# RECONCILING CUSTOMARY LAW AND MODERN GOVERNANCE: THE DEVELOPMENTAL ROLE OF AFRICAN TRADITIONAL SYSTEMS

*CHARLES MANGA FOMBAD*[*] [**]

**Abstract**

Before the advent of colonialism, African societies were self-contained and self-governing within the framework of traditional systems that ensured development, peace and stability. During the colonial period, these were distorted and relegated to an inferior and informal status, whilst Western laws and systems of governance were imposed to facilitate the essentially selfish, exploitative mission of the colonial powers. Independence in the 1960s offered an opportunity for African leaders to restore these systems and break the inherited patterns of discrimination and marginalisation to which they had been subjected. Unfortunately, many of the new leaders saw traditional systems either as archaic or as dangerous bastions of rival political power that needed to be dismantled or have their authority limited. In spite of this antipathy to traditional systems, the reality today is that the majority of Africans live in rural areas and are still subject to traditional justice systems and governance institutions. The post-1990 wave of democratic revival raised fresh hopes that the important governance role of African traditional systems would be restored in the new constitutional dispensations that emerged. This paper looks at some of the challenges that are faced in trying to reconcile a multiplicity of sometimes contradictory traditional systems with the demands of constitutionalism and democracy in a manner that can help them to play a greater role in fostering national development. The main argument is that African traditional systems have the potential to contribute positively to development but, equally so, the potential to be exploited as a means to oppress the people and perpetuate autocratic rule, thereby promoting underdevelopment and poverty. The paper suggests that, to ensure that the former rather than the latter prevails, what is necessary is a profound rethinking and reorientation of national policies and regulation of traditional systems vis-à-vis the modern state.

## A. INTRODUCTION

Africa stands at a crossroads as it grapples with the complex co-existence of and interaction between its formal, modern system of governance and courts, on the one hand, and, on the other, its largely informal traditional systems, consisting of traditional justice systems and traditional governance institutions. Although pre-colonial Africa had its challenges of frequent conflicts over resources, territory and power, before the advent of colonialism, many communities were self-contained and self-governing within the framework of traditional

[*] Professor of comparative African constitutional law,
Director, Institute for Comparative and International Law in Africa, Faculty of Law
University of Pretoria, South Africa.

[**] I thank the anonymous reviewer for her/his careful reading of the manuscript and the insightful comments and suggestions that have certainly improved on the quality of the paper.

systems that promoted some level of development, peace and stability.[1] During the colonial era, these systems were distorted and relegated to an inferior and informal status, whilst Western laws and systems of governance were imposed to facilitate the essentially selfish, exploitative mission of the colonial powers.[2] For example, in Ethiopia, Professor David, the drafter of the Ethiopian Civil Code, recommended that customary law be abolished because it varied too much from area to area, was unstable, and, in his opinion, often lacked true juridical characteristics.[3] He, like various European scholars, argued that it impeded development and was responsible for the undeveloped nature of African society.[4]

Independence in the 1960s offered an opportunity for African leaders to revive African traditional systems and break the inherited patterns of discrimination and marginalisation to which these had been exposed. In many African countries, however, the new leaders saw traditional systems either as archaic or as dangerous bastions of rival political power that needed to be dismantled [5] or have their authority limited. In spite of this antipathy to traditional systems, the reality today is that many Africans, especially those who live in rural areas, are still subject to traditional justice systems and governance institutions.[6] The post-1990 wave of democratic revival raised fresh hopes that the important governance role of African traditional systems would be restored in the new constitutional dispensations that emerged.

Although African traditional systems have continued to metamorphose and are different from what they were both before and directly after the colonial era, their developmental potential, especially in the light of the modern imperatives of constitutionalism and democracy, has been largely understudied and probably misunderstood. For example, whilst there are some who treat traditional systems in a deferential, even reverential, manner, others consider them as a relic of the past and an obstacle to development.[7] Indeed, numerous scholarly works over the years have pointed to the imminent demise of African traditional systems, especially since

---

[1] See G B N Ayittey, *Indigenous African Institutions*, 2nd edn (2006); and I Kopytoff, Igor *The African Frontier: The Reproduction of Traditional African Societies* (1987).

[2] See, for example, A Seidman and R Seidman, "The Political Economy of Customary Law in the Former British Territories of Africa," (1984) 28(1 &2) *Journal of African Law 53*, where they point out that due to the use of English deeds forms, the formal "English" courts transformed West Africa customary land law from one which was adapted to the rotating tillage of annual food crops for subsistence, to one which was suited to the permanent tillage of tree crops for export. The authors note, for example, that Ghanaian customary law, which had made land inalienable by way of "interpretation", made land alienable in order to respond to the imperatives of capitalist production of export crops.

[3] See David, "La refonte du code civil dans les états africaines" (1962)72/692 *Révue de Droit des Pays d'Afrique* 352–364.

[4] T Verhelst, in his 1968 paper, "Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration," available at, https://escholarship.org/uc/item/33g2v27d, puts it thus: "A number of statesmen and legal scholars entertain a deliberately negative approach to customary law. Customs are viewed as hindrances to development and their replacement by modern legislation or modern common law, on western patterns, is urged as a prerequisite to economic and social development."

[5] The immediate post-independence period witnessed various attempts to abolish traditional institutions. See K Mengisteab, "Traditional Institutions of Governance in Africa", available at, https://oxfordre.com/politics/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1347; and Verhelst (n 4)

[6] The resilience of these traditions systems is discussed in section C below.

[7] In addition to Mengisteab, (n 5) and, United Nations Economic Commission for Africa (UNECA), "Relevance of African Traditional Institutions of Governance", available at https://hdl.handle.net/10855/3086.

the revival of constitutionalism and democratic governance in the 1990s.[8] The fact that these systems continue to co-exist with – and (as we shall we) complement and reinforce – the inherited Western systems of governance and justice is evidence not only of their resilience but, more importantly, their role in fostering the economic, social, and political development of the continent. This raises the question of how we can reconcile the diverse and sometimes contradictory nature of traditional systems with the demands of constitutionalism and democracy in a manner that could help them play a greater role in national development.

