listed in section 166 of the Constitution cannot render justice due regard being given to practical impediments including inaccessibility for social and economic reasons. Whereas the word 'forum' should be strictly interpreted to mean recognised dispute resolution forums. The most important thing is that the Constitution acknowledges that forums other than Western style courts can render fair trials.

Looking at the chiefs' courts in relation to the Bill of Rights and particularly issues pertaining to the right to a fair trial, one has to always bear in mind their peculiar context and values. As such, international instruments which are in most cases too alien to fit in their values should not strictly apply to them. However, the exclusion and discriminatory light in which women are not allowed to preside over courts or participate in the proceedings thus violating section 9 (3)¹⁰⁴ requires State's efforts to sensitise chiefs and headmen to realize the equally important role women are capable of playing in these judicial processes.

3.3 Chiefs' courts versus international minimum standards of a fair trial

Compliance or otherwise with the right to a fair trial should be considered in a particular context if one is to fully appreciate its form and content in a comparative framework. To understand the diversity of cultural contexts and their relevance to the conceptualisation and protection of human rights would serve to enhance prospects for cross-cultural enrichment in defending and promoting human rights. Flowing from such an understanding is that the right to a fair trial

¹⁰³ South African Constitution (n 92 above) Section 16 (1) Schedule 6.

¹⁰⁴ It states: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ...gender ,sex..."

means different things in different contexts and situations. In this paper, we are looking at the standards of the right to a fair trial and their relevance to particular communities and legal systems. It is not enough to understand human rights as norms of domestic or international law or as universal ethics. One should inevitably take into consideration all the facts of the life of the community, against which the law must play.¹⁰⁵

3.3.1 Some of the international fair trial standards and Chiefs' courts

It can be argued that the fundamental component of the right to a fair trial is the right to have access to the courts of law as guaranteed by the article 14 (1) of the ICCPR and African Charter, article 7 (1) (a) among other human rights instruments. It has already been mentioned how some communities would be denied access to justice if the Western style courts were the only forums to dispense justice. Some of the reasons why this would constitute denial are that proceedings in these courts are out of touch with the communities' perception, social needs and are bogged in technicalities and materially demanding as opposed to the proceedings in the chiefs' courts that are swift, easily accessible and less procedural. These and other factors make Western style courts beyond especially black poor communities' means and skills. Thus, Chiefs' courts guarantee their right to access the courts of law more than Western can.

The right to be heard by an independent and impartial tribunal is another example of fair trial elements that seem violated by chiefs' courts. Chiefs' courts' independence and impartiality can be questioned since chiefs and headmen who, in modern administrative structures, can be said to belong to the executive, are at the same time judges. On this point, we agree with Madlanga, J., in *Bangindawo case*.¹⁰⁶ He stated that independence of the judiciary and impartiality as conceived in Western jurisprudence are not the same as under African customary law. He warns of the danger in a wholesale transplant of a concept suited to one legal system onto another stating that there is no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting.¹⁰⁷ The imposition of Western standards for impartiality and independence would strike at the very heart of the indigenous South African legal system, especially the judicial facet of chiefs and headsmen.

¹⁰⁵ The International Council on Human Rights Policy, Sixth Annual Assembly Report, Guadalajara, (2003).

¹⁰⁶ *Bangindawo and Others v Head of Nyanda Regional Authority and Another*, 1998 (3) BCLR 314.

¹⁰⁷ As above, 326.

3.4 Relevance of chiefs' courts in contemporary South Africa

The social and legal diversities and needs of South Africans necessitate dual the legal systems in order to make justice accessible to all.¹⁰⁸ Different South African social groups have different social and legal backgrounds, cultures and values¹⁰⁹. It follows, therefore, that their perceptions of what constitutes justice and fairness differ. Also, due to the legacy of apartheid, each of these social groups, generally, lives under different economic conditions. It would thus be illogical to assume that one uniform legal system that does not accommodate all these realities is practical to all. Such an approach would be the one Pashukanis described as “conferring legal equality upon social unequals which serves to reaffirm their inequality”.¹¹⁰ Today, chiefs' courts are the most popular and trusted form of justice to many black, rural South Africans.¹¹¹ Unlike Roman Dutch legal system based on retributive justice and whose object is to establish blame and administer punishment, chiefs' courts attempt to promote healing and enforce community values and allow members of the community to freely and substantively participate in the process.¹¹²

On a whole, chiefs' courts are relevant because: Firstly, customary law as the traditional law of the indigenous black South Africans and the chiefs' courts that apply this law, are part of the cultural heritage of these communities. Secondly, they are a useful and desirable mechanism for the speedy resolution of disputes since they are easily accessible, inexpensive and procedurally simple. Thirdly, they can be easily made to adapt to changing needs of those they serve and to the requirements of South African Bill of Rights.¹¹³

¹⁰⁸ Boyanne John Tshehla 'Non-State ordering in the post-apartheid South Africa-A study of some structures of non-State ordering in Western Cape province', LLM dissertation presented at the University of Western Cape (2001) 15.

