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The impact of colonisation on the indigenous conflict management practices on the African continent

By

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Acknowledgements

To my parents, who have lovingly supported me through this journey, thank you for always believing in me and having faith in my ability to cross the finish line. Your motivation kept me going during the most challenging times.

To my beautiful children, Alondwe and Akwande, thank you for your compassion and understanding. The many hours spent away from you were not easy but necessary in order for me to reach this goal.

You remain the biggest motivation and reason for it all!

Abstract

The objective of this study was to elucidate the various ways in which colonial influence and power impacted upon indigenous African dispute resolution methods. The study provides an over-view of the systematic way in which colonisation was carried out and how the law was instrumental to its perpetuation and installation. The research further provides an analysis of the generic principles that constitutes indigenous African dispute resolution methods and provides discussion on the core values of these processes. The research demonstrates that the colonisation project was systematic and strategic when eroding and side-lining these dispute resolution practices, in an attempt to render them redundant and ineffective. The malleability of African dispute resolution methods has not only ensured that it remains relevant throughout the continent but has also made strides in influencing the development of western laws and judicial processes in Africa. Taking these strides into consideration, the research looks into the viability of reviving and possibly expanding the reach of African indigenous dispute resolution methods beyond the boarders of Africa.

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Chapter 1:

Colonisation defined within the context of the Doctrine of Discovery and the implications on Indigenous legal systems

1. Introduction

Colonialism has had a lasting impact on the territories in which it has been systematically and often forcefully applied in various parts of the world. While the occupation of foreign territory is at the core of its definition, colonisers' actions went beyond mere settling and integrating into the societies of these territories.[1] Colonisers devised many tactics to morph the colonised territory's social structure and way of life. In many ways, they infiltrated every aspect of the territory, adapted the social, political, economic, and cultural systems, and ultimately led to changes in the way dispute resolution was implemented.[2] This dissertation explores the many ways colonisation, directly and indirectly, impacted the indigenous dispute resolution methods applied by African states before they were occupied by Western settlers.[3]

Colonisation is a problematic term to accurately and appropriately describe. It entails a multitude of systematic dynamics that pertain to a vast number of societal factors and ideologies. Thus, it carries many definitional elements that contribute to defining what the novelist Joseph Conrad identified as the 'vilest scramble for loot that ever disfigured the history of human conscience.'[4] This notion is supported by the assertion that:

> Colonialism is not a simple act of accumulation and acquisition .... [it is] supported and perhaps even impelled by impressive ideological formations that include notions that

[1] A Black, 'The Stronger Rule of the More Enlightened European: The Consequences of Colonialism on Dispute Resolution in the Sultanate of Brunei' (2009) 13(1) *Legal History* 102.
[2] Black (n1) 103.
[3] S Merry, 'Law and Colonialism' (1991) 25(4) *Law & Society Review* 890.
[4] L Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13(3) *Michigan State Journal of International Law* 438.

> certain territories and people require and beseech domination, as well as forms of knowledge affiliated with domination.[5]

In an attempt to provide a simplified understanding of the concept of Colonialism, one may ascribe a narrow definition and a broader one. Defined broadly, 'colonisation is a relation between two or more groups of unequal power in which one not only controls and rules the other but also endeavours to impose its cultural order onto the subordinate group(s)'.[6] Narrowly put, colonisation refers to 'the European political, economic, and cultural expansion into Latin America, Africa, Asia, and the Pacific during the last four hundred years'.[7]

Expanding on the narrow definition of colonisation, one must acknowledge that it still 'entails different geographical regions, varying historical periods, idiosyncratic modes of colonialism among different European nations.'[8] 'Colonialism ordinarily encompassed the large-scale transfer of laws and legal institutions from one society to another, each of which had its distinct sociocultural organisation and legal culture'.[9] However, this research ascribes this notion with the proviso echoed by many scholars who have done much work in providing contextualised and historical work in this field. Namely, identifying recurring themes pertaining to colonisation should not lead one to generalisation or oversimplify the observations.[10] While there may be generic factors across colonised territories, the manner in which these territories experienced colonialism varies. Therefore, while this research may refer to various territories, it will focus on the experiences emanating from the African continent.[11]

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[5] Black (n1) 117.
[6] Merry (n3) 894.
[7] Merry (n3) 894.
[8] Merry (n3) 890.
[9] Merry (n3) 890.
[10] Merry (n3) 891.
[11] D Vermette, 'Colonialism and the Suppression of Aboriginal Voice' (2008) 40(2) *Ottawa Law Review* 230.

1.1 Colonialism: the modus operandi

The extensive reach of colonialism makes one wonder how this phenomenon became so widespread and how the colonisers were able to implement and sustain colonisation over so many years. Below, we briefly explore the method and process used by colonisers to carry out their plan to occupy and dominate territories over which they subsequently asserted authority.

The majority of the colonised world experienced colonisation through an international law known as the Doctrine of Discovery.[12] This doctrine entailed European countries claiming they had discovered new territories beyond their own territories 'by merely having their explorers place a flag and religious symbol in the land of native people'.[13] Under this legal principle, colonisers made 'legal claims of ownership and domination over lands, assets and superior rights over peoples that they had discovered.[14]

'The Doctrine of Discovery is one of the earliest examples of international law' and was designed to enable and manage European actions and conflicts relating to exploration, trade, and colonisation of non-European territories.[15]

It is also essential to note that the Doctrine did not require the knowledge or consent of the indigenous inhabitants to take effect.[16] This Doctrine introduced significant social and economic change to the African continent, mainly because the 'newfound colonies' were appropriated from the native Africans without any form of compensation.[17] Native occupiers soon became adversely affected by colonisation due to the limitation of their national sovereignty and independence which was imposed by the Doctrine of Discovery. The systematic domination and reservation of international diplomacy, commercial, and

[12] R Miller, 'The International Law of Colonialism: A Comparative Analysis' (2011) 15(4) *Lewis & Clark Law Review* 847.
[13] Miller (n12) 847.
[14] Miller (n12) 847.
[15] Miller (n12) 854.
[16] Miller (n12) 847.
[17] R Roberts, 'Colonialism and Customary Law in Africa: A Response to Leslye Obiora' (1993) 17(3) *Legal Studies Forum* 256.

political activities to nationals of the discovering European country further entrenched colonial interests at the expense of the native people.[18]

While scholars' postulate that the Doctrine of Discovery was implemented in various stages and processes, the consensus is that the loss of territories belonging to indigenous nations was not through a gradual and systematic process but was instead effected 'immediate[ly] and without their knowledge, consent, or payment'.[19]

In addition to the above, a comprehensive change was initiated to administratively reform the areas that would secure commercial and other European interests.[20] The securing of land ownership for colonisers was at the top of the list of priorities, and this task was initiated immediately through the reform of land ownership rights, which was based on the European framework.[21]

Colonisation did not take place without resistance from native settlers. Many battles were fought in the name of resistance and in an attempt to retain territory and sovereignty. Therefore, colonisers needed to establish law and order in the new territories to 'ensure a "just" means for resolving disputes.[22] However, the "just system" applied to resolve these disputes would be those applicable in the European territory of the colonisers. To embed these new dispute resolution processes, the following significant actions were carried out:

1.1.1 The dissemination and secularisation of foreign/European law in the colonised territories:

By creating new institutions for making and applying colonial laws that aligned with 'Western concepts relating to justice, due process, constitutionality and appellate

[18] Miller (n12) 852.
[19] R Miller, 'The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery' (2021) 32(1) *Duke Journal of Comparative and International Law* 37.
[20] Black (n1) 102.
[21] Black (n1) 102.
[22] Black (n1) 103.

review'[23] not only reshaped the native justice systems but also made indigenous dispute resolution systems subservient to these new laws. This indirectly rendered all indigenous dispute resolution methods that did not align with new European laws redundant.[24]

1.1.2 The bureaucratisation of dispute resolution:

Colonialism brought a European style of government administration to its colonies, in order 'to depoliticise politics and reduce all human affairs to questions of proper administration'.[25] The coloniser's ability to subject disputes with the colonised to the realm of colonial law was fundamental to upholding colonial norms. This action involved confiscating disputes from native peoples, communities and way, to placing them within the foreground where colonisers had monopoly and power.[26]

The bureaucratisation of forms and access to justice was so prevalent in the agenda of colonialism internationally that it is 'a recurring theme in most studies on war and conflict in the developing world, particularly in Africa'.[27] The introduction of westernised forms of justice enjoys this prominent status in the colonisation project because it was an effective vehicle that initiated a matrix of change in indigenous life and its institutions.[28]

1.2 Law and Colonialism

Chanock has described Law 'as the cutting edge of colonialism.'[29] He used this description to explain how 'the introduction of Western law justified and legitimated conquest and control.'[30] It is trite that the Western legal systems found their way to Africa through the process of colonisation and that indigenous legal systems that proved to be

[23] Black (n1) 104.
[24] Black (n1) 104.
[25] Black (n1) 115.
[26] Vermette (n11) 257.
[27] Juma (n4) 438.
[28] J Ojwang, 'Rural Dispute Settlement in Kenya' (1975-1977) 7 *Zambia Law Journal* 63.
[29] Merry (n3) 890.
[30] Merry (n3) 890.

incompatible with Western legal systems were quickly deemed inadequate.[31] Where such incompatibility arose, colonial administrators either created separate court systems based on race or relegated traditional justice systems to the background, as was the case in countries such as Tanzania and Mozambique.[32] Ultimately, either treatment of the indigenous legal system culminated in a 'dual structure of dispute resolution' which created a hybrid or hierarchal combination of indigenous and Western processes.