In order to appreciate the extent to which African traditional systems can contribute to national development, this paper proceeds, in section B, to examine the evolution of traditional systems and their types. These systems contribute to development in two ways. The first way, which is discussed in section C, is through the traditional justice system, which provides accessible and affordable access to justice, especially for those living in rural areas. The second, examined in section D, is through traditional governance institutions, which complement modern governance institutions. Section E discusses the challenges traditional systems face and their prospects for the future. The paper ends in section F with some concluding remarks. My argument is that African traditional systems have the potential to contribute positively to development but, equally so, the potential to be exploited as a means to oppress the people and perpetuate autocratic rule, thereby promoting underdevelopment and poverty. To ensure that the former rather than the latter prevails, what is necessary is a profound rethinking and reorientation of national policies and regulation of traditional systems vis-à-vis the modern state.

## B. THE EVOLUTION OF AFRICAN TRADITIONAL SYSTEMS

For the purposes of this discussion, "African traditional systems" refers to customary law and traditional justice systems, on the one hand, and African traditional governance institutions, on the other, both of which have evolved since the pre-colonial, colonial, and post-colonial period. This overview begins by examining the concept of customary law, after which it considers the different traditional governance systems that exist.

### 1. Conceptualising customary law

Although there is no debate about the fundamental changes that African traditional systems have undergone since the pre-colonial period, scholars have differing views on the nature and scope of these changes. This has given rise to two main issues: the first concerns the very concept of customary law, and the second, the impact of the changes the latter has undergone.

In spite of the fact that most authors have described customary law in differing ways, as have some of the national laws that try to define it,[9] there is broad agreement on its essential

[8] Some of the authors who made these predictions are discussed by C Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa", in J Fenrich, P Galizzi and T Higgins (eds.), *The Future of African Customary Law,* (2001), 31 at n 1–6.

[9] In South Africa, for example, the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 define customary law in similar terms as "the customs and usages traditionally observed among indigenous African peoples of South Africa which form part of the culture of those people".

features.[10] Customary law in a general sense refers to the customs and practices of a given community that regulate the social behaviour of members of that community: every member feels obliged to comply with customary law because it relates to their circumstances and challenges in life. As a normative order developed by communities themselves, customary law varies among communities, regions, and ethnicities over time and according to changing circumstances. Whilst African customary laws pre-date the colonial period, they have undergone change, with the most significant changes having occurred during both the colonial period and the time since then.

But it is the impact of changes since the colonial period, rather than the definition of customary law, that has generated controversy amongst some contemporary scholars. Two viewpoints are worth mentioning. The first is that of Raymond Atuguba, who has come up with what can be described as a seven-stage evolutionary theory of customary law.[11] He postulates that customary law started with what he refers to as "pristine customary law" and evolved "lineally" through "judicial customary law, "codified customary law", "statutorily instituted customary law", "complementary customary law", and "insular customary law", before ending with "declared customary law." The plausibility of this evolutionary theory is questionable, but it suffices to point out that it is difficult to understand how customary law has become so evolved today that we have only a "declared customary law" left over from pre-colonial "pristine customary law".

The second theory, put forward by two authors,[12] is that "indigenous laws are oral precolonial norms which people observe in their ancient forms, while customary laws are adaptations of precolonial norms to socioeconomic changes".[13] The premise is that the impact of colonial rule was so revolutionary that "many precolonial norms lost their indigenous flavour".[14]

According to the first school of thought, there has been an evolution from pristine customary law to declared customary law, and, according to the second, a transformation of the indigenous law of the pre-colonial era to the customary law today, but the major flaw of these evolutionary theories is their misunderstanding of the role of change. Whilst all laws are bound to change with time, one of the defining features of customary law is its flexible, dynamic nature, which ensures that it can adapt to and reflect the changing needs and desires of the community within which it operates. Such change on its own, regardless of how profound it is, cannot transform customary law into something as radically different as what these authors have suggested.

---

[10] See generally, G Woodman, "A Survey of Customary Laws in Africa in Search of Lessons for the Future," in Fenrich et al (n 8) 9–30

[11] See R Atuguba, "Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa," available at https://intergentes.com/seven-phases-in-the-evolution-of-customary-law-in-sub-saharan-africa/.

[12] See A Diala and B Kangwa, "Rethinking the Interface Between Customary Law and Constitutionalism in Sub-Saharan Africa,"(2019) 52(1) *De Jure Law Journal* 189–206.

[13] Diala and Kangwa 197.

[14] Diala and Kangwa 200.

Nevertheless, the fundamental changes pre-colonial customary law underwent in its transition into what we have now do warrant some distinction. The most widely accepted and analytically plausible distinction is that between what is referred to, on the one hand, as official customary law (or lawyers' customary law or state customary law), and, on the other, living customary law.[15] "Official customary law" refers to the customary law that has emerged from the courts and been refined and recast by state institutions. It appears in the form of codes of customary law, legislation, court precedents, restatements of customary law, academic texts, and other written sources. By contrast, "living customary law" refers to the unwritten practices and customs observed by communities and invested with binding authority by all. However, such "living customary law" becomes "official customary law" the moment it is recognised and enforced in a court.[16]

There are certainly differences between the two types. For example, living customary law is relatively flexible and can be changed by the community as the need arises, whereas official customary law can be changed only by way of the complex formal processes reserved for this process. Although it must be acknowledged that the dividing line between official and living customary law may be difficult to discern with exactitude, the distinction probably offers the best guide to understanding how customary law has changed without falling into the fallacy of positing a clear-cut evolution from one form of customary law into another form.

Closely related to the issue of how the substantive content of customary law has evolved is the issue of how it is enforced, a matter discussed later. For now, we look at the types of traditional institutions of governance that have contributed to the development of customary law.

## 2. Typologies of African traditional institutions of governance

To aid its exploitative mission, colonial occupation sought to remake African societies, in the process not only tampering with the substantive content of customary law but also restructuring traditional institutions of governance. For example, in certain countries, the colonial authorities invented chiefs, thereby imposing a centralised system of governance on decentralised systems, such as those among the Ibos of Eastern Nigeria and various communities in Kenya.[17] In some such centralised systems, colonialists distorted the relationship of traditional leaders to the community by making them accountable to the colonial state rather than their communities.

Be that as it may, the nature and structure of traditional institutions and the governance role of traditional rulers within these institutions has changed fundamentally from what it was before and during the colonial period as well as after independence. Indeed, after the immediate post-independence period, the most dramatic changes were those during the post-1990 wave of democratisation and the constitutional reforms and institution-building that accompanied it.