¹⁰⁹ The preamble of South African Constitution stipulates that South Africans “Believe that South Africa belongs to all who live in it, united in our diversity”.

¹¹⁰ In Boyanne John Tshehla (n 108 above) 16.

¹¹¹ Ferial, H 'South Africa: blending tradition and change'
<<http://www.unesco.org/courier/1999-11/photoshr/33.htm>> (accessed on September 4, 2004).

¹¹² As above.

¹¹³ Yvonne Mokgoro 'The role and place of lay participation, customary and community courts in a restructured future judiciary', Papers of conference organized by the national Association of Democratic Lawyers, Pretoria (October 1993) 76.

3.4.1 Accessibility

More than their Western style counterparts, chiefs' courts are accessible to indigenous rural communities in terms of social status, wealth or education. Justice is affordable because there is for instance no need for legal representation due to absence of legal complications. Informality of procedures makes them user-friendly and public participation makes the process popular since people regard them as their own and not something imposed from above. Chiefs apply rules and customs traditionally known to their communities and the language of the court is the one of the parties, with no risk of distortion through interpretation. This makes justice more affordable. Justice is thus fairer in the eyes of these communities as opposed to the Western style courts which are bogged down in technicalities.

Chiefs' courts are also accessible in terms of social distance. According to South African Law Commission,

Since the presiding chief and his councillors who constitute the court are not very different in terms of social status, wealth or education, disputants do not feel as intimidated by the chief's court as they would in a western-type court.¹¹⁴

Traditional courts are also cost effective in terms of transport costs since they exist in almost every area of jurisdiction of a traditional leader since, virtually every village has a court within reach of its residents. People do not have to travel long distances to magistrate's courts at district headquarters.¹¹⁵ Some scholars have argued that the inability of the Western style of justice to meet the needs of ordinary South Africans is not only due to the content of the substantive law that they apply, but also because the structure and procedural requirements of these courts have an effect of denying their accessibility.¹¹⁶

3.4.2 Relevance to constitutional interpretation

Recognising the importance of indigenous South African law in contemporary South Africa, SACHS J. (Judge of the South African Constitutional Court) stated the following in *S v Makwanyane*¹¹⁷;

¹¹⁴ SALC 'The harmonisation of the common Law and indigenous Law: Traditional Courts and Judicial function of Traditional leaders', Discussion paper 82 (May 1999) 2.

¹¹⁵ As above, 3-5.

¹¹⁶ Grant B and Schwikkard P 'People's courts' (1991) 7 *South African Journal of Human Rights* 304.

¹¹⁷ *S v Makwanyane and Another* (n 97) 369.

...Our function as members of this court - as I see it - is, when interpreting the Constitution, to pay due regard to the values of all sections of society, and not to confine ourselves to the values of one portion only, however, exalted or subordinate it might have been in the past.¹¹⁸

Within the new South Africa, it is vital that the legal system does not continue to ignore the legal institutions and values of a very large part of the population. Moreover, the law of that section that suffered the most violations of fundamental rights under previous regimes, and that perhaps has the most to hope from the new constitutional order. South Africa is now founded on values of human dignity, equality and respect for human rights¹¹⁹. Therefore, recognising South African indigenous justice system is a fulfilment of its constitutional obligation to ensure that everybody has access to justice. This is necessary because as already mentioned, the Western style of justice lacks legitimacy to many South Africans and this perception has an effect of preventing their meaningful access to these courts because they do not meet their needs.

¹¹⁸ As above, 370.

¹¹⁹ Constitution of the Republic of South Africa (n 92 above) Section 1 (a).

CHAPTER 4

GACACA COURTS AND INTERNATIONAL FAIR TRIAL STANDARDS

Introduction

The word "Gacaca" derives from a type of grass called "*Umucaca*" in Kinyarwanda (lawn in English). *Gacaca* courts are therefore a community-based model of conflict resolution that Rwandans used before the introduction of Western models of justice by colonialists. *Gacaca* dealt with social as well as economic conflicts like property claims, distribution of cattle among heirs, misunderstandings between husband and wife, but also minor criminal cases like livestock theft. The trials were held in the open, people sat on *Umucaca*. A major focus was on reparation of the harm caused by the offender and reconciliation of the parties or their families.