In many jurisdictions within the African continent, with the progression of time, under the colonial era, European laws were imposed as more suitable and superior to indigenous dispute resolution mechanisms on African society, thereby 'sidelining indigenous laws.'[33]

Scholars have argued that the intention behind the introduction of Western laws in colonised territories was to bring law and order into the colonised territories. While this may have been the primary intention, it must be acknowledged that the law can be used as a means to carry out oppression by imposing colonial values and authority upon Aboriginal people/nations.[34]

Legislators of the times were well aware of the mandate created by the Doctrine of Discovery and Western interests that had to be safeguarded against the natives of occupied territories. Legalising the violation of the rights of natives became a norm across the continent, and 'thus, violence, especially against the colonised, became the defining character of the colonial enterprise'.[35] It is also ironic to note that the laws that were put in place to enable colonisation to become embedded were sanctioned at international planes and accepted as part of international law.

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[31]A Aiyedun, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law, Democracy and Development* 158.
[32] Aiyedun (n31) 159.
[33]B Batchelor, 'Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education' (2021) 25 *Law, Democracy and Development* 491.
[34] Vermette (n11) 235.
[35] Juma (n4) 439.

The application of legal rules to the process of colonialism gradually dismantled indigenous community peace-building mechanisms. It strategically replaced them with often dysfunctional centric authorities or structures that only aided in creating more instability for the natives that had to live by these new rules.[36] On the other hand, European nations used the same laws 'to justify their colonial empires using legal, social, and political arguments', which not only cemented the colonial project but also ensured its survival and success.[37]

1.3 Research Statement

This dissertation explores the manner and extent to which the indigenous dispute resolution methods have evolved due to foreign influence arising out of colonisation. Further to the above, the dissertation provides a comparative analysis of the aspects that form the causal link between the systematic act of colonisation and the distortion in the cultural, political and social set-up of indigenous communities. To better explore this phenomenon, we will unpack the concept of colonisation and analyse the modus used to bring about changes in societal structures that culminated in changed and sometimes unrecognisable dispute resolution mechanisms.[38]

In essence, the dissertation will demonstrate that, particularly in the African context, colonisation went beyond the mere unauthorised occupation of land rather that it involved and contaminated many pillars of indigenous people's society, so much so that there was an impact on the manner in which power and authority were sustained to the extent that it created new principles and methods of resolving conflict.[39]

[36] Juma (n4) 439.
[37] Miller (n19) 45.
[38] Merry (n3) 890.
[39] Black (n1) 104.

1.4 Research Objectives

This dissertation will seek to provide in-depth answers to the following research objectives:

1. What did pre-colonial dispute resolution look like for African countries, and was it effective in resolving disputes that arose at the time?
2. Which aspects of indigenous dispute resolution were commonly affected by colonial influence, and what was the method and reasoning for this focus?
3. Has colonialism and its external influence yielded a positive or negative dispute resolution environment for the people occupying the affected territories?
4. Have colonial dispute resolution methods been willingly adopted and incorporated into present-day dispute resolution mechanisms in the affected territories, or is there a move to revert to pre-colonial dispute resolution methods?

1.5 Research Methodology

This research topic will be substantiated through research material comprising books, journals, and articles to provide a comparative analysis across various jurisdictions. It will draw on the principles enshrined in the Convention C 169 Indigenous and Tribal Peoples Convention (1989) No 169 (ILO C 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Case law will be referenced to the extent that such case law bears reference to principles set out in the ILO and UNDRIP.

Commentaries from scholars such as Carlo Osi and Catherine Price will discussed to substantiate observations and findings pertaining to the topic. Due to the nature of the topic, the approach adopted in compiling the research material uses a socio-legal approach to ensure that the principles and findings are provided within the relevant context.

1.6 Proposed Structure

Chapter 1: Colonisation defined within the context of the Doctrine of Discovery and the implications on indigenous legal systems

This dissertation will focus on the concept and methodical implementation of colonialism and the manner in which it generically unfolded in various territories.[40] It will also look at the true intentions of the process and how they are later unveiled and applied against indigenous people of multiple territories.[41] It will also shed light on the consequences, both intended and unintended, behind the idea of colonisation.[42]

Chapter *2: Indigenous dispute resolution methods, the good, bad and effective.*

This part of the paper will provide an overview of the traditional dispute resolution methods employed by indigenous people on the African continent and also present a comparative analysis of the various changes to these methods and the reasoning behind such changes.[43] The aim is to provide a before-and-after picture of the dispute resolution landscape and analyse such changes, which impact on indigenous people. While this comparative analysis will touch on generic dispute resolution principles, its primary focus will be on territories within the African continent.

Chapter 3: The dynamics of a mutated and diluted means of justice

This chapter will hone in on the significant impact that colonisation had on traditional dispute resolution systems and what these changes practically translated to, for indigenous people who relied on these processes. Features such as the creation of division, the loss of land, and the exploitation of resources could only have led to conflict, and they would have directly or indirectly led to changes in the resolution of such disputes. It will also explore the manner in which Western legal systems were introduced to indigenous territories and the cultural suppression and erosion that accompanied it.[44] This change to Western legal systems from indigenous dispute resolution methods would have

[40] Merry (n3) 890.
[41] Vermette (n11) 235.
[42] Merry (n3) 891.
[43] C Price, 'Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution' (2018) 18(3) *Pepperdine Dispute Resolution Law Journal* 395.
[44] C Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods In lieu of Litigation' (2008) 10(1*) Cardozo Journal of Conflict Resolution* 179.

an impact on the autonomy of the colonised territory and would have caused social fragmentation by virtue of the creation of new hierarchies that are designed to resolve or escalate disputes or conflicts.[45] Furthermore, it will also look at how colonial behaviours also introduced new and complex conflicts to indigenous territories, thereby creating an opportunity to proliferate Western approaches to resolve the new conflicts.[46]

Chapter 4: International Strides to recognise traditional dispute resolution methods and the Benefits of re-instating the Status Quo

This chapter examines the relevance and purpose of the ILO C169 and UNDRIP at the global and continental (Africa) levels. It will specifically focus on the fruits of the aforementioned international treaties that seek to amend the destruction caused by colonisation in traditional forms of dispute resolution.[47] In this chapter, we explore the move by many territories to recognise traditional authorities and protect cultural heritage, as well as the creation of national policies that seek to integrate customary laws into modern-day dispute resolution. We further look into the creation of community courts that strive to cater for both reconciliation and healing as part of the dispute resolution process in an attempt to resolve land and resource disputes that were created by the introduction of colonialism.[48]

This chapter presents a framework for a new dispensation that may provide an opportunity to create a hybrid dispute resolution mechanism that belongs to an era that takes the best of both worlds (western and indigenous dispute resolution mechanisms) and develops alternative dispute resolution while applying restorative justice that is necessitated by the legacy of trauma which includes but is not limited to, the violence, displacement and exploitation suffered by Indigenous communities who were colonised.[49]

[45] Vermette (n11) 230.
[46] Vermette (n11) 258.
[47] Osi (n44) 177.
[48] Osi (n44) 203.
[49] Osi (n44) 204.

1.7 Delineations

While this dissertation acknowledges that colonisation occurred in many jurisdictions across the world, it will focus on colonisation and its impact on indigenous dispute resolution methods within the African continent. Reference to international treaties or experiences that emanate from outside the African continent will only be used to the extent that they form part of the framework of the principles that will be elaborated on in the text.

1.8 Conclusion

'The legacy of colonialism is a recurring theme in most studies on war and conflict in the developing world, and more so in Africa'.[50] Colonialism continues to have adverse implications for the developing world. It not only desegregated African communities but also changed the manner in which African societies reasoned and perceived dispute resolution.[51] Disempowered and relegated to sub-councils, indigenous dispute resolution methods may have faded, but they continue to exist in new forms that provide relevant and effective solutions to the many communities that still employ them.

[50] Juma (n4) 438.
[51] Juma (n4) 439.

Chapter 2:

Indigenous dispute resolution methods, the good, bad and effective

2. Introduction

It is trite that indigenous dispute resolution mechanisms existed prior to colonial times on the African continent. While these mechanisms may vary in certain respects and methods, they are fundamentally premised on similar principles. This part of the dissertation, explores the principles that govern traditional and customary dispute resolution mechanisms in Africa and analyses the differences and nuances between colonial laws and indigenous African dispute resolution methods.

2.1 Context and Clarity

While many may like to believe that indigenous African people lived in absolute harmony in pre-colonial times, it is unrealistic to think that conflicts between community members and tribes were non-existent. This is because indigenous African people, like all communities, were faced with 'outbursts between tribes or clans'[52] or even smaller disputes arising from miscommunications or misunderstandings between family and even friends, amongst other disputes.[53] It is important to remember that dispute resolution is necessitated by conflict and that conflict in any community is inevitable. Africa is no different from any other society in the world and is not spared when it comes to social ills and misunderstandings. One must then believe that conflicts arose, and mechanisms had to be developed to resolve them, even during pre-colonial times.