In spite of these changes, however, it can be said that although African traditional institutions of governance are diverse, their structure and authority lie, overall, on a continuum

[15] For further discussion, see Woodman (n 10); Himonga (n 8) 9–57; and A Allott, "What Is to be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950," 1–2 *Journal of African Law* (1984) 56–58.

[16] See C Rautenbach, "Oral Law in Litigation in South Africa: An Evidential Nightmare?"(2017)20 *Potchefstroom Electronic Law Journal* 1-25.

[17] For a full discussion, see Mengisteab (n 5) 2–6.

between two poles.[18] At the one end is the centralised system where the traditional leader exercised nearly absolute power; at the other, the decentralised, consensus-based system led by a council of elders with fairly limited powers. Most parts of pre-colonial Africa had highly decentralised governance systems in which law-making, social control, and the allocation of resources were carried out by village groupings or communities. Consensual decision-making in a manner that varied from one community to another was the main governing principle. Considerable effort was always taken to accommodate the wishes and interests of various members of society. This approach was adopted in settling disputes by trying to narrow differences through negotiations in a manner which ensures that there is no winner or loser.

By the same token, there were also centralised traditional governance systems in Africa, with some ruled by kings and monarchs and still in existence today. The best-known examples are King Mswati of Eswatini (who is an absolute monarch), as well as King Mohammed VI of Morocco and King Letsie III of Lesotho, both of whom are constitutional monarchs. Besides the kings and monarchs, numerous chiefs and other traditional leaders operate in centralised systems. In addition to extreme cases where there is an absolute monarch, such as King Mswati, the mechanism for accountability by traditional leaders in such systems is weak compared to that in decentralised systems, given that such leaders often combine legislative, executive and judicial powers. The degree of centralisation and concentration of powers in the hands of the leader vary however from one community to another.

Whilst classifying traditional governance institutions as centralised and decentralised systems is useful for analytical purposes, changes over the last four decades have led to the emergence of numerous sub-types.[19] Along the centralised-decentralised spectrum, scholars have identified several emergent types of leadership structure.[20] Yet regardless of how we wish to describe or categorise customary law today, one thing is certain: some traditional institutions, such as those for resolving disputes, are thriving, and have the potential to contribute to national development. In spite of rapid urbanisation, especially in the last five years, the majority of Africans still live in rural areas and lead their lives mainly (even if not entirely) under the influence of traditional systems of governance and conflict resolution. It is true that the numbers are much reduced: for example, a 2022 survey showed that only about 57.63% of the population in sub-Saharan Africa live in the rural areas, compared to 85.38% who did so in 1960.[21]

The continued resiliency, legitimacy, and relevance of traditional systems in the socio-cultural, economic and political lives of Africans, particularly the not-so insignificant majority who live in rural areas, manifests itself in at least two key areas. The first is through customary justice systems, to which we now turn, and the second is in local governance (discussed later).

---

[18] Mengisteab (n 5) 4.

[19] See generally United Nations Economic Commission for Africa (UNECA) (2007) (n 7) 2–5.

[20] See Mengisteab (n 5) 5–6, who lists eight types of leadership structures: monarchs (absolute and constitutional); paramount chiefs with weak systems of accountability; paramount chiefs; chiefs with limited powers; chiefs selected by the community; invented chiefs and state-paid chiefs; non-hereditary selected leaders with "constitutional" power; and councils of elders.

[21] See "Sub-Saharan Africa Rural Population 1960–2024", available at https://www.macrotrends.net/global-metrics/countries/SSF/subsaharan-africa-/rural-population#google_vignette.

## C. DEVELOPMENTAL IMPACT OF TRADITIONAL DISPUTE RESOLUTION

As noted, some of the early post-independence leaders tried to abolish customary justice systems but quickly realised this was a mistake. These systems reflect, and are founded upon, African traditions, beliefs, customs, practices, religions and values. There is no doubt that the endurance of this system of justice in its diverse forms has contributed in no small measure to the continent's social, economic, and political development. This, as shown below, is strongly evident in the fact that, in rural areas, the vast majority of people prefer to take their disputes to customary courts.

The fact is that in many African countries, particularly those with vast territories, such as the Democratic Republic of the Congo, Sudan, Chad, Niger, Angola, Mali, and South Sudan, the traditional justice system has filled the gap left by the scarcity or absence of modern state courts in most rural areas. For example, in war-torn South Sudan, it is estimated that between 55% and 90% of cases that reach the courts are "decided by the underrated yet critical customary courts staffed by chiefs".[22] It has been suggested that without customary courts, "lawlessness would reign in large swaths" of South Sudan.[23] In Sierra Leone and Uganda, it has been shown that the traditional justice system was the sole means available to resolve disputes in those countries during their prolonged periods of civil war and in the aftermath of reconstruction.[24]

But customary courts remain popular not only during periods of civil conflict or when societies are under the threat of lawlessness. Even in Botswana, regarded as one of the most stable and democratic countries on the continent, the customary courts "handle approximately 80% of criminal cases and 90% of civil cases in the country".[25] Matthew Winter and Jeffrey Conroy-Krutzh show in a study that an overwhelming majority of the people prefer to have their land disputes settled by customary courts.[26] While the suggestion that these courts resolve disputes involving up to 90% of the population is an exaggeration, the point nevertheless underscores the importance of these courts.[27]

---

[22] See G Musila, "The Rule of Law and the Role of Customary Courts in Stabilizing South Sudan", 29 May 2018, available at https://reliefweb.int/report/south-sudan/rule-law-and-role-customary-courts-stabilizing-south-sudan. 2.

[23] Musila (n 22).

[24] See M Kane, Oloka-Onyango and A Tejan-Cole, "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor", available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://landwise-production.s3.amazonaws.com/2022/03/Kane_Reassessing-customary-law-systems-as-a-vehicle-for-providing-equitable-access-to-justice-for-the-poor_2005-1.pdf.

[25] See K Sharma, "Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana", available at file:///C:/Users/u04380886/Downloads/11-wb_traditional_structures_botswana%20(2).pdf. 7.

[26] See M S Wintersa and J Conroy-Krutzb, "Preferences for traditional and formal sector justice institutions to address land disputes in rural Mali", (2021)*World Development*, available at https://doi.org/10.1016/j.worlddev.2021.105452 and; F Kariuki, "African Traditional Justice Systems", available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf 2–3.