Following the 1994 genocide in Rwanda, the Rwandan government of national unity had, as a matter of priority, the task of trying over 120,000 detainees suspected of participating in the genocide.¹²⁰ Therefore, plans to adapt other dispute resolution mechanisms other than the Western criminal system that had so far achieved little success began in 1998. These traditional courts (*Gacaca*) were re-established by law in 2001 in an attempt to achieve both justice and reconciliation.¹²¹

Gacaca courts have been criticised especially by human rights watchdogs that they fail to meet Rwanda's due process obligations. While perhaps not conforming to the letter of human rights law, this chapter explores the potentials of *Gacaca* courts to embody its spirit by serving the need for justice and accountability in Rwanda while fostering reconciliation and social harmony. This could be the basis to build a culture of human rights this country that is known for historical abuse of fundamental human rights.¹²² We concede, however, that *Gacaca* courts, though a special conflict management mechanism, must still guarantee fair trial standards. The UN Human Rights Committee in its General Comment 13 provides in paragraph four (4) that "the provisions of Article 14 apply to all courts and tribunals within the

¹²⁰ See the website for Rwanda's Ministry of justice <www.minijust.gov.rw> (accessed on August 14, 2004).

¹²¹ Law establishing *Gacaca* courts (n 14 above).

¹²² See generally, the History of Rwanda (n 120 above).

scope of that article whether ordinary or specialized."¹²³ Article 14 of the ICCPR is to the effect that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The persons tried by the *Gacaca* courts fall within the ambit of article 14 of the ICCPR. This is because the accused are being brought before *Gacaca* courts in the determination of criminal charges against them; courts are established by law and apply state law; the overall control will be exercised by state institutions and penalties will be executed in state prisons.

Before entering into deeper discussion on *Gacaca* courts, it is important to mention the challenges that the post-genocide Rwandan government faced. These include massive participation in the genocide resulting into exorbitant numbers of detainees with limited means to bring them to justice. This frustrated Rwandan domestic efforts to prosecute the crime of genocide and respect the accused rights to a fair trial. Many suspects have been in detention for years without trial, yet just releasing them cannot be recommended taking into account the fragile nature of post-genocide society in Rwanda. Not only Rwanda's domestic efforts failed to address this situation, but also the International Criminal Tribunal for Rwanda set up by Security Council Resolution 955 in 1994 has failed to contribute to Rwandan reconciliation process.¹²⁴

In addition to financial means, Rwanda faced a problem of lack of judges, prosecutors and defence Lawyers. These were either killed during the genocide, were themselves implicated in the killings or fled the country. Rwandan judiciary was therefore almost, non-existent. The government of Rwanda could therefore not carry out the type of large-scale judicial process that was required. Yet, it was bound to render justice and restore social harmony despite the crippling constraints. This is what led to resorting to a traditional mechanism; *Gacaca*.

¹²³ HRC General Comment 13 'Equality before the courts and the right to a fair and public hearing by an independent court established by law', ICCPR Art. 14, Human Rights Committee, 21st Sess; U.N. Doc A/39/40 (1984) <<http://www.unhchr.org>> (accessed on September 28, 2004).

¹²⁴ Human Rights Watch/Africa 'Rwanda: A new catastrophe? Increased International efforts required to punish genocide and prevent further bloodshed' <<http://www.hrw.org/africa/index.php>> accessed on October 7, 2004).

4.1 Rwandan domestic attempts before resorting to *Gacaca*

Although Rwanda had ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, its penal code did not, at least in express terms, provide for the punishment of the crime of genocide or crimes against humanity.¹²⁵ Consequently, serious debates ensued in Rwanda over how to adopt new measures to bringing to justice tens of thousands of people suspected to have committed this heinous crime.¹²⁶ In November 1995, an international conference on "Genocide, Impunity, and Accountability" was convened by the government of Rwanda in Kigali to discuss the problems that would arise in prosecuting the perpetrators of the 1994 genocide.¹²⁷ It brought together Rwandan government leaders, foreign legal experts, representatives of local NGOs and genocide victims' associations. After the conference and upon its recommendation, the government of Rwanda had to adopt mechanisms to deal with the genocide cases. These included creating specialized chambers within the existing courts that would particularly hear genocide cases and a classification scheme aimed at allocating accountability. Classification aimed at separating the main organizers of the genocide from criminals with lesser degrees of responsibility and with it, a unique measure aimed at encouraging offenders to confess in exchange for substantially reduced sentences was adopted.¹²⁸

4.1.1 The Organic Law N° 08/96

Following the Kigali Conference, the Rwandan government began to prepare legislation giving effect to recommendations made at the Conference and on August 30, 1996 the Transitional National Assembly adopted organic Law n° 08/96 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed in Rwanda from October 1, 1990 to December 31, 1994.¹²⁹ With the adoption of this law, the government hoped to address illegal detentions; to encourage suspects to support voluntary

¹²⁵ Lawyers Committee for Human Rights 'Prosecuting genocide in Rwanda'
<<http://www.lchr.org/pubs/descriptions/rwanda.htm>> accessed on August 16, 2004.