The study of indigenous dispute resolution methods was predominantly carried out by Western anthropologists who were intrigued by the colonial land's natives and believed that describing these methods to their academic colleagues would enrich their study of

[52] C Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation' (2008) 10(1) *Cardozo Journal of Conflict Resolution* 197.
[53] Osi (n52) 197.

the natives' way of life.[54] While the observations that were shared and documented by anthropologists may be a reflection of the indigenous dispute resolution practices, one must leave room for certain inaccuracies and biased criticism. One must bear cognisance to the fact that these records were, at times, tainted by the intention to undermine the very processes that were being observed. While the documentation of many African dispute resolution methods can be attributed to anthropologists, a plethora of details resides within the undocumented repositories of the indigenous communities themselves. These dispute resolution methods varies from region to region depending on the cultural values of the people who live by them. Although diverse in their forms, Indigenous African dispute resolution methods share several ideologies that appear like a golden thread through most, if not all, indigenous dispute resolution methods.[55]

At this juncture, it is imperative to draw a clear distinction between indigenous law and customary law in order to place the correct term within the context of the dissertation. Starr and Collier define indigenous law as 'the reconstruction of pre-contact native law' and distinguish it from customary law, which they define as 'the outcome of historical struggles between native elites and their colonial or postcolonial overlords'.[56] This distinction is vital, as customary law does not accurately reflect genuine 'African values and philosophies'.[57] It is important to understand that indigenous African laws in their purest form are not to be interpreted 'within the context of a cultural process which is predicated upon historically shifting power asymmetries as is the case with customary law'.[58] While it is true that African customary law is born of indigenous African law, they are different as African customary law is contaminated by colonial influences. Chanock, who invested much time in analysing the formation of 'customary law in Zambia and Malawi from the late nineteenth century to independence in the 1960s, notes that African

[54] A Yadudu, 'Colonialism and the Transformation of the Substance and Form of Islamic Law in the Northern States of Nigeria' (1991) 9(1) *Journal of Law and Religion* 18.
[55] L Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13(3) *Michigan State Journal of International Law* 495.
[56]R Roberts, 'Colonialism and Customary Law in Africa: A Response to Leslye Obiora' (1993) 17(3*) Legal Studies Forum* 253.
[57] Roberts (n56) 255.
[58] Roberts (n56) 254.

customary law started off with 'a fluid, shifting set of principles and procedures to a fixed, written set of codes which claimed continuity with an African past'.[59] Chanock's conclusion supports two notions, namely:

a) that the is a stark difference between African indigenous law and customary law and;
b) that African customary law is derived from African indigenous law.

With the distinction above in mind, it is equally important to acknowledge that the principles of African indigenous laws 'exist in wide-ranging forms, between multiple configurations of traditional justice systems across African communities.'[60] The influence of regional cultural practices on dispute resolution methods also contributes to the different formulations and combinations of principles that make up the different indigenous dispute resolution methods, but the core and basis remain fundamentally similar. Society must be cognisant of the fact that 'the evidence we have for African history comes to us filtered through a series of distortions, including the transformative experience of the colonial period itself'.[61] Time must thus be invested in doing the necessary analysis to exclude such distortions so that the traditional methods can be extrapolated and understood correctly.[62]

To succeed in understanding the aforementioned parameters will be a starting point for understanding the character of indigenous African society's dispute resolution processes. This is because the ideologies and 'procedures of conflict resolution are an important index of prevailing social and economic relations. They indicate the tempo of economic interactions and the extent to which these create rights and obligations translatable into legal norms'.[63]

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[59] S Merry, 'Law and Colonialism' (1991) 25(4) *Law & Society Review* 897.
[60] A Aiyedun, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law, Democracy and Development* 166.
[61] Roberts (n56) 255.
[62] Roberts (n56) 255.
[63] Ojwang (n28) 63.

2.2 The pillars of African Indigenous dispute resolution mechanisms

The characteristics of indigenous dispute resolution mechanisms must be understood 'against the background of the indigenous political systems.'[64] Scholars postulate that African political systems existed broadly in two forms, namely:

a) Societies with central authority, administrative machinery and judicial institutions. These societies were court-like structures whose authority was supported by what was akin to a state and;
b) Societies that lacked central authority, administrative machinery and relied on informal tribunals whose authority was based on the force of etiquette and the threat of ostracism.[65]

Irrespective of the indigenous political system applicable in a region, African indigenous law adopted the 'informal character' of dispute resolution. The traditional approach did not have a prescribed or formalised 'concepts upon which the application of the law depended.'[66] By way of example, African indigenous laws generally did not draw a distinction between criminal and civil law, and they categorised disputes in such a way that identified the definitional elements of a crime or delict or distinguished between matters impacting individuals and matters impacting the community.

Below, this research explores some of the fundamental similarities of the dispute resolution mechanisms that form the features of indigenous African dispute resolution.

2.2.1 Elders, Chiefs and Community Involvement

A common feature of African dispute resolution is the pivotal role of and reliance on the wisdom and judicial skills of community elders and local leaders in resolving disputes. Disputes were ordinarily presented to a tribunal comprising community members, with the traditional leader, such as the chief or king, as the head or a council of elders presiding

[64] Ojwang (n28) 64.
[65] Ojwang (n28) 64.
[66] Ojwang (n28) 65.

over the matters that were brought before them.[67] The decisions of the elder/s or tribal chieftains bore much weight as they were perceived to be concluded through rationalised thought or process supported by the experience and wisdom that came with age and stature.[68]

The elders, customary court, or council would be tasked with not only adjudicating matters but also bore the responsibility of resolving disputes in a manner that placed the interests of the greater community at the forefront. These customary courts were thus granted 'broad and flexible powers to interpret evidence, impose judgments, and more interestingly, manage the process of reconciliation'.[69] The result of this fluid way of managing dispute resolution would ultimately culminate in a remedy that is restorative in nature and promotes 'a sense of unity, shared involvement and responsibility, and dialogue among groups otherwise in conflict.'[70]

The elders in African communities remain 'the paragons of wisdom' despite new political organisations and modern influences that have reached African rural communities.[71] The elders remain 'a great repository of first-hand information on the historical aspects of the conflict, its cultural ramifications, and the actors involved, and they can inspire confidence in a cause of action that seeks to bring peace'.[72] By way of example, 'the Mtemi of Tanzania, Bashingantahe of Burundi, Ahsntehene of Ghana, Doho of Kenya and the Guurti of Somalia' have, to this day, reserved dispute resolution tribunals comprised of elders who are responsible for making decisions pertaining to matters of indigenous law.[73] These elders are perceived as the custodians of indigenous law and are deemed to be best placed to adjudicate its observance and compliance.[74]

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[67] Aiyedun (n31) 158.
[68] Osi (n52) 197.
[69] Osi (n52) 198.
[70] K Witchger, 'Equality in Process: Community Land Dispute Resolution Mechanism in Kenyan Law' (2018) 37(1) *Columbia Journal of Gender and Law* 84.
[71] Juma (n55) 497.
[72] Juma (n55) 498.
[73] Juma (n55) 498.
[74] Roberts (56) 295.

Many African countries have retained the use of elders to resolve conflicts and, in some instances, have adopted hybrid dispute resolution methods that incorporate both modern courts and indigenous methods. In Kenya, 'elder councils operate as appendages to provincial administration, helping to arbitrate local land disputes'.[75] Similarly, the Gacaca courts of Rwanda, which comprise an elder council, have been revived to enhance the continued involvement of elders in resolving disputes.[76]

A striking feature of indigenous conflict settlement is the pivotal stature attributed to the philosophy of social life and the need to maintain harmony in the community. In indigenous African communities, harmony and the mutual interest of disputants was the basis of 'the social and political system'.[77] The community interest was seen as the cornerstone for the 'economic survival of the society' and were integral to the establishment of social and political goals for the community. [78]

It, therefore, goes without saying that a key feature of indigenous African dispute resolution is the ideology or understanding of societies as units.[79] The scholar, Roberts defines 'a unit is a single item, which is a subdivision of a whole'.[80] Deciphered, this definition supports the notion that conflicts between members of a unit directly or indirectly affect the entire community, and thus, the community would have to play a certain role in resolving such disputes.[81] This is why the decisions taken by indigenous dispute resolution tribunals kept the community interest as a guideline for decisions and dared not go against the interests of the community when applying their minds to the conflicts that came before them.

[75] Juma (n4) 500.
[76] Juma (n4) 500.
[77] Ojwang (n28) 65.
[78] Ojwang (n28) 65.
[79] Aiyedun (n31) 159.
[80] Aiyedun (n31) 157.
[81] Aiyedun (n31) 157.

2.2.2 Ubuntu and Restorative Justice

Elaborating on Roberts' ideology on community involvement in African dispute resolution, the scholar Masina draws on the philosophy of Ubuntu to further describe the *modus operandi* of African dispute resolution methodology. Masina postulates that

> 'Ubuntu seeks to find a balance between self and other, the destructive and creative, good and bad. It moves away from the thinking of social relations in dualistic oppositions, that is, an either/or situation, good versus bad, black versus white, self, versus other, in seeking to resolve conflict'.[82]

The ubuntu philosophy shifts the premise upon which a dispute is to be resolved and focuses on arriving at a mutually beneficial condition or outcome. This state or outcome is not simply achieved by instruction or directive. It is realised through gaining the cooperation of disputants and the appreciation that common good should be prioritised above singular interests.[83]

By unpacking the key features of the ubuntu principle, one can support the observation drawn by the scholar Nhlapo, who postulates that ubuntu 'drives the restorative justice nature of African dispute resolution'.[84] This is mainly because the restorative justice process seeks to 'restore victims, repair harm, and re-weave the fabric of human relationships in a community'.[85]

Having regard for the reconciliatory approach applied in indigenous dispute resolution methods, 'it is safe to deduce that the traditional African way of resolving conflict is not aimed at solely meting out punishment for wrongdoing but also aims to foster social healing and restored social relations'.[86]

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[82] Aiyedun (n31) 158.
[83] Aiyedun (n31) 158.
[84] Aiyedun (n31) 159.
[85] J Metoui, 'Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities' (2007) (2) *Journal of Dispute Resolution* 524.
[86] Aiyedun (n31) 158.