[27] See Mengisteab (n 5) 9

The endurance and growing importance of customary courts is based largely on the advantages they offer litigants. The key ones are as follows:

- They are inexpensive, mainly because lawyers are not allowed to appear before them.
- They are easily accessible in that litigants do not have to travel great distances to attend them. By contrast, modern courts are located mostly in urban areas.
- Litigants are usually familiar with the language of the proceedings. The latter are simple and easy to understand, unlike the complex and formal ones of modern courts.
- There are no backlogs, so cases are dealt with expeditiously.
- Litigants are likely to be more familiar with the customary law which is applied than with modern law, much of which was inherited from the colonial era and is seldom updated timeously so as to reflect the circumstances in which citizens lead their lives.
- There is often a sense of ownership of the customary law which is applied.
- Because it is developed at grass-roots level, customary law has survived and helped the people even at times when the formal structures of state have broken down or been absent.
- Disputes are settled mainly on the basis of restorative justice and compromise. This involves negotiation and mediation to rebuild broken relationships and restore harmony in the community, an approach fundamentally different to the punitive and adversarial nature of modern justice systems.
- With its flexibility, customary law changes with time and as circumstances dictate.[28]

Despite its advantages, the customary law justice system (as we shall see) has a number of weaknesses that would need to be addressed to enhance its effectiveness.

Besides the growing importance of customary courts as both an alternative and complementary part of the courts in the legal system, substantive principles of customary law are becoming more significant than ever before as sources of law. This explains the distinction between living customary law (which is what is regularly enforced by the customary courts) and official, state, or judges' customary law. The principles of customary law were initially enforced by customary courts in some circumscribed areas, such as family life, succession, and the case of certain land ownership and use rights, as an alternative to the received state laws imposed in the colonial period. However, in many of these areas, customary law is today provided in the form of official customary law, and not merely as an alternative or complement to modern law: in certain countries and on certain issues, customary-law principles have become the dominant law.[29] In Botswana, for example, there are statutes which combine both

[28] See generally Kane et al. (n 24).
[29] See Atuguba (n 11) 26–30.

customary law and received law principles.[30] In Somalia, with the support of communal leaders, the traditional justice system and some of its principles have been reformed successfully so as to incorporate formal legal rules.[31] The overall effect of developments like these has been to enrich the sources of law and strengthen existing dispute resolution mechanisms.

Perhaps one of the most remarkable features of the traditional justice system has been how it has coped with its tension with modern legal principles, particularly human rights principles. The compatibility of customary law with modern human rights standards has been widely debated and has a long history. It is not a debate that has been settled, nor is it one that we can go into in this discussion. However, from the perspective of the evolution of customary law and its contribution to contemporary developments, particularly legal, social and economic developments, two trends are worth noting.

First, during the colonial period, the recognition and enforcement of customary law, especially by the colonial courts, was subject to the so-called repugnancy test in anglophone Africa. This allowed the enforcement of only those customary laws that were not repugnant to "natural justice, equity and good conscience", or incompatible, be it directly or indirectly or by necessary implication, with any written law in force. Variants of this repugnancy test were found in many pieces of legislation. In francophone Africa, where the French assimilationist approach was more aggressive than that in anglophone Africa, customary laws were allowed to be enforced only if they were not "contrary to the principles of French civilisation"[32] or "contrary to public order" (*ordre public*). These were vague concepts which, whilst they did help to eliminate many obnoxious customary law rules,[33] were sometimes applied arbitrarily to further the exploitative agenda of the colonialists. This helped eradicate many of the undeniably barbaric aspects of customary law, but it still left intact many practices, such as discrimination against women and youths, in various spheres of social and economic life. Until the 1990s, although many African constitutions and/or laws retained the repugnancy test in one form or another, discriminatory practices were not prohibited.[34]

---

[30] See Sharma (n 25) at 4–5, where he lists a number of statutory provisions that incorporate both customary law principles and common law principles, such as the Adoption of Children Act, Local Police Act, and Succession Act.

[31] See A Ripple, "Increasing Equitable Access to Justice in African Nations: Creating Cohesion Between Customary and Formal Legal Systems", available at https://dt-global.com/blog/access-justice/ ..

[32] The crux of the French policy of assimilation and civilisation was that it sought not only to eliminate differences through a policy of cultural and (sometimes) political assimilation, but also to eradicate all African traditional values, cultures, and identities. See E Saada, "Entre 'Assimilation' et 'Décivilisation': L'imitation et le Projet Colonial Républicain,"(2005) *Anthropologie and Sciences Humaine*s 19–20; M Mamdani, *Define and Rule: Native as Political Identity* (2012) 1–2.

[33] There are numerous instances in the literature where such customary laws were invalidated, and rightly so too. For example, in *R v Ugochima*, the custom among the Ibo in Nigeria of killing or throwing twins away with their mother, based on the popular belief that twins were an ill omen for the communities in which they were born, was outlawed. See D Asiedu-Akrofi, "Judicial Recognition and Adoption of Customary Law in Nigeria," (1989) 37(3) *American Journal of Comparative Law* 582; E A Taiwo, "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions – Lessons for Nigeria," (2009) 34(1) *Journal for Juridical Science* 89–115.

[34] For example, section 15 of the 1966 Constitution of Botswana prohibits discrimination on the grounds of "race, tribe, place of origin, political opinions, colour or creed", but subsection 4 expressly states that this prohibition shall not apply to customary matters such as adoption, marriage, divorce, and devolution of property on death.

Secondly, since the wave of making and remaking constitutions that began in the 1990s, many constitutions have made fundamental changes that have ushered in a new dispensation for traditional systems in most African countries.[35] In a number of countries, this has affected the content of customary law as well as the procedures before customary courts. The fact that these constitutions recognise and entrench in different ways both customary laws systems and traditional governance institutions underscores their importance in contemporary development. The depth of constitutional entrenchment varies from one constitution to another. For example, in recognising freedom of religion, belief and opinion, section 15(3)(a) of the South African Constitution of 1996 states that this does not prevent legislation recognising "marriages concluded under *any tradition*, or a system … of … *personal* or family law; or *systems of personal* and family law *under any tradition* …" (emphases added). Section 39(2) obliges the courts, "when interpreting any legislation *and when developing the common law or customary law*…[to] promote the spirit, purport and objects of the Bill of Rights" (emphases added).