¹²⁶ As above.

¹²⁷ Shabas, W.A 'Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems' (1996) 7 Criminal Law Forum 528.

¹²⁸ As above, 530.

¹²⁹ Organic Law n° 08/96 of August 30, 1996, on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990,
<<http://preventgenocide.org/law/domestic/rwanda.htm>> (accessed on August 7, 2004).

guilty plea procedure and to speed up the process of reconciliation.¹³⁰ Special chambers were created within the twelve First Instance Courts then existing in Rwanda to specifically try genocide cases. In addition to establishing the classification scheme, organic Law 8/96 also attempted to deal with potential prosecutorial barriers such as the lack of evidence against the majority of the suspects. For instance, while there was some evidence of involvement by the top authorities of the genocidal regime that could be verified through lists of arms distributions, newspaper articles, and radio broadcasts, "There was hardly any evidence to substantiate the involvement of the large majority of 'ordinary' killers because most eyewitnesses had been killed or had left the country"¹³¹. It is in this respect that the Rwandan legislature decided that the organic law institutes a confession and guilty plea procedure that would allow those who confessed according to the law and provided evidence against other suspects to be rewarded by a reduction in penalty. This confession procedure was an innovation to a civil law system like Rwanda's because it is a sort of plea bargaining that is a practice in common law criminal justice systems.¹³² Viewed as an instrument to overcome the general lack of evidence available to try suspects of genocidal crimes, the confession and guilty pleas were also intended to establish the truth about the genocide and to serve justice and reconciliation.

4.1.2 The challenge to regularise illegal detentions

The massive arrests and detentions that immediately followed the genocide resulted into illegal detentions of thousands of suspects for years with little hope of facing trial. In September, 1996, the Rwandan government embarked on an ambitious plan to regularize these detentions by issuing the organic Law n° 09/96 that provided for provisional modifications to the Rwandan Criminal Procedure Code and this entered into force retroactively on April 6, 1994.¹³³ This was yet another special measure to deal with the special crime because it provided for temporary derogations from statutory deadlines prescribed by the Code of Criminal Procedure for issuing an arrest record, a provisional arrest warrant and a preventive detention order. According to this Law, individuals who had been detained before its coming into force were to have a record of arrest drawn up and a warrant for arrest issued by December 31, 1997 and their trials were

¹³⁰ Lawyers Committee for Human Rights Report (n 125 above).

¹³¹ Stef, V 'Justice, Reconciliation and Reparation after Genocide and Crimes Against Humanity: The Proposed Establishment of Popular Gacaca Tribunals in Rwanda', Paper presented at the All Africa Conference on African Principles of Conflict Resolution and Reconciliation, Addis Ababa (November, 1999) 8.

¹³² Shabas, W.A (n 127 above) 539.

¹³³ Stef, V (n 131 above) 9.

supposed to begin within ninety (90) days of the issuance of the arrest warrant.¹³⁴ Upon realization that this attempt to accelerate procedures was unrealistic, the Rwandan government had to extend the application of the Law until August 31, 1999, thus providing little if any relief to tens of thousands of illegal detainees.¹³⁵

It would be irrational for one to think that releasing prisoners was the easiest and best way to ease overcrowding in prisons. Taking into account the fact that the government had a task to reconcile and render justice at the same time, releases could only be done in a manner that would be compatible with justice and that did not provoke protests or revenge by the surviving genocide victims. As noted by the Special Representative of the United Nations Commission on Human Rights, Michel Mousalli,

...there was fierce resistance when the Government announced, on 6 October 1998, that it planned to release 10,000 prisoners who had no judicial files.¹³⁶

Faced with this situation, the Rwandan government, after consultation with both political and civil society leaders decided to establish a Commission in October 1998 to look at possible mechanisms for accelerating judicial proceedings and foster reconciliation.¹³⁷ It is this Commission that published an official document detailing a proposal for *Gacaca* courts as the best alternative.¹³⁸

4.2 *Gacaca* courts as the last hope for justice and reconciliation in Rwanda

To better understand the relevance and potentials of *Gacaca* courts in the aftermath of the genocide in Rwanda, it is important to look briefly at the history of this traditional justice system before fitting it into the current complex, post-genocide situation.