The landmark case of *S v Makwanyane*[87] demonstrated just how pivotal the principles of ubuntu are to the African notion of restorative justice. Bearing in mind the approach described by the aforementioned scholars, one is able to draw a compatible description of the submission of Mohamed J in *S v Makwanyane*, who described ubuntu as 'an expression of the inherent capacity for, and enjoyment of, love towards fellow men and women and the fulfilment involved in recognising their innate humanity'.[88] In concurrence, Mokgoro J asserted, amongst other things, that 'the spirit of Ubuntu emphasises respect for human dignity, marking a shift from confrontation to conciliation'.[89] Thus, the restorative justice approach is still very much promoted on the African continent, so much so that the judicial application of laws is often framed within the context of restorative and progressive interpretation.

Howard Zehr, dubbed the 'grandfather' of restorative justice, distinguishes between an adversarial process and a restorative process by posing the questions that each method of resolution ordinarily aims to answer. He does so by posing questions that present the objective of each dispute resolution process. In relation to the adversarial approach, which is often applied in 'retributive criminal justice-seeking', he poses the following pertinent questions:[90]

1) What laws have been broken?
2) Who did it? and
3) What do they deserve?

In relation to the restorative justice approach, he juxtaposes the following questions:[91]

1) Who has been hurt?
2) What are their needs? And
3) Whose obligations are these?

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[87] *S v Makwanyane and Another* (CCT 3/94) (1995) ZACC 3.
[88] B Batchelor, 'Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education' (2021) 25 *Law, Democracy and Development* 496.
[89] Batchelor (n33) 496.
[90] Metoui (n85) 524.
[91] Metoui (n85) 524.

Zehr's strategic approach causes the mind to formulate the distinguishing characteristics of the two approaches to dispute resolution while also highlighting the key objectives and focuses.

2.2.3 Efficient, affordable, accessible and simplified

Accessing justice through 'indigenous means was for the most part simple, understandable and flexible'[92] and for this reason, it was efficient, effective and accessible. There was no need to file papers or appoint qualified representatives and timeframes for concluding a process were determined by its urgency and the availability of the chief or community elders. This made the conclusion of matters expeditious and provided relief to disputants on the same day or shortly thereafter when the matter was heard.

While the indigenous dispute resolution mechanisms were void of formality and/or complexity, disputants were still assured of just outcomes formulated by knowledgeable persons who would also ensure that communal relations remained intact.[93] This approach was adopted because of the appreciation that disputants would still have to live together in the same social setting that existed prior to the dispute arising.[94]

Although simplified, precolonial African dispute resolution methods recognised 'concepts of due process and judicial accountability to the community in some form.'[95] For instance, the chief or elders enjoyed wide and flexible powers to arrive at findings and outcomes. They were not limited by formalities such as binding precedents and could to a large extent, descent from previous rulings where they deemed it necessary. Exercising these wide powers was, however, not without limitations.[96] The chief or elders had a duty to ensure that they did not go against the will of the community or 'act beyond or contrary

[92] Aiyedun (n31) 158.
[93] Aiyedun (n31) 158.
[94] Aiyedun (n31) 165.
[95] Aiyedun (n31) 163.
[96] Aiyedun (n60) 166.

to their powers'.[97] It can, therefore, be argued that traditional dispute resolution methods contained an element of 'democracy and judicial accountability,' and there was very little room to deal with matters in an arbitrary manner.[98]

Just as its process, indigenous dispute resolution methods culminated in simplified outcomes and sanctions. For instance, the Zulu of South Africa often made use of the process of a '*Ukuthelelana amanzi* (to wash each other's hands) as part of resolving disputes amongst kinsmen'.[99] This process would be overseen by a mediator who would afford the disputants an opportunity to narrate 'their versions, after which the mediator would ask them if they were prepared to forgive each other'.[100] 'The disputants would be given water mixed with ash to cleanse their hands and thereafter drink some beer from the same calabash to signify the end of the dispute'.[101] The simplicity of this dispute-resolution method did not make it any less effective than a long-drawn-out arbitration or even a trial. The disputants were empowered to end the dispute and restore relations at the same time.

The Tsonga of South Africa employed a similar process, which involved the disputants 'partaking of drink or food from a common container'.[102] Using a herb known as mudroom, which is in a broken shell filled with liquid, the 'disputants would take turns to drink the liquid and spit it out while whispering words of penitence'.[103] This process would be followed by a proclamation of peace by the disputants, followed by the breaking of the shell. The process would be concluded by the disputants drinking together or sharing food together.[104] As with the Zulu approach, the dispute is finalised in a manner that resonates with the disputant's way of life and is achieved without the complexity of technical arguments and codified sanctions.

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[97] Aiyedun (n31) 163.
[98] Aiyedun (n31) 163.
[99] Juma (n55) 499.
[100] Juma (n55) 499.
[101] Juma (n55) 499.
[102] Juma (n55) 498.
[103] Juma (n55) 500.
[104] Juma (n55) 499.

In Sudanese indigenous dispute resolution process, mediation was commonly used, so much so that there were 'traditional mediation experts are called *ajaweed*.'[105] The interventions of the *ajaweed* were so effective that they remain entrenched and incorporated into the Western judicial systems that were established after independence.[106] This is but one example of a dispute resolution method that is widely thought of as a concept imported from Europe when, in actual fact, its use and application on the African continent pre-date colonisation.

2.2.4 Localised and relevant

Ordinarily, indigenous dispute resolution methods were all that African communities had at their disposal to resolve conflict. Although these methods were very informal, they were genuinely indigenous and unique to these peoples.[107] This uniqueness was common to indigenous people who applied these methods and lived by them as a way of life. For these people, these methods made sense and were accepted and understood, regardless of the criticisms that colonial involvement would introduce.

It is well known that no one community has the same exact rules and process for dispute resolution in indigenous African communities and that even in the same African region, the dispute resolution groups vary 'from one ethnic community to another'.[108] For instance, the Luo and Kikuyu of Kenya applied the same rules in dealing with cattle theft but completely different rules when it came to disputes pertaining to land.[109]

Analysing the systems of government that were in place in precolonial times, it can easily be concluded that indigenous African people used a centralised system of government, 'with kings and monarchs as the sole custodians of power'.[110] Better explained, it can be stated that 'African communities were mostly heterogeneous or

[105] Juma (n4) 500.
[106] Juma (n4) 500.
[107] Osi (n44) 195.
[108] Ojwang (n28) 67.
[109] Ojwang (n28) 67.
[110] Aiyedun (n31) 160.

multicultural, with a paramount chief or a king-in-council at the head.'[111] Prominent examples of these structures could be found in tribal communities, 'such as the Yorubas in Nigeria, Zulus of South Africa, and the Bemba of Zambia.'[112] The fact that these systems of government did not necessarily distinguish between judicial and governance roles but rather combined both functions into a singular leadership role or body makes the African dispute resolution formulation particularly interesting, as there generally was no separation of powers. Be that as it may, this was the African way, and those who lived by it found it suitable for the most part and accepted it as their way of life.

Bennett postulates that indigenous African tribunal procedures were fairer and more transparent because of the community's involvement and its open and consultative gatherings.[113] While peculiar to Western settlers, the fact remains that the custodians and beneficiaries of the indigenous dispute resolution methods understood them and were committed to resolving disputes through these processes.

2.3 Prominent criticisms of indigenous dispute resolution methods

While traditional dispute resolution methods are lauded for their efficiency, accessibility, transparency, and restorative nature, they are not free of criticism and shortfalls. The following points out some of their disadvantages and challenges. These observations do not seek to undermine indigenous dispute resolution methods but rather aim to provide the basis upon which an argument for improvement and modification for sustainable future use can be built.

Lack of structure:

As indicated above, indigenous African dispute resolution methods lack the formality that one would ordinarily find in judicial processes. It would, therefore, follow that they would be susceptible to some negative criticism. These challenges, coupled with the perception

[111] Aiyedun (n60) 166.
[112] Aiyedun (n60) 166.
[113] Aiyedun (n31) 163.

that indigenous processes were ad hoc, uncoordinated, poorly planned, and largely ineffective, do not place them at a good starting point.[114] Just like any other dispute resolution method, these criticisms must be weighed up against the benefits of the process and not only seen in the negative.[115] Simply appreciating that where the process lacks coordination and structure, it makes up for in terms of ease of navigation and understanding, and where it is criticised for being overly simplistic, it makes up for in terms of efficiency and the satisfaction of disputants.