Only a few African constitutions subject the enforcement of customary law to the imperatives of the bill of rights and in this way try to ensure that, at best, customary law conforms to contemporary human rights standards.[36] Several cases have been decided by the superior courts of Kenya and South Africa in which living customary law has been interpreted and applied in a manner consistent with the bill of rights and human rights standards in general.[37] The present requirement that customary law is recognised and enforced only when it is consistent with, for example, the "spirit, purport and objects" of the bill of rights or the values of the constitution as a whole appear to be a sanitised modern version of the repugnancy test. It may be seen as a slippery slope towards disguising and passing some constitutional values as customary law. However, the reality is that customary law has never been static: regular adjustments, adaptation, and changes to enable it to reflect the contemporary mores of the society have been its main strength. The adjustments made to enable it meet contemporary human rights standards are part of the continuous process of change which is inherent to customary law. The changing nature of customary justice systems is also reflected in the traditional institutions that played a role not only in sustaining them but also in contributing to governance in general.

## D. THE ROLE OF TRADITIONAL INSTITUTIONS IN ENHANCING LOCAL GOVERNANCE

African traditional institutions have contributed to what has been described as Africa's "silent revolution" of decentralisation.[38] This is as a result of the efforts made in the post-1990 constitutions to bring government closer to the people in order to provide better prospects for

[35] It is worth pointing out that, with the exception of Botswana and Mauritius (which still operate under their 1966 and 1968 independence constitutions, respectively), most of these changes have been in anglophone Africa. Few francophone and lusophone African constitutions have effected similar changes.

[36] See, for example, F Kariuki, "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems", available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://su-plus.strathmore.edu/server/api/core/bitstreams/198547ba-0b59-4162-8c2f-d3c3eed189a8/content.

[37] See Kariuku (n 36); and Himonga (n 8). 41-50.

[38] See C M Fombad, "Constitutional Entrenchment of Decentralization in Africa: An Overview of Trends and Tendencies," (2018) 62(2) *Journal of African Law* 175–199.

accountable and responsive governance, especially at the local level.[39] Traditional leaders of varying ranks, as well as, to some extent, community leaders, form an integral part of local governance, particularly at the grass-roots level.

A wide variety of traditional forms and institutions of governance co-exist, visibly or "invisibly", alongside modern institutions of governance. Their pervasive existence throughout Africa is not in doubt, making them an important instance of the phenomenon of the "invisible" constitution at work in Africa.[40] However, the extent of such constitutional entrenchment varies from one country to another. Analytically, one can make the distinction between high, moderate and low levels of decentralisation of traditional institutions in these constitutions. From this perspective, decentralisation is high where there is effective devolution of powers, and low where there is some deconcentration of powers or a mere delegation of powers. It is moderate if there is a partial devolution of powers combined with some deconcentration of powers.[41]

A high level of such decentralisation is found in the constitutions of Ghana, Lesotho, Uganda, Zambia, and Zimbabwe.[42] The Ghanaian Constitution, for example, contains provisions which define the institution of chieftaincy, provide for the creation of a Regional and a National House of Chiefs, and specify what their functions are. Whilst chiefs are barred from taking part in active politics, the Constitution limits itself to conferring some limited legislative functions to both the Regional and National House of Chiefs.[43] Basically, they play a merely advisory role, especially in dealing with legislation that affects the traditional justice system, traditional governance institutions, and related matters. A second category of constitutions also contains provisions dealing with traditional institutions, but these are often less detailed than those in the preceding group.[44]

The third category, to which the overwhelming majority of African constitutions belong, makes either obscure reference to traditional institutions[45] or none at all. The primary reason for the non-constitutionalisation of the administrative role of traditional institutions within Africa's modern decentralisation systems lies in the difficulty of defining what precise functions these institutions are to play. For example, unlike in Nigeria's previous constitutions, its Constitution of 1999 is silent on the role of traditional institutions owing to disagreement on what approach to take. The South African 1996 Constitution, in its sections 211–212,

[39] C M Fombad (n 38).
[40] On the invisible constitution, see L Tribe, *The invisible constitution* (2008).
[41] It is important to point out here that because the focus is on the constitutional position of these traditional institutions in the constitution, it may well be that in spite of a low or moderate level of constitutional entrenchment, ordinary legislation may provide for a high level of decentralisation of traditional institutions. An example is Botswana. For detail, see Sharma (n 25).
[42] See articles 242(d) and 270–277 of the Ghanaian 1992 Constitution; sections 44–53, 92 and 103–104 of the Lesotho Constitution of 1993; article 246 of the Ugandan Constitution of 1995; articles 164–172 of the Zambian Constitution of 2016; and sections 280–287 of the 2013 Zimbabwe Constitution.
[43] See the provisions cited above.
[44] See, for example, articles 213 and 223–224 of the Chadian Constitution of 1996; article 207 of the DRC Constitution of 2006; article 118 of the Mozambican Constitution of 2004; article 102(5) of the Namibian Constitution of 1990; article 166–167 of the Interim Constitution of South Sudan of 2011; sections 227–235 of the Swaziland Constitution of 2005; and article 143 of the Togolese Constitution of 1992.
[45] See, for example sections 58–59 of the Gambian Constitution of 1997 and section 146(4) of the Malawian Constitution of 1994.

recognises the role of traditional institutions and traditional leaders, and mandates the legislature to enact laws regulating it. However, due to disagreement about the role these institutions should be given, the legislature has struggled to come up with a law acceptable to all stakeholders, especially the traditional leaders themselves, on the one hand, and, on the other, civil society and human rights institutions opposed to the continuation of certain traditional practices.[46]

As pointed out earlier, in those countries with vast territories where the effective presence of the state is highly limited, traditional institutions provide the basic judicial and administrative services that people need. It is in the rural areas of Africa, where state presence is limited, that the impact of the continuing relevance of traditional institutions is particularly significant.