¹³⁴ Drumbl, M 'Rule of Law amid Lawlessness: Counselling the Accused in Rwanda's Domestic Genocide Trials (1998) 29 *Columbia Human Rights Law Review* 574.

¹³⁵ Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda, Michel Moussalli, U.N. GAOR, 55th Session. Agenda Item 116(c), U.N. Doc. A/55/59 (2000) 30.

¹³⁶ As above.

¹³⁷ Stef, V (n 131 above) 1.

¹³⁸ As above.

4.2.1 Pre-genocide *Gacaca*

We have already mentioned the fact that *Gacaca* is a community-based dispute resolution mechanism that predates colonialism in Rwanda. We have also indicated how the name *Gacaca* connotes to the fact that community members (for example a family or a village) gathered and sat on the grass, *Umucaca*, when listening and trying to rectify the offensive conduct of one or some of their members. Literature suggests that in the pre-colonial Rwanda, before bringing a dispute before the *Mwami* (King), it had to be taken before *Gacaca*.¹³⁹ However, serious disputes such as conflicts between hierarchical chiefs and crimes like homicide were not heard by *Gacaca*. They were taken directly to the *Mwami*.¹⁴⁰ The elders in the community, “*Inyangamugayo*” (Men of integrity) served as *Gacaca* judges. They were laymen, respected by the community. The latter entirely got actively involved in the whole dispute resolution process. Generally, criminal sanctions resembled a civil settlement, such as compensation for the damage suffered. The sanction was meant to serve two objectives: First, to make the offender appreciate the gravity of the damage caused by his/her conduct to the victim and thus, to the community. Secondly, to reinstate the victims into their original state so that reintegration of, and reconciliation with the offender is facilitated.

During the colonial period, the Germans and the Belgians introduced a more formal state-centred legal system into Rwanda. As the Belgian colonial administration system began to replace the Rwandan traditional administration system, it also created tribunals for each administrative unit.¹⁴¹ After independence in 1960s, *Gacaca* reappeared in Rwanda, though not in its purely traditional form.

Colonization made original, traditional *Gacaca* to gradually disappear; its new shape after independence was closely affiliated with state structures.¹⁴² Despite the closer connection to state structures and the locus of political power, post-colonial *Gacaca* still maintained its core values and continued to exist alongside the state tribunal systems.¹⁴³ Just a few months after the 1994 genocide, the Minister of Justice suggested that Rwandans should as much as possible resort to *Gacaca* for amicable settlement of disputes so as to re-establish a culture of

¹³⁹ Garine, H ‘The *Gacaca* Tribunals for Trying Genocide Crimes and Rwanda’s Fair Trial Obligations under the International Covenant on Civil and Political Rights’ (2001) 7, 8.

¹⁴⁰ As above.

¹⁴¹ As above, 9.

¹⁴² Stef, V (n 131 above) 15.

¹⁴³ As above, 11.

confidence and trust among Rwandans.¹⁴⁴ As such, the evolution of *Gacaca* since independence paved the way for the innovative approach adopted by the government of Rwanda to try perpetrators of a very serious crime of genocide and other crimes against humanity.

4.2.2 Post-genocide *Gacaca*

The bench of a *Gacaca* court is composed of seven lay judges who have five deputies. The required quorum for a session is at least five of them. They are elected by the community not for their learning, but for their integrity and that is why they are not called *Abacamanza* which is the Kinyarwanda name for judges, but are called *Inyangamugayo* (persons of integrity) as already mentioned. Every resident of a village with the jurisdiction of a *Gacaca* court who is at least eighteen (18) of age is a member of *Gacaca* court's General Assembly and qualifies to elect the *Inyangamugayo*. But to be elected, one has to have at least 21 years of age. The General Assembly is a very important and strong organ of a *Gacaca* court. It is the one that sets the day, time and venue of a *Gacaca* court session. For a court session to begin there must be at least one hundred (100) members of the General Assembly. Regarding court procedure, after making sure that the quorum of the General Assembly and the bench is attained, the president of the court gives a summary of the matter before the court and gives the floor to the defendants and plaintiffs respectively to present their versions. Then witnesses for both parties and the General Assembly respectively take the floor. After everybody has said what they know about the case at hand, the accused is again asked to react to all that have been said against them. Then the bench retires for deliberations. The decision of the court is either unanimous or the opinion of the majority.