Power imbalance:

Conflicts carry many varying dynamics, and power balance, or lack thereof, is a very important component of the dispute resolution process.[116] It is extremely important to ensure that any dispute resolution process does not lose sight of the more marginalised group or disputant. This will ensure that the facts presented do not get distorted and result in an unfair outcome.[117] The discussions presented the overarching approach of indigenous dispute resolution methods, which, in summary, aim to adopt a 'neutralist model of adjudication'.[118] This model does not, however, guarantee that there is no imbalance of power or room for misinterpretation of culture or facts.[119]

When specifically looking at imbalance based on gender, African indigenous dispute resolution methods are left wanting. The influence of culture and practice has left African women marginalised and often vulnerable to conflict. The marginalisation of women is, however, not unique to Africa. If one looks at the international landscape, it is easy to see that 'women have been depicted as helpless victims of war and aggression' throughout history.[120] This incorrect perception remains, notwithstanding the fact that scholars have,

[114] Juma (n4) 468.
[115] Juma (n4) 442.
[116] Juma (n4) 502.
[117] Osi (n44) 201.
[118] Osi (n44) 201.
[119] Osi (n44) 201.
[120] Juma (n4) 502.

over time, been able to establish that women have had an impactful role to play in conflicts, particularly on the African continent.[121]

African women have contributed significantly to the liberation struggle against colonialism. From the Kenyian Mau Mau wars against the British to the nonviolent resistance of the women of South Africa against apartheid, it is clear that women contributed to Africa's independence.[122] The role played by African women in conflicts indicates that they may be useful in the peace-making process and key to effectively resolving disputes.[123]

Regrettably, the involvement of African women in 'peace processes and negotiations has been limited'.[124] This exclusion of women from discussions, particularly those related to dispute resolution, can be directly linked to the failures of some of the most important peace-making initiatives.[125] A classic example is that of the United Nations sponsored Somali peace conference, where women were excluded.[126] As a result, 'warlords and bandits gained legitimacy and increased their activities'.[127] This mission became a complete failure because the exclusion of women indirectly culminated in the exclusion of 'culture and tradition'.[128]

The perpetuation of the marginalisation of women from community land decision-making and land dispute adjudication processes, as observed in rural Kenya, does not assist to resolve this issue. Instead, it casts a negative shadow on the viability of fair outcomes in Indigenous dispute resolution processes.[129]

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[121] Juma (n4) 502.
[122] Juma (n4) 502.
[123] Juma (n4) 504.
[124] Juma (n4) 502.
[125] Juma (n55) 504.
[126] Juma (n55) 502.
[127] Juma (n55) 504.
[128] Juma (n55) 504.
[129] Witchger (n70) 84.

Differing concepts of fairness:

The concept of fairness, as understood in Western jurisprudence, sometimes differs from that which is understood and accepted as fair in African customary law, even though both these concepts strive to uphold human dignity and mend relationships.[130] The context and history of a region thus become important to understanding the element of fairness in particular matters. While it may not always reflect a picture of fairness prima facie, fairness may reside in understanding other factors that are part of the matter. Similarly, it is also true that unfairness can be introduced by disregarding contributing factors and dynamics that are part and parcel of a dispute, thereby resulting in an imbalanced and unfair outcome.

Saunders explains that '[W]hites, by and large, are individualistic exclusivists [...] Africans, by and large, are communal inclusivists'.[131] When we consider the issue of fairness or unfairness, we must, therefore, frame it within the context of society and cultural background so as not to adopt a blanket stance that may well be misplaced.[132] An outcome centred around the community at large and not the disputants themselves may be perceived as unfair by third parties who do not share the same cultural background and experience. However, this does not hold true for those who come from and live by this ideology.

Perceptions and misconceptions:

The African dispute resolution approaches were often undermined as being somewhat primitive and unsophisticated by colonialists.[133] This introduced challenges to the authenticity and relevance of these methods thereby causing erosion to the standing and status of traditional tribunals and adjudicators. [134]The relegation of customary dispute resolution mechanisms to a lower hierarchy of laws further caused stagnation to the

[130] Aiyedun (n60) 163.
[131] Juma (n55) 497.
[132] Juma (n55) 497.
[133] Aiyedun (n31) 156.
[134] Aiyedun (n60) 157.

development and modernisation of these methods as they were considered subservient.[135] As a result, it remains to be seen if these methods will not revert to their former glory if given the space to develop and adapt to modern day challenges.[136] Colonialism had truly devastating effects on the minds of native people and caused a lot of damage to societal thought and culture.[137] It captured the minds of the colonised and caused them to doubt whether their ways of life we good enough to contend with the European alternatives.[138] This allowed doubt and uncertainty to creep in, and eventually, the Indigenous people began to question the suitability of their own ways.[139]

Scholars have not assisted in removing misconceptions about the suitability of indigenous dispute resolution mechanisms by continuously 'arguing that traditional law does not distinguish between civil and criminal matters'.[140] This criticism suggests that indigenous dispute resolution methods lacked a level of sophistication that comes with categorisation of matters. This assertion went further to create the impression that a lack of categorisation would automatically culminate in the implementation of incorrect remedies and outcomes.[141] Radcliffe-Brown, a British anthropologist, challenges this misconception by arguing that the lack of categorisation should be understood within 'the context and functionality of African law' as opposed to applying a superficial analysis that uses presumptions at the fore.[142]

Lack of Privacy:

The above indicates that indigenous dispute resolution was not private and was meant to 'socialize the entire community, thus involving the whole society'.[143] The interest of the

[135] Juma (n4) 487.
[136] Aiyedun (n31) 158.
[137] Juma (n55) 497.
[138] Juma (n55) 497.
[139] Aiyedun (n31) 157.
[140] Juma (n55) 497.
[141] Juma (n55) 499.
[142] Juma (n55) 498.
[143] C Price, 'Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution' (2018) 18(3) *Pepperdine Dispute Resolution Law Journal* 400.

community was of paramount importance and overrode what would be considered the right to privacy. While privacy around sensitive matters may have been most suitable for the affected individual, in the minds of Indigenous leaders, transparency of the process and outcome went further towards satisfying the interests of the community. Particularly where the outcome of a matter bore consequences for both the individual and the community, the adjudicators were bound to a duty to preserve the interest of the community. Any outcome that did not fulfil this mandate would be cause for concern.[144]

Conclusion

Notwithstanding their simplistic nature, indigenous dispute resolution methods, provided communities with recourse to resolving conflicts efficiently and with little to no complexity. The restorative nature of indigenous conflict resolution makes the process more appealing due to the holistic approach that underpins its values. Although indigenous dispute resolution methods have evolved over the years, they remain rooted in the principles that align with cultural norms of the communities that still rely on them. Their relevance and effectiveness remains unquestionable, particularly to those communities that are yet to gain access to judicial dispute resolution institutions.

Indigenous dispute resolution continues to weather the test of time because it is premised on the interest of society and pivots on the principles of restorative justice. While it must be conceded that indigenous dispute resolution methods are not without fault, it is equally important to indicate that no justice seeking processes flawless and that in the same way in which judicial procedures are continuously amended and updated, so must indigenous dispute resolution methods.

[144] Juma (n4) 449.

Chapter 3:

The dynamics of a mutated and diluted means of justice

3. Introduction

The establishment of colonial powers and their accompanying laws introduced new methods and procedures of dispute resolution throughout the African continent. The imposition of foreign and colonial laws on indigenous people as part and parcel of the process of colonisation meant that traditional dispute resolution mechanisms were adapted, disregarded or relegated to inferior status depending on the assessment of the colonial government. In most instances, this led to hybrid or dual legal systems in the colonial territories and culminated in the various legal doctrines that dictated the new status of indigenous modes of dispute resolution.

It is common cause that colonialism impacted 'the content and meaning of law as well as the structure and character of authority,'[145] which meant it had an influence on 'the expression of conflict in African societies' as well as how these conflicts were resolved.[146] The 'super-structural changes' that were introduced by colonialism had a significant impact on traditional organisational systems and caused changes in 'social and economic institutions'.[147]

This chapter examines colonial laws' implications for indigenous dispute resolution models in African countries and provides an overview of the systematic manner in which amendments and modifications to traditional methods of dispute resolution were determined and implemented.

[145] Roberts (n17) 257.
[146] Roberts (n17) 257.
[147] Ojwang (n28) 65.

3.1 Colonialism and the introduction of foreign law

Chapter 1 (one) of this dissertation, provided a synopsis of the *modus operandi* was used to carry out the colonisation process and traversed the ideological basis upon which many of the laws that were introduced to the African continent were deemed necessary for the colonial powers. It further demonstrated how the law was an important tool used to entrench colonial interests and support the Doctrine of Discovery. At this juncture, it is paramount to leverage the background provided and go beyond the point of summation by providing details on this topic.

As stated previously, colonialism was not simply an act of occupying lands and extending foreign authority. It infiltrated almost every aspect of native lives and changed the way of life to the extent that natives questioned their identity and ideals.[148] Traditional dispute resolution methods were not left unscathed as colonialism became entrenched and government controlled dispute resolution replaced or altered the customary law systems.[149] Where colonial laws did not disregard indigenous laws, they retained an inferior status to colonial laws and were only regarded if they could fill the gap where colonial laws were not formulated or only applied to matters involving native persons living in rural areas.[150] The impact of this meant that indigenous laws became suppressed and/or changed to suit the standard of the colonialist government.[151]

Through the creation and implementation of laws, colonial powers were able to create regulation mechanisms to manage the native slave and labour forces, the extraction of mineral resources in mines and[152] the redistribution and allocation of land.[153]

[148] D Vermette, 'Colonialism and the Suppression of Aboriginal Voice' (2008) 40(2) Ottawa Law Review 227.
[149] Price (n43) 395.
[150] Price (n43) 397.
[151] Price (n43) 397.
[152] Price (n43) 398.
[153] Merry (n3) 892.