Generally, the role of traditional authorities in local governance is often dealt with in ordinary legislation. Nonetheless, traditional authorities still operate in a largely informal setting, with no clear definition of their role. Even countries, such as Namibia and South Africa, which have acknowledged the relevance of traditional authorities continue to grapple with the problem of determining the extent to which they can be incorporated into the decentralised governance structure. The emerging reality is that the authority, powers, functions and status of traditional authorities have declined since independence owing to their subordination to government officials and modern governance structures.[47]

For example, in Namibia, the Traditional Authorities Act 25 of 2000 defines the powers, duties and functions of traditional authorities. Apart from the power to settle disputes, the powers conferred on traditional authorities in section 3 of the Act are quite limited. These include the powers to administer and execute the customary law of that traditional community; uphold, promote, protect and preserve the culture, language, tradition and traditional values of that traditional community; preserve and maintain the cultural sites, works of art and literary works of that traditional community; and perform traditional ceremonies and functions held within that traditional community. Section 3(2) gives them, inter alia, the power *to assist* the Namibian police and other law enforcement agencies in the prevention and investigation of crime; and to *assist and co-operate* with the government, regional councils and local authority councils in the execution of their policies and keep the members of the traditional community informed of developmental projects in their area; to ensure that the members of the traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia. Besides being required to fulfil typical traditional responsibilities, the traditional

[46] In commenting on this, C Murray, in "South Africa's Troubled Royalty: Traditional Leaders After Democracy", Law and Policy Paper 23, available at, http://law.anu.edu.au/centres/cipl, warns: "We must guard against the possibility that a new order revelling in its emancipation from (neo) colonial rule will abrogate its responsibility to its citizens in the name of a new Africanisation. The danger is that settlement with the lobby of traditional leaders will be a smokescreen for the failure to implement democracy where it really matters: at grassroots, in the material conditions of the ordinary existence of women and men."

[47] See in general Sharma (n 25); and C Rautenbach and G M Ferreira, "Traditional Authorities and State Functions in South Africa: A Complex Relationship of Private Participation," (2023) 26 Potchefstroom Electronic Law Journal 1–38.

authorities are, in all facets of modern governance, required merely to *assist* or *co-operate* with government officials.

A similar approach to restricting the role of traditional authorities in local governance appears under the South African Traditional Leadership and Governance Framework Act 41 of 2003, which, although replaced by the Traditional and Khoi-San Leadership Act 3 of 2019, remains operational because the latter was declared unconstitutional by the Constitutional Court.[48] The 2003 Act provides a comprehensive framework which, inter alia, deals with the functions and roles of traditional authorities and their leaders. Section 4 describes the functions of traditional councils; section 4A describes those of kingship or queenship councils; and 4B those of traditional sub-councils. The functions of traditional leaders are set out in sections 19–20.

Whilst the functions set out in section 4 are elaborate, they are, for the most part, not substantive because they allow the traditional councils, kingship or queenship councils, and traditional sub-councils only to "assist, support, recommend, and participate". By contrast, section 20 provides guiding principles for the allocation of roles and functions to traditional leaders in respect of activities such as arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, economic development, environment, tourism, disaster management, the management of natural resources, education, and the dissemination of information about government policies and programmes. This provision, however, gives the national or provincial government, as the case may be, virtually absolute discretion, through legislative or other measures, to decide which of these roles will be conferred, when, and to what extent. Even when the roles are conferred, the national or provincial government has the powers to monitor the implementation of the functions associated with the roles and can stop the traditional council or traditional leader from performing them if it is not satisfied with the council or leader's performance.

Several other statutes also purport to allow traditional authorities to collaborate and participate in local governance,[49] but, as Rautenbach and Ferreira point out, "the legislative framework designed to facilitate such collaboration is intricate and often challenging to execute effectively"; the authors conclude that, as a result, "the valuable input of traditional leaders remains underutilised, leading to adverse consequences for rural communities".[50]

The South African Constitution is arguably not only one of the most modern and liberal in the world, but within Africa, provided the best framework for enabling traditional institutions to play a role in governance, particularly at the local level, and enhance the efficient delivery of services to local communities. Continual suspicion – especially by political elites, with the support of human rights organisations worried about limited checks and balances on traditional governance today – has resulted in traditional authorities being given a mainly supporting and advisory role in South Africa's decentralised governance structure.

[48] See *Mogale v Speaker of the National Assembly* CCT 73/22 [2023] ZACC (30 May 2023).
[49] See, for example, the Spatial Planning and Land Use Management Act 16 of 2013.
[50] See Rautenbach and Ferreira (n 47) 6.

By contrast, in most African countries the state retains extensive power over traditional leaders, with legislation serving merely to co-opt and control them, especially in remote communities with limited government presence.[51] In exchange for government largesse and the freedom to govern their communities as they please, these traditional authorities usually compel their people to vote for the ruling party in elections. In practical terms, the effect of attempts at decentralisation of traditional governance in most African countries – particularly those ruled by repressive autocrats, such as Yoweri Museveni of Uganda, Paul Biya of Cameroon, Paul Kagame of Rwanda, Denis Sassou Nguesso of the Republic of Congo, and Salva Kiir Mayardit of South Sudan – has been to decentralise autocracy.

Unless ordinary citizens are allowed access to government decision-makers and given an opportunity to provide regular input to decisions concerning their welfare, the reliance on traditional leaders and elders alone will not alleviate widespread poverty in Africa's rural areas. The widely discussed Botswana *Kgotla* is one of the few institutions that still uses traditional structures for consultation, communication and public participation in governance.[52]

## E. CHALLENGES AND FUTURE PROSPECTS

The constitutional reforms since the 1990s show that traditional systems have the potential to contribute positively to Africa's development, but numerous challenges remain. The prospects for the future will depend on how these challenges can be overcome.

### 1. Challenges

A distinction should be made between challenges faced by traditional justice systems and those faced by the traditional institutions of governance, albeit that in some instances they are similar or overlapping.

#### a. Challenges faced by the traditional justice systems

The main challenge relates to the fact that, whilst the traditional justice system (as noted earlier) has certain advantages over the modern judicial system, it too has a number of weaknesses. A few of these deserve mention here.[53]

First, the ill-defined and sometimes informal nature of traditional justice systems means that they lack the independence to prevent political elites or government officials from using those who sit in these courts to harass their local opponents. Secondly, with no records being kept, one is never sure of the consistency of decisions, and nor can one predict the outcome of a dispute. Thirdly, the composition of the customary courts often excludes women, the youth, the poor, and ethnic minorities. Such discrimination is difficult to reconcile with fundamental rule-of-law principles of equality of all before the law, due process, and fair hearing. Fourth, the traditional justice system does not have principles to deal with issues of conflict of

[51] In many traditional settings, and as a legacy of the arbitrary powers traditional leaders were allowed to exercise as long as it did not impact negatively on their authority, it was a taboo to disobey their orders because of, amongst other threats, the fear of ancestral retribution.
[52] See further Sharma (n 25)..
[53] See in general Kane et al. (n 24) 11–13; Kariuki (n 36) 1–3; and Sharma (n 25) 13 and 18.

customary laws when resolving disputes between persons from different communities with differing customary laws.