Genocide suspects fall into four categories. Category one includes among others, the persons whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors and ringleaders of the genocide or crimes against humanity. Category two includes suspects whose criminal acts place among killers or those who committed acts of serious attacks against others, causing death. Category three is for authors of serious attacks without intending to cause death and category four is comprised of persons who only committed offences against property.¹⁴⁵ *Gacaca* courts are supposed to hear Categories two to four.¹⁴⁶

¹⁴⁴ As above, 13.

¹⁴⁵ See article 51 of *Gacaca* Law (n 14 above).

¹⁴⁶ Art. 2 (1) of *Gacaca* Law (n 15 above) stipulates: "The persons...prosecuted for their participation in criminal acts that put them in categories 2 to 4...are answerable to *Gacaca* Jurisdictions...".

The new *Gacaca* adopts some of the core values of the traditional *Gacaca* proceedings. For example, it aims to increase community participation and to promote reconciliation and harmony. The two however differ in some aspects. For instance, whereas traditional *Gacaca* derived its authority from the common understanding of the community, the new plan was set up by the State. Additionally, while traditional *Gacaca* did not handle serious criminal matters and could not impose prison sentences, the new plan deals with genocide and may pronounce prison sentences. The new *Gacaca* is thus a hybrid of Rwandan Traditional Justice System and the Western model of criminal justice. In as far as rendering judgments, however, the two are similar because in both cases, Judgments are made by consensus or in case the members of the bench disagree, the majority opinion suffices.¹⁴⁷

4.3 Evaluation of *Gacaca* courts in light of Rwanda's due process obligations

Rwanda is a state party to both the ICCPR and the African Charter. The Rwandan government must therefore comply with fair trial guarantees as required by these instruments. Since the inception of *Gacaca* courts, some human rights organisations have suggested that the Rwandan government has preferred expediency of trials and reconciliation to its international fair trial obligations.¹⁴⁸

This section examines the *Gacaca* courts in light of Rwanda's international obligations to ensure that genocide suspects receive a fair trial. It also examines whether it is necessary to follow the 'word' of international fair trial standards if a special mechanism like *Gacaca* courts is to achieve its noble aims: justice and reconciliation. Compliance with the following components of the right to a fair trial is examined: The right to a fair and public hearing by a competent, independent, and impartial tribunal established by law and the right to legal representation. We examine only these two components of the right to a fair trial because, in a country that is just coming out of a very brutal genocide, the community is likely to be divided and therefore community courts like *Gacaca* can be thought to be subjective (partial) and thus likely to victimise those suspected to have committed atrocities. Thus perceive, suspects need legal representation.

¹⁴⁷ Article 24 (1) of *Gacaca* Law states: "The Seat for a *Gacaca* Court shall decide by consensus, and failing this, it decides with the absolute majority of its members".

¹⁴⁸ Sarkin, J 'The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts in Dealing with the Genocide' (2001) 45(2) *Journal of African Law* 143.

4.3.1 Public hearing by a competent, independent and impartial tribunal

The requirement that an accused person be tried by a fair, independent, and impartial tribunal is one of the constituting elements of the right to a fair trial. This requirement has in itself an intangible element which the Human Rights Committee has tried to elaborate. It stated that qualifications for judges, the manner in which they are appointed, and the actual independence of the judiciary from the executive and legislative branches, all play a role in whether tribunals succeed at being fair, independent, and impartial.¹⁴⁹

Also, in its Views upon the communication submitted by Olo Bahamonde against Equatorial Guinea¹⁵⁰, the Human Rights Committee stated that:

...a situation where the functions and the competence of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.¹⁵¹

In line with General Comment 13 of the Human Rights Committee, critics have raised the question as to whether *Gacaca* courts can be fair and impartial considering the general lack of legal training by the judges. However, the current situation in Rwanda is that even many judges in its Western style courts have only a few months' of legal training and thus the lack of competence required by General Comment 13 is not particular to *Gacaca* judges. Another concern often raised is whether the *Gacaca* courts will be able to function independently. Generally, *Gacaca* Law complies with the Views adopted by the Human Rights Committee in *Bahamonde v. Equatorial Guinea*.¹⁵² The Law draws clear distinctions between *Gacaca* courts and both the executive and legislative branches of the government. According to Article 11, individuals who occupy any administrative or executive positions at any level of local or national administration; members of security forces; professional judges or who sit on the governing body of any political party; religious order or non-governmental organization cannot be elected to the *Gacaca* Bench. As to the public nature of the hearings, *Gacaca* courts guarantee this right much better than Western style courts because the whole village is supposed not only to attend the hearing, but also to state what they know about the accused person's conduct during the genocide.

¹⁴⁹ General Comment 13 (n 123 above) 3.