Simultaneously, the law was used to 'construct a new consciousness, a new set of understandings of persons and relationships within African societies.'[154]

Chanock correctly pointed out that 'the law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion'.[155] Beyond this postulation was the power of the law to morph relationships through the use of power and the exploitation of that power against African communities. For instance, what has come to be known as customary law was created to manage the changing dynamics within African societies and contain their conflicts.[156]

3.2 Catalysts for conflict in Africa

The African continent comprises over fifty-two states, which 'are at different stages of political development and experience different levels of conflict'.[157] Relative to its size and the extent to which Africa was subjected to colonial atrocities, its conflicts are as big as the continent itself. Scholars have identified four broad categories of conflicts, namely:

a) intractable conflicts (those which are too difficult to resolve);
b) protracted social conflicts (by communal groups for such fundamental needs as security, recognition and even fair access to political institutions);
c) international social conflict (deep-rooted, prolonged conflicts that spread across a state's boundaries); and
d) complex political emergencies (multidimensional conflicts with devastating consequences such as massive human rights violations).[158]

The African continent experiences a myriad of variations and intensities of conflicts that cut across the spectrum of the categories of conflicts mentioned above.[159] This widespread and varied conflict landscape can be attributed to the complexities that come

[154] Merry (n3) 892.
[155] Roberts (n56) 253.
[156] Roberts (n56) 253.
[157] L Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13(3) *Michigan State Journal of International Law* 428.
[158] Juma (n157) 428.
[159] Juma (n157) 428.

with establishing and maintaining colonial power. Africa is plagued with territorial disputes and administrative dysfunction that stem from the resistance against colonisation and its systematic tactics.[160] This resistance, widely termed the 'liberation movement,' gained much momentum between the 1950s and 1960s and spurred the United Nations to push for the move towards the 'decolonization process '.[161]

While the strides toward decolonisation were welcomed and appreciated, they did not address or redress the issues that consume the continent to this day. The corrosion caused to institutions such as 'kinship, marriage, and property rights' has a lasting and prolonged impact on the African continent, and attempts to resolve these matters through development and international funding are proving to be futile.[162]

The discussion will elaborate on the most common causes of conflict on the African continent and explore the attempts to address and prevent the perpetuation of such conflicts where such steps have been applied. Due to the complexity of the African conflict landscape, the following will endeavour to make reference to specific case studies in order to expand on pivotal aspects of the contents relating to this study.

3.3 Appropriation of land and territorial demarcation

The freehold right to access and use of land enjoyed by African natives in precolonial times came to an abrupt end with the onset of colonisation. All forms of international rights, ranging from 'governmental sovereignty, diplomatic and commercial powers, were presumed to have been automatically limited upon the arrival of Europeans'.[163] The so called discovering nation almost immediately gained the right to control, politically and commercially, rule over the indigenous people that had inhabited the discovered land.[164]

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[160] Roberts (n17) 256.
[161] N Saito, 'Decolonization, Development, and Denial' (2010) 6(1) *Florida A & M University Law Review* 1 2.
[162] Roberts (n56) 255.
[163] Miller (n19) 39.
[164] Miller (n19) 39.

South Africa and Zimbabwe are classic examples of the effect that colonisation and land dispossession on the native people.[165] In both countries, most of the population was excluded from land ownership, and the settler group acquired most of the agricultural land.[166] The natives were allocated land that was, for the most part, barren and susceptible to poor rainfall conditions, which made subsistence farming and balanced nutrition challenging. These nations were both dependent on the land for survival, and this colonial step meant that survival became more difficult for the natives.[167] In contrast, the colonial settlers were able to expand their interests in commercial agricultural activities.[168] It is, therefore, no wonder why the issue of land distribution or re-distribution continues to plague these two countries to this very day.

The role of the law in relation to the systematic dispossession of land is clearly identifiable within the South African context. While we note that the process of dispossession was initiated 'through conquest and unfair agreements,' it was institutionalised through legislation, namely the Native Land Act of 1913.[169] This 'Act initially allocated 8% (eight per cent) of South Africa's land area to Indigenous Africans while the rest was reserved for the minority white population.[170] This portion allocation was increased by a mere 5% (five per cent) in 1936'.[171] The disproportionate allocation of land persisted until the end of the apartheid era in the early 1900s, but to date, the demographics of allocations remain relatively similar.[172]

[165] Rugege (n147) 235.
[166] Rugege (n147) 236.
[167] Rugege (n147) 236.
[168] Rugege (n147) 235.
[169] Rugege (n147) 235.
[170] Rugege (n147) 235.
[171] Rugege (n147) 235.
[172] Rugege (n147) 235.

3.4 Cultural suppression and the erosion of indigenous dispute resolution methods

Traditional dispute resolution mechanisms have demonstrated resilience and longevity throughout the colonisation project, notwithstanding the fact that they were in many instances undermined by colonial laws. They were not totally eradicated but instead continue to be practised and recognised, albeit in informal systems, in varied forms and in lower courts. As a result of their irrepressible nature, both traditional dispute resolution and formal legal channels co-exist throughout the African continent and are constantly reconciled and/or used interchangeably.[173]

While indigenous dispute resolution methods maintain a footprint in the African continent, they have been affected by changes that are caused by the need to respond to socio-political challenges that were created by the introduction of colonial rule. For example, in Somalia, 'traditional structures developed and changed hand-in-hand with the socio-political structures established by the colonial rulers'.[174] This is attributed to the close association between the indigenous dispute resolution ideology and the cultural practices in the region as well as the 'commitment to traditional societal norms'.[175] While the aforementioned point is not the central focus of this paper, it is imperative to acknowledge the significance of cultural suppression as part of the colonisation project and the role it played in the effectiveness or lack thereof in the attempts to eradicate or change indigenous dispute resolution methods.

The resilience of traditional dispute resolution methods did not always withstand colonial efforts to obliterate or undermine indigenous laws.[176] In many instances, they were changed or modified and practised in an evolved form.[177] In instances where they

[173] Price (n43) 395.
[174] Aiyedun (n31) 160.
[175] Aiyedun (n31) 160.
[176] Aiyedun (n31) 162.
[177] Aiyedun (n31) 162.

were not altered, they were subjected to a lower level in the hierarchy of laws and utilised as an alternative to colonial laws that were granted a much higher status.[178]

Transmuted indigenous laws created a new way of managing conflict and subjected African natives to a new way of life. New parameters and appeal structures, such as western courts, meant that disputants could seek ways to disregard the rulings of traditional tribunals and obtain outcomes that differed from those imposed by traditional laws. What was accepted practice and respected as a final decision became subject to a process of appeal and review, causing the powers of traditional tribunals to be limited.[179] In other words, proclamations and verdicts of traditional tribunals could be undermined by simply opting to follow the ruling or precedent of a Western court.

3.5 Introduction of western judicial systems

The process of westernising African dispute resolution processes did not stop at the stage of amending procedural aspects but went as far as changing and prescribing sanctions. This phenomenon has been highlighted by the scholar Ubah, who has analysed what he has termed the 'westernization process' impact on Islamic law in Northern Nigeria.[180] Ubah particularly identifies the intensification or relaxation of sanctions to align with what is acceptable in terms of western standards as a means to undermine decisions taken in traditional tribunals.[181] By increasing or decreasing sanctions during appeal processes the preceding decisions immediately became questionable and was indirectly placed on a track to becoming redundant or permanently modified.[182] The establishment of western courts caused a direct assault on traditional judicial systems that were in place prior to colonisation. These courts introduced the categorisation of matters and provided new methods for redress while also disregarding certain traditional principles.[183]

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[178] Price (n43) 395.
[179] Price (n43) 396.
[180] Yadudu (n54) 19.
[181] Yadudu (n54) 22.
[182] Yadudu (n54) 20.
[183] Ojwang (n28) 69.

The strategy that was used to establish courts seemingly required some compromise due to the pliability of indigenous law and entrenched cultural practices. It became evident that the total eradication of indigenous laws and practices would not be possible and that an alternative form of law would have to be introduced to coordinate native disputes. This is how customary law was introduced and built. 'Customary law is thus recognised as a legal system specific to the historical contingencies of the early colonial period.'[184] It is a law that is a collaborative project between colonisers and native leaders of the time who sought to preserve their interests in relation to authority.[185] The middle ground, that is customary law saw into existence the likes of the East Africa Native Courts Amendment Ordinance 26 of 1902.[186] This statute cemented the hierarchy of laws and their applicability to natives. Provision 27 of the East African Native Courts Amendment Ordinance 26 of 1902 reads as follows:

> In all cases civil and criminal to which natives are parties, every Court
> (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance or any regulation or Rule made under any Order in Council or Ordinance; and
> (b) shall decide all such cases according to substantial justice...[187]

Summarily put, the natives were permitted to apply their own indigenous laws as long as those laws were not in conflict with any rules or laws that were imposed by the colonial settlers. A further interpretation of this ordinance is that the laws of the settlers enjoyed superior status to that of native laws, which were limited in application to natives and subservient to colonial settler rules.

[184] Roberts (n56) 253.
[185] Roberts (n56) 253.
[186] Ojwang (n28) 70.
[187] Ojwang (n28) 71.

3.6 Disempowerment of indigenous leaders

Precolonial Africa comprised of people that lived in settled communities that had their own governance and political structures.[188] Kings ruled over their subjects and different tribes functioned in ways that accorded with their cultural ideologies.[189] Life may have had its trying times but African communities had developed ways to cope with such challenges and were able to weather the storms.