Furthermore, one of the most serious challenges is that the inferior status assigned to traditional justice systems in the colonial era persists to this day. The repugnancy test, the application of which (as explained above) was fairly arbitrary and made the exact content of customary law uncertain, remains on the statute books of most African countries. In its modern-day form, it subjects the recognition and enforcement of customary law to conformity to the bill of rights and the constitution, a factor that perpetuates the inferior status of traditional justice systems and renders their principles uncertain.[54]

In addition, some of the traditional leaders and elders who sit in customary courts are often not well educated, which makes it difficult for them to understand the prevailing human rights standards they are required to consider if their decisions are to stand when taken on appeal to the formal modern courts. The latter courts are staffed by trained legal experts who, since they often have little knowledge of customary law, rely on assessors. Because of growing urbanisation and the migration of populations from one area to another and the absence of any formal training in customary law, combined with the lack of interest in customary law by the youth, the number of assessors, usually the elders, who are knowledgeable in customary law is steadily dwindling.[55] The assumption that the elders are the most knowledgeable in the traditions and customs that make up customary law is no longer true because most of them spend their working lives in other parts of the country and only return to their village community when they retire.

Finally, in most African countries, constitutions and legislation seldom clearly define the status of traditional dispute settlement systems, especially where there is a plurality of legal systems. A typical example of a country with such lack of clear policies and laws indicating the status of traditional justice system is Cameroon. Supposedly a bi-jural jurisdiction (in which the common law in the anglophone regions and the civil law in the francophone regions co-exist), there is no certainty as to how customary law and Muslim law fit in the whole justice system.[56]

### b. Challenges faced by traditional governance institutions

The main challenge faced by traditional governance institutions concerns how they could be effectively integrated within modern governance structures, particularly through decentralisation, such that the two systems complement each other and foster socio-economic development. Three obstacles that need to be overcome can be highlighted here.[57]

The first is that the hereditary nature of traditional leadership renders it incompatible with democratic governance, which as its cornerstone has free and fair competitive elections

[54] For a discussion of the modified version of the repugnancy test in the Kenyan and South African constitutions of 2010 and 1996, respectively, see Kariuki (n 36) 10-13; and Himonga (n 8) 39–55.
[55] This problem is discussed in C M Fombad, "Fostering a Constructive Intra-African Legal Dialogue in Post-Colonial Africa," (2022)66(1) *Journal of African Law* 1–22.
[56] See further C M Fombad, "An experiment in legal pluralism: The Cameroonian bi-jural/uni-jural imbroglio," (1997) 16 *University of Tasmania Law Review*, 209–234.
[57] See generally United Nations Economic Commission for Africa (UNECA (n 7) 10–11; and Sharma (n 25) 4–6.

in which the people choose their leaders. As a result, traditional leaders are not subject to the same level of accountability as elected officials. In addition, they often combine elements of executive, legislative and judicial powers, which violates the principle of separation of powers, one of the fundamental principles of modern constitutionalism and democratic governance.

Secondly, the corruption of traditional leaders and the clientelist relationship many of them developed during the colonial era have continued unabated since independence. Most modern legislation has perpetuated the colonial practice in which the government is the final authority for recognising and approving traditional leaders. Although they derive their authority and power from both the customs and traditions of the community as well as modern legislation, it is the latter that is often decisive. This has made them more dependent on state authorities rather than their communities. In most African countries, particularly those governed by long-serving autocrats, traditional leaders have been mobilised and politicised by the state to ensure electoral support from their communities. In many of these situations, traditional leaders now operate much like civil servants. The built-in traditional mechanisms to check against abuse of hereditary powers that made traditional leaders responsive and accountable to the people have been eroded by increasing state control.[58]

Thirdly, in most remote areas where there is little state presence, the sometimes arbitrary exercise of powers by traditional leaders has reduced members of their community to what Mahmood Mamdani has described as subjects of the traditional leader rather than citizens of the state.[59] This exposes the community members to the worst excesses of unchecked arbitrary rule by traditional leaders who are not, and cannot be held, accountable to their community due to their attachment to the state and their willingness to do its political bidding.

## 2. Prospects for the future

The issue of whether and to what extent traditional institutions should be incorporated into modern African constitutions has generated intense, sometimes acrimonious, debate between so-called "traditionalists" and "modernists."[60] To the modernists, the traditional African institutions are a historical relic that belongs to antiquity. They consider the collaboration of many traditional rulers with colonial regimes in the past and with some of the worse dictators and human rights abusers today on continent to have profoundly discredited this institution and paved the way for its loss of legitimacy, loyalty, and support, especially amongst the younger generation. Many now wonder whether they have any place in a modern Africa still grappling with the challenges of entrenching an ethos of constitutionalism and respect for the rule of law.

---

[58] See G B N Ayittey, "Constitutional Checks and Balances in Traditional Africa", in C M Fombad and N Steytler (eds), *Constitutional Identity and Constitutionalism in Africa,* (2024)50–73.

[59] M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of the Late Colonialism*, (1996).

[60] For a good discussion of this debate, see C Logan, "Traditional Leaders in Modern Africa: Can Democracy and the Chief Co-exist?" Afrobarometer Working Paper No. 93, available at, http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCoQFjAA&url=http%3A%2F%2Fwww.afrobarometer.org%2Ffiles%2Fdocuments%2Fworking_papers%2FAfropaperNo93.pdf&ei=Yul5U6zqHLKV7AatzoAI&usg=AFQjCNE2x2ZXIepOmpXRMcOcZwYjtJwsdg&sig2=-4wXCvHRdmRW4bKYMOmFlg&bvm=bv.66917471, d.ZGU; and G B N Ayittey, *Indigenous African Institutions*, (1991); Mamdani (n 59); and S Dusing, *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia, and South Africa* (2002).

[60] See C Murray, "South Africa's Troubled Royalty: Traditional Leaders After Democracy", Law and Policy Paper 23, http://law.anu.edu.au/centres/cipl.