¹⁵⁰ *Human Rights Committee, Bahamonde v. Equatorial Guinea, Comm. No 468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993) Para. 9.2*

¹⁵¹ As above, 9.4.

¹⁵² Garine, H (n 139 above) 38-39. In this case, the Committee held that where the executive arm of the government intervenes in Judicial matters, the latter cannot render impartial judgments.

4.3.2 The right to legal representation

Article 14 of the ICCPR stipulates that anyone facing criminal charges has the right to defend himself in person or through legal assistance of his own choosing. The Law establishing *Gacaca* courts does not provide for legal representation. Legal professionals are instead expressly prohibited from applying their legal expertise in *Gacaca* proceedings. Logically, therefore, allowing professional lawyers to represent the accused persons in *Gacaca* proceedings would create professional imbalance since the bench is composed of the laymen.

The European Court on Human Rights in *Pham Hoang v. France* found that the defendant had a right to legal counsel because he did not have the sufficient training necessary to enable him to develop and present arguments to the court.¹⁵³ This finding suggests, we submit, that in a situation where the judges are laymen and court procedures do not involve legal technicalities and arguments which is the case with *Gacaca*, legal representation is irrelevant.

Also, we submit that the right to consult with counsel in Article 14(3) should be seen as pertaining to the need for procedural equality for both the prosecution and the defence. Where both parties to a case are not represented, there is no unfairness. Finally, it is arguable that the play of argument and counter-argument of witness and counter-witness by the *Gacaca* Assembly amounts to representation. It is even better than what the Western style justice system can offer because support from community members who know all the circumstances of the case is likely to be based on more concrete arguments than those of Lawyers who may not be able to grasp all such circumstances no matter how their clients might have recounted them.

4.3.3 Balancing the right to a fair trial with the right to truth and to an effective remedy

The truth is important in post-genocide Rwanda for several reasons. Firstly, the truth alleviates the suffering of the surviving victims. Secondly, it vindicates the memory or status of the deceased family members. Thirdly, it encourages the state to confront its dark past and, through it, seek reform.

¹⁵³ *Pham Hoang*, 16 *Eur. Ct. H.R. at Para. 40*. In this case, the court determined that the challenges Mr. Pham Hoang intended to raise on appeal were sufficiently complex and that he did not have the legal training essential to enable him to present and develop the appropriate arguments on such complex issues himself.

Each of these advantages imposes substantive and procedural requirements to arrive at the truth. As a substantive matter, genocide survivors need to learn: What happened, why the crime was committed and who committed the crime. Knowing what happened is especially important when the direct victim did not survive. From practical experience, we submit that the failure by the survivors/family members of the direct victim to know what happened to their loved ones is more painful than the truth itself, even when what they learn is gruesome. *Gacaca* courts are a solution to this problem. In cases of mass killings like the Rwandan genocide, the next of kin do not know where the remains of their family members are and how they died. Some times, family members know how the direct victims died but may not know where they are buried or, if buried in mass graves, which of the remains are theirs.¹⁵⁴ This is genocide survivors are always engaged in emotionally difficult search practices including, for example, exhumations to learn these details. Being able to see the direct victims' remains and confirming their deaths is crucial in allowing surviving family members to grieve. So importantly, *Gacaca* is a way for survivors to feel that their own dignity is restored, when perpetrators publicly acknowledge their responsibility and ask for forgiveness.

The procedural requirement on the other hand requires State's commitment to institutional reform.¹⁵⁵ This institutional reform, in a country that needs reconciliation for social continuation, may ensure that accountability is pursued through a dynamic criminal process like *Gacaca*. To motivate the offenders to reveal their role in the genocide, *Gacaca* procedure provides for reduction of sentences for those who confess and ask for forgiveness. The confession procedure may be said to violate the fundamental precept of presumption of innocence. Though confession is voluntary, reduction of sentences in favour of those who confess may be said to amount to moral coercion. To some one who clearly understands the complexity of Rwandan situation however, there is no doubt that this interpretation would be too simplistic. After all, genocide victims may also have a case if they argued that the procedure amounts to violation of their right to effective remedy by preferring confessions to accountability.

¹⁵⁴ See generally for example, *Durand & Ugarte v. Peru, Case No. 68, Inter-Am. C.H.R., OEA/ser. C, (2000) 98*. In this case, there is a summary of the testimony of several doctors involved in the identification of the remains of the dead after a massacre and it clearly explains the importance of such an information to the family members of the victims.

¹⁵⁵ Alex, B 'A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission' (2000) 286.