Indigenous leaders, such as Kings and chiefs bore the responsibility of providing their communities with leadership and progression. They were in charge of commercial activity and ensured that resources were distributed fairly.[190] Ownership of the land vested in the king and access to land was by freehold right.[191] This ensured that fertile land was accessible to all and ensured that no one was subjected to famine or starvation.[192]

Colonisation brought immense change the leadership structure so African communities. What is more apparent is the strategic manner in which these leadership structures were infiltrated and used as tools in the perpetuation of colonisation. Chanock asserts that traditional systems of authority were the 'cornerstones of the colonial settlers' strategy for governance.'[193] By turning the traditional leaders into administrators of processes as opposed to being the custodians that they were, colonial settlers were able to acquire indirect authority over the natives through the existing traditional authorities.[194]

This infiltration of traditional leadership no doubt caused indigenous communities to become 'wary of institutions of colonial administration that were introduced into African communities under the guise of being traditional.'[195] This very phenomenon was experienced when the British colonisers introduced the chieftaincy of the Tanganyika of

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[188] Juma (n4) 489.
[189] Roberts (n56) 258.
[190] Roberts (n56) 258.
[191] Juma (n 4) 489.
[192] Roberts (n56) 253.
[193] Roberts (n56) 256.
[194] Roberts (n56) 256.
[195] Juma (n55) 497.

Tanzania.[196] This step assisted the British in gaining more authority over the Tanganyika community, gaining more ground, and advancing colonial interests.

Laws that empowered colonial settlers to appoint traditional leaders mushroomed, and several pieces of legislation were promulgated throughout the African continent. The Village Headman Ordinance 29 of 1902 enactment is one of many examples. This ordinance empowered 'the Commissioner to appoint village leaders who were to be the key institution for maintaining order within the village.'[197] These appointees were soon to be used as governmental informants who would assist in monitoring the political climate of the community and warn the colonial government of any changes or plans to attempt to challenge the government of the day.[198] The function of these traditional leaders changed to that of spy and informer, and the general responsibilities that were synonymous with the role fell by the wayside, causing a great leadership deficit in these communities.[199]

Similarly, under the East Africa Native Courts Ordinance, the government was empowered to select 'native Chiefs to act as overseers of rural administration and judicial process.'[200] These appointments were merely a collation of persons who would owe their loyalties to the state and not necessarily hold the interest of their communities. One could assert that the *modus* used by the colonial governments was that of infiltration and indirect control. The outcome of this strategy was traditional leadership structures that:

> (a) had split loyalty between their communities and the government that applied control over them;
> (b) was comprised of leaders who no longer played leadership roles, thus plunging their communities into crisis that would remain unattended or resolved;

[196] Juma (n55) 489.
[197] Juma (n55) 489.
[198] Juma (n55) 490.
[199] Juma (n55) 490.
[200] Ojwang (n28) 70.

(c) operated in accordance with the dictates of foreign legislation that was masked as traditional or customary rules.[201]

These changes to the appointment of, and powers vested in indigenous leaders lowered the status of the chiefs and over time, eroded their stature in society. It became apparent that the focus of chieftainships changed to hold the interests of the state and not that of the community as was the position prior to colonisation.[202]

3.7 The autonomy of colonised territories and hierarchy of laws

Precolonial dispute resolution processes are wide-spread throughout the African continent but they do not make up the core of the corpus juris of African legal systems.[203] They bear a secondary status to the imported and imposed laws.[204] Where it proved to be most convenient and least disruptive to colonial interests, western governments allowed Africans to live by their own laws and under the limited rule of their own leaders.[205] In other words, 'traditional leaders were allowed to administer customary laws, provided that the laws were not repugnant to natural justice, equity and good conscience and were not in conflict with public policy or contrary to the stipulations of the Constitution or any other formal legislation.'[206] Colonial powers reserved themselves veto powers that could be used to over-rule or ban customs and practices that they perceived as being 'barbaric' or 'anachronistic.'[207]

As a result of this oversight and self-proclamation of authority, the sovereignty of most African countries was compromised or erased by colonial acts. The fact that many formal courts in Africa were, for the longest time, subject to review by appellant courts that were in Western countries who had to ratify or approve the rulings of certain matters meant that the ultimate custodians of laws in the colonised territories were the governments that

[201] Ojwang (n28) 71.
[202] Ojwang (n28) 71.
[203] Aiyedun (n31)162.
[204] Aiyedun (n31) 162.
[205] Aiyedun (n31) 161.
[206] Aiyedun (n31) 151.
[207] Aiyedun (n31) 150.

had colonised that particular country. As a result, colonised African countries lacked autonomy and the ability to self-govern, which meant that the power to legislate and implement legislation did not vest with the natives but rather made the colonial site an extension or satellite site of the colonial power.[208]

'According to the Decolonization Unit of the United Nations, almost one-third of the world's population was 'non-self-governing' in 1945'.[209] The world moved towards a decolonisation agenda, with 80 (eighty) former colonies territories recognised as independent by 2002. This included the declaration of independence of 18 (eighteen) African states by the United Nations (UN).[210] Fundamentally important was the adoption of the UN Charter 'which dedicated 3 (three) chapters to ensuring the eventual independence of 'non-self-governing territories' and the well-being of their inhabitants'.[211] This was a shift from the colonial agenda that sought to destroy indigenous legal systems by rendering them irrelevant and, after that, making them subservient to laws from 'civilised countries'.[212]

3.8 A Unique African Legal Systems Landscape (the creation of Pluralist legal systems)

The legal system and social context of African nations are unique and complex.[213] The landscape of most, if not all, 'African countries reflects an interaction between two or more systems of law'.[214] The African continent boasts a multitude of combinations of laws; however, Islamic law, common law, and civil law remain the most dominant. For example, the Nigerian legal landscape comprises customary law, Islamic law, and English common law, while South Africa uses a legal system that comprises a combination of Roman-

[208] Aiyedun (n31) 160.
[209] N Saito, 'Decolonization, Development, and Denial' (2010) 6(1) *Florida A & M University Law Review* 3.
[210] Saito (n209) 3.
[211] Saito (n209) 3.
[212]A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard International Law Journal* 23.
[213] Price (n43) 395.
[214] Aiyedun (n31)159.

Dutch Law, English law, common law, and customary law.[215] Most interesting is that the indigenous and foreign systems operate mutually in the same jurisdiction and have somehow managed to find their respective place in the legal system, notwithstanding the many differences in ideology and principles in certain areas.[216]

Western countries ordinarily have only one legal system, while many African countries are pluralistic nations due to the integration of traditional dispute resolution concepts with Western methods and laws.[217]

Uganda is one of many African countries that are examples of a hybrid legal system comprising modern or Western dispute resolution methods and traditional values. Ghana's approach is similar to that of Uganda. However, infusing these two systems is better guided by context and culture in Ghana.[218] Ghana's approach to its pluralist legal systems entails nuances that centre legal outcomes on the cultural practices of the specific region.[219] As a result, the legal system is fluid, not only according to generic customary principles but also customised in terms of geographical cultural approaches, which tend to differ from region to region.[220]

The Rwandan Gacaca Courts are one of the most prominent examples of the pluralist approach to dispute resolution. Most admired for their Indigenous grassroots approach, the Gacaca courts capitalised on traditional Rwandan problem-solving practices. The familiarity with these traditional practices made it easier for the masses subjected to these courts to identify and cooperate with the process. The Gacaca courts are, therefore, a good example of an indigenous dispute resolution process that has flourished despite the presence and denomination of a Western court system.[221]

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[215] Aiyedun (n31) 159.
[216] Aiyedun (n31) 159.
[217] Price (n143) 395.
[218] Price (n143) 412.
[219] Price (n143) 412.
[220] Price (n143) 413.
[221] Vermette (n11) 210.

The motive behind the creation of the Gacaca courts was not necessarily the preservation of the traditional Rwandan method of resolving disputes but rather to address the scepticism that conventional criminal courts would be unable to bring the genocide perpetrators to justice while creating a form of participatory justice that could also expedite the finalisation of the process.[222] These courts achieved their objective and, as a by-product of their function, realised the preservation of traditional dispute resolution methods within a court structure.[223]

Conclusion

Most African states make use of pluralistic dispute resolution models due to colonial influence. While the introduction of foreign legal methods and principles may have had an impact on the promotion and development of indigenous dispute resolution methods, it has not culminated in the eradication of these methods. Key features of the various indigenous dispute resolution methods are found in many African judicial processes. This means that even though colonial laws may have altered traditional dispute resolution methods, the indigenous dispute resolution methods have in turn influenced colonial dispute resolution mechanisms.

[222] Vermette (n11) 208.
[223] Vermette (n11) 208.

Chapter 4:

International strides to recognise Indigenous dispute resolution methods and the benefits of re-instating the status quo

4. Introduction

The African continent is part of a global community and thus cannot operate in isolation. The bilateral understandings that come from being part of a larger global community benefit each state and continent, which remains true for the African continent as well. Global citizenship remains paramount for every state, and understanding international laws and standards is integral to many government functions. A simple reading of the definition of international law highlights why it is crucial to the operations of any state.