Modernists believe that, after decades of manipulation by colonial and post-colonial governments and the complicity of traditional leaders in the repression of local populations, there are too many questions about what is really "traditional", and wonder how historically rooted these "traditional institutions" truly are. For their part, traditionalists see traditional institutions as an enduring heritage; these institutions not only play a critical role as custodian of African culture and traditions, but also serve as the best link between the government and grassroots and, therefore, as a key instrument for maintaining peace, order and stability.

Despite the controversial role of traditional governance institutions and the contemporary challenges faced by African traditional justice systems, they still have the potential to facilitate and foster democracy, good governance, constitutionalism, and continental socio-economic development. Promoting this would require a number of concerted policy changes and the enactment of legislation. Although the ability of traditional systems in many communities to operate at optimum level has been limited by political interference, the resilience of this system shows that some traditional leaders are still respected because of the services they offer. This suggests that they would continue to contribute to Africa's development in different ways. The prospects for the future depend on how we build on the positive aspects of these systems.

It is clear from the preceding discussion that inadequately researched analytical conclusions by some scholars about the evolution and present trajectory of traditional systems, and sometimes misguided government policies and regulations, have contributed to the manner in which traditional systems are treated today. There is therefore a need for comprehensive empirical studies to be carried out to document the manner in which traditional systems have been operating and have evolved. Case studies of traditional dispute settlement systems, particularly in those countries where they play a significant part in the resolution of disputes in rural areas, need to be undertaken. This would provide an opportunity to identify the real challenges that limit their effectiveness and to determine how these could be remedied. This could serve as the basis for clearer and more informed legal and policy frameworks for regulating how traditional dispute settlement systems should operate in the future and how best they can be integrated into the formal justice system.

A similar study of the role of traditional authorities in governance needs to be carried out to inform the approach to be adopted in trying to integrate them within the modern decentralised governance systems in operation today. Traditional governance institutions provide an opportunity for people at local level to participate directly in their own governance and because of its consensus-based approach to resolving issues, is particularly apt for dealing with diversity management and nation-building. Ultimately, the decision as to whether or not to integrate the traditional justice system in the formal judicial system and the traditional governance system into the decentralised modern governance system must be informed by empirical research and careful analysis of its outcome.

African customary law is not written, and the assumption is that it is well known by members of the community, especially the elders, because it is handed down from one generation to another by word of mouth. However, there is no reason to assume this will continue to be so, particularly with the migration of the youth to towns in search of education

and a better life. There is a real risk that the traditional system could slowly die away. There is also no reason to assume that traditional leaders and the elders in the different villages are still as familiar with these customs and traditions and the way the traditional institutions are operating as was the case in the past. There is therefore a need for basic knowledge about the operation of traditional systems to be included in the curriculum of schools and taught formally.[61] Particular attention should be paid to investigating the possibility of teaching customary law in tertiary institutions as well as specialised institutions, or programmes, for training judicial officers.

Whether we like it or not, customary law is changing and most of the changes today are brought about through legislation. Whilst customary law's essential character as norms based on the traditions of the community should remain sacrosanct, there is no denying that modern legislative measures are bound to influence the way customary law evolves as well as its content. The evolving nature of contemporary customary law highlights the need for documentation across communities to capture its diverse strands, institutions, and processes. This requires comprehensive empirical studies to identify divergences, their causes, and opportunities for harmonisation. Such documentation would serve as a valuable record for future generations, preserving customary law's adaptability while providing a knowledge base without rigidly codifying it.

## F. CONCLUSION

Access to justice and poor service delivery, particularly among Africa's rural majority, remain major obstacles to the continent's economic, social and political development. There are reasons to believe that certain aspects of Africa's traditional systems, particularly their justice systems, are contributing in many ways to addressing these problems. However, the future role of these systems cannot continue to be determined and guided by fears, suspicions, doubts, assumptions, prejudices, and political opportunism. It must be informed by empirical research into their present operations and careful analysis of the findings to chart a way forward. As critical elements of Africa's historical past, traditional institutions cannot be wished away: they have been around since even before the slave-trade period that pre-dated the colonial era. They are an integral part of our tradition and culture, and rather than being a historical relic to be ignored, are part of the future.

African states have generally tolerated the existence of traditional justice systems, particularly in those rural areas where the modern justice system is absent or, for financial or other reasons, inaccessible. Perhaps more serious is the fact that most states have significantly underutilised traditional leaders at the grass-roots level and done relatively little to integrate them effectively in formal governance structures. In most cases, traditional leaders have mainly been co-opted, and in very much the same way as during the colonial period, to serve the selfish political ends of government. Many of the policy and legislative reforms adopted in countries have left most of the people living in rural areas feeling abandoned and relegated to the status

[61] It is clear today that unless customary law is taught in every law faculty as a compulsory course, it is likely to die out. As Cowen rightly notes, no legal system can survive unless it is taught scientifically. See D Cowen "Early Years of Aspiration to the 1920s" in D Cowen and D Visser (eds), *The University of Cape Town Law Faculty: A History 1859–2004* (2004) 8.

of subjects of traditional authorities rather than of citizens of the country. This need not be the case.

This paper shows that traditional systems have a critically important role to play in promoting development, especially in rural areas where a majority of the population still live today. More research needs to be undertaken to see how best to integrate traditional authorities, the justice systems they manage, and traditional governance institutions into modern governance structures in a dynamic way that enables them to contribute to meeting the daily needs of the people. The ultimate goal is to see how best the two systems could interact harmoniously and complement each other in order to enhance development and service delivery.

Certain aspects of traditional systems remain controversial, such as certain forms of discrimination against women and youth, as well as the hereditary nature of leadership positions. However, if it is accepted that one of the distinctive features of customary law is its adaptability to changing circumstances, then there is no reason to hesitate to progressively adjust traditional justice systems and institutions to the imperatives of democracy, constitutionalism, and human rights standards. With goodwill and collaboration between governments, traditional authorities, and academics, comprehensive constitutional and legislative reforms can be undertaken to make the tried and tested traditional systems equitable (especially in regard to women, children and vulnerable people), transparent, predictable, accountable, and consistent with human rights standards. In this way, Africans would be able to get the best from our rich cultural heritage whilst embracing the demands of contemporary governance in a manner that fosters sustainable economic development and political stability.