Gacaca courts do not conform to some of the requirements for a due process, but it would be a biased judgment to assert that only the accused persons' rights are affected by this mechanism. Seeking effective remedies for human rights abuses is itself a right, one that is essential to safeguarding all others. *Gacaca* procedure does not ensure the right of the victims to an effective remedy than it deviates from the word of the fair trial requirements for the accused. Clearly, the complexity of the post-genocide situation in Rwanda requires the State and its entire citizens to adopt and adjust to special measures to ensure continuation of Rwandan society.

From the foregoing, and particularly the fact that there are many thousands of individuals still awaiting trial and millions of people still awaiting some form of justice, the only hope is a mechanism of justice that is less time-consuming; operates in many places simultaneously and does not depend on extensive training for court personnel including lawyers and judges. Rwandans and the world want to see justice done and *Gacaca* appears the best alternative to centuries of prosecutions by Western style courts. We are not suggesting that situations like the one prevailing in Rwanda have to completely waive States' international obligations to guarantee the right to a fair trial to the accused persons. However, peculiar situations can justify peculiar measures especially in countries in transition where reconstruction of social fabric is an absolute way forward.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This paper has discussed the indigenous African justice criminal justice systems in general and evaluated their compliance with fair trial standards in Rwanda and South Africa in particular. It indicates how critics that consider indigenous African criminal justice systems as being too traditional to protect and promote human rights are too simplistic. Simplistic in that they are bound up in the traditional-modern dichotomy in which traditional is equated with backward and modern with advanced. It has also been suggested that indigenous African criminal justice systems should not be measured based on Western conception of justice and fairness.

This is due to among other reasons, that the two systems are based on different philosophical foundations. The Western style is characterised by retribution, procedural rigidities and the need to establish guilt and innocence. The indigenous African criminal justice systems on the other hand aim at rehabilitation and reintegration of offenders as well reconciling them to safeguard or promote social cohesion. It has also been explained how indigenous African courts are grounded in tradition and culture of Africans and requiring them to proceed like Western style courts in hearing and deciding on cases amounts to encroaching on the right to culture. The imposition of the Western conception of the notions of a fair trial in the indigenous African criminal justice systems would be irrelevant, unnecessary and against the interests of justice since they, like the Western style courts would become alien and inaccessible to many; especially the rural, poor, communalistic and illiterate communities.

Indigenous African criminal justice systems generally conform to the spirit of human rights law in relation to a fair trial. For instance, the promptness with which cases are handled and resolved amounts to respecting the right of the accused to be tried without undue delay. The right to have access to courts of law is respected in that courts are in the neighbourhoods of the parties, they use local languages and customary procedures understood by all and conducted by people who are socially important to both litigants. Regarding confessions in indigenous African criminal justice systems that have labelled as constituting an incentive to self-incrimination, the voluntary nature of the process (no state coercion); the central role played by communities and litigants themselves aiming at addressing the wrongs; the taking of decisions by compromise rather than strict rules of law reflect the aim of the court and the communities to resolve disputes and ensure justice. Therefore, the courts and communities

could, and do not where they exist, perpetuate injustice by forcing innocent people to confess guilt.

In the Rwandan case, it is after realizing that the Western judicial system was woefully inadequate to handle post-genocide situation that the government returned to the country's traditional dispute resolution mechanism. It addresses the caseload of genocide suspects; pursues restorative justice; rebuilds a sense of community and reconciles the country. *Gacaca* courts are the last hope for restoration of Rwandan social fabric torn because it locates the trial genocide suspects within the communities in which the offences were committed.

On a whole, indigenous African criminal justice systems do not conform to the letter of international human rights law in as regards its provisions on the right to a fair trial. Indigenous African courts, however, have the potential to embody its spirit. Justice is much better rendered without some of the requirements like the right to appeal and the right to legal representation. The inclusive nature of the proceedings where by every community member participates with a spirit of fighting injustice compensates for appeal and legal representation in Western style systems. A single or a few centralised judges are bound to make mistakes or be guided by selfish interests; thus the need for appeal and legal representation.

5.2 Recommendations

1. Indigenous African criminal justice systems should be recognised and encouraged. Indigenous African courts should be given the status and respect of courts of law and allowed to operate alongside.
2. Due to cross-cultural and cross racial legal disputes, African countries need to provide the choice of law. This requires formal recognition of indigenous African laws in States' Constitutions.
3. The jurisdiction of indigenous African courts should not be heavily restricted. However, cases involving State security for which these courts cannot easily get evidence or require confidentiality should be under exclusive jurisdiction of Western style courts.
4. Fair trial requirements as set out in international human rights instruments which are irrelevant in the proceedings of indigenous African criminal justice, and absence of which does not compromise interest of justice in view of those who opt for such courts should not be imposed.

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