> International law is universal. It is a body of law that applies to all states regardless of their specific cultures, belief systems, and political organisations. It is a common set of doctrines that all states use to regulate relations with each other.[224]

International law arises from the same empirical expansion that brought with its colonisation. Its universalisation was propelled by the many colonial wars that resulted in the assimilation of many nations under the rule of European powers.[225]**.** Many treaties and codes have been promulgated by international law bodies such as the United Nations over the years; however, the imbalances of the colonial project still prevail. Despite their acknowledgement, 'African traditional dispute resolution methods are still couched in stagnant and extant language that de-emphasizes their regenerative and transformative capabilities on international platforms.'[226]

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[224]A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard International Law Journal* 1.
[225]Anghie (n224) 2.
[226] L Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13(3) *Michigan State Journal of International Law* 419.

In this chapter discusses the place and position allocated to African indigenous dispute resolution methods and investigate ways in which their place in international for a can be improved and enhanced.

4.1 The international emancipation agenda and protection of indigenous rights

'The International Labour Organisation (ILO) is the United Nations (UN) agency devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity'.[227] While its main objective is to address employment rights and labour related issues, it also houses Convention 169, which concerns Indigenous and Tribal Peoples in Independent Countries.[228] This convention, adopted in 1989, 'seeks to ensure that Indigenous and Tribal peoples enjoy human rights without discrimination, exercise control over their own development and participate in decision-making processes that affect their lives'.[229] Convention 169 is visionary in the sense that, to date, it remains the only 'legally binding international instrument open for ratification that is exclusively dedicated to the rights of Indigenous and Tribal peoples'.[230]

Notwithstanding its many years of existence, 'it is the only binding treaty on Indigenous people's rights'.[231] Convention 169 does not enjoy the same prominence as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which pertains to 'the rights of ownership and ownership of the people concerned over the land they traditionally occupied and their control over their economy'.[232] These treaties and conventions have come about as a response to the realisation that there are Indigenous

[227] Indigenous & Tribal Peoples Convention1989 (no. 169) 3.
[228] P Larsen, 'Indigenous rights and ILO Convention 169: learning from the past and challenging the future' (2020) *The International Journal of Human Rights* 84.
[229] Larsen (n228) 84.
[230] Larsen (n228) 84.
[231] Larsen (n228) 83.
[232] E Syahruddin,' Factors that Encourage the Implementation of Alternative Dispute Resolution Between Indigenous Peoples and Corporations in Indonesia' (2022) 5(1) *Open Journal for Legal Studies* 11.

people who remain marginalised in the countries of their origin and are reduced to accessing limited if any, rights that should afford them an independent and decent life.[233]

Articles 8 (eight) and 9 (nine) of the ILO explicitly recognise Indigenous people's rights to independence and self-governance and to live in accordance with their indigenous laws. Article 8 recognises that most colonised regions exist within hybrid legal systems and specifically prescribes that due regard must be had for customs and customary laws.[234]

This level of recognition of Indigenous people's rights supports the notion that at an international level, there is an attempt to redress the injustices of the past and promote social just towards those 'Indigenous peoples who still live in the middle of the political constellation of law' that strips them of their human rights.[235]The deepening levels of inequality among colonised communities, specifically, require scrutiny and understanding of the gains or lack thereof of Convention 169.[236] One need only look at the increase in controversies across Asia and Africa to realise that Convention 169 is either not widely implemented or is disregarded by the member states.[237] This begs the question of how member states are not held accountable for failing to comply with the terms of the convention, which clearly has measures to enforce accountability. The Convention contains reporting requirements at 6 (six) year intervals as well as a supervisory body that oversees the reporting process.[238] The ILO also empowers members through a complaints process that can be relied on to invoke the terms of C169, but more needs to be done to give the Convention the teeth it requires to yield more effect.

[233] C169 (n227) 6.
[234] C169 (n227) 6.
[235] Syahruddin (n232) 11.
[236] Larsen (n228) 85.
[237] Larsen (n228) 85.
[238] Larsen (n228) 88.

4.2 International acknowledgement of the efficiencies of traditional African dispute resolution methods

Many comparisons have been drawn between African indigenous dispute resolution methods and those that emanated from the Western world. This comparison process has provided a rich database of indigenous dispute resolution methods that are now being considered on international platforms. Many factors have contributed to the realisation that the simplistic approach of indigenous conflict resolution bears relevance in the modern world.

Carolyn Nordstrom has lauded indigenous resolution methods, particularly those observed during the Mozambican civil war, for their 'creatively evolved systems of dealing with the violence around them'.[239] The level of sophistication that is harnessed from actively and persistently dealing with conflict resolution provides fertile ground for refining and improving skills. This can only come from practical experience and from making do with minimal resources. The chaos and devastation that Africa has endured for centuries has gifted the continent with the sophisticated dispute resolution methods that Nordstrom so eloquently describes.[240]

Several features lend indigenous justice systems praise and compliments, particularly when it comes to resolving disputes amongst African communities.[241] Some factors that make indigenous dispute resolution methods effective include, but are not limited to:

a) Ease of accessibility to the adjudicating body for disputants in rural communities: Indigenous African dispute resolution processes are without laborious formalities that drain time and resources before accessing justice. They are also situated within communities and are therefore are easily accessible to disputants ;

[239] Juma (n226) 419.
[240] Juma (n226) 419.
[241] A Aiyedun, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 *Law, Democracy and Development* 161.

b) knowledge of the environment and cultural context: In the same way that western laws are localised and customised to respective regions, so are indigenous laws and dispute resolution mechanisms. Each region facilitates it dispute resolution processes within the context of regional political, social and communal background and therefore yield outcomes that are most relevant and effective;
c) the possibility of having proceedings heard in the local language: This entails breaking down language barriers and reduces the risk of misunderstanding between disputants and adjudicators;
d) The restorative nature of achieving solutions that guarantee the restoration of local peace in accordance with local customs: This remains centric to African indigenous dispute resolution processes and proves to be an effective way to help disputants to reach common ground in relation to their conflict;
e) Non-bureaucratic structure and;
f) The promotion of 'common-sense' thinking with the promotion of substantive issues versus procedural technicalities. Disputants are not entangled in laborious processes that prolongs the journey towards the resolution of conflicts. The rules of indigenous dispute resolution methods are simple and expedient. [242]

Furthermore, Indigenous communities take pride in receiving assistance through a process and structure that aligns with their customs and way of life. The people actively participate in the process due to its familiarity and higher level of trust compared to the state's law.[243]

From an international perspective, there has been much enlightenment about indigenous dispute resolution forms and the thought of cultivating them for modern-day use. For instance, in Canada, there is an attempt to revive indigenous dispute resolution methods. The revival process started 'by identifying the customary norms of doing things, analysing traditional institutions for dispute resolution, and assessing the need for leadership that will progress the process '.[244] This initiative is commendable and extends

[242] Juma (n226) 422.
[243] Aiyedun (n240) 161.
[244] Osi (n52) 198.

hope to the aboriginal people of Canada, who still yearn for the restoration and reinstatement of their cultural norms that were stripped away by colonisation.[245] The test, however, for the possible resuscitation of the indigenous dispute resolution process lies in its ability to adapt to modern-day conflicts and the 'forces of societal developments.'[246] The Aboriginal people of Canada must anticipate that they will have to consider the revival of their indigenous laws within the context of modern day developments. They must remove any elements that will cause rigidity and stunt the development of indigenous laws.

Within the African context, dealing with varying forms of conflicts 'has become a pattern of life in many of the African communities, particularly those that have been afflicted by war.[247] As such, African nations have found creative ways of using 'people-to-people peace processes with a combination of other resources to resolve conflicts.'[248] By way of example, in southern Sudan, the conflict between the Nuer and the Dinka was resolved using a combination of 'traditional methods, military ideas, and religious values to create a viable framework for peace'.[249] This approach demonstrates the adaptability of indigenous dispute resolution methods and shows that traditional methods are malleable enough to be used in conjunction with other methods or approaches.

The time for Africa to take its place in international peacekeeping initiatives is long overdue, given the consideration that many scholars have continuously affirmed the view that African Indigenous institutions, 'through their traditional inputs into processes such as arbitration, mediation and negotiation'[250] can make tangible contributions to general peace-keeping. Notwithstanding the various acknowledgements of the suitability of indigenous African dispute resolution methods, it is disappointing to note that there has been limited recognition of indigenous programs emanating from the African continent.

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[245] Osi (n52) 199.
[246] Juma (n226) 419.
[247] Juma (n226) 419.
[248] Juma (n226) 420.
[249] Juma (n226) 420.
[250] Juma (n226) 418.

Instead, the opposite phenomenon has occurred.[251] The continued marginalisation of African methods at international levels remains a barrier to the meaningful contribution that indigenous African dispute resolution could make.

4.3 Decolonisation: The key to the restoring indigenous forms of dispute resolution

This research asserts that contemporary African societies employ a dual legal framework consisting of indigenous dispute resolution methods and 'formal legal channels.'[252] The challenge remains the reconciliation of these 'two spheres' and the strengthening of the African indigenous leg as part of restitution for the many years of active suppression through colonisation.[253] Indigenous African dispute resolution, in its current state, cannot be deemed to be on an equal footing with colonial laws. This is because it has been subjected to suppression, manipulation, and relegation, which made it an alternative as opposed to being nurtured and developed over centuries to meet the demands of modern day conflicts. It is, therefore, imperative that we bear in mind that when drawing comparisons between the two forms of law, the playing field is not levelled.

The journey towards creating parity between the two legal systems apparent in most African states starts with the emerging movement of decolonisation, which is gaining traction throughout the African continent. Defining decolonisation requires consideration of the many facets of colonisation itself and, therefore, becomes complex. Some scholars have tried to simplify the definition of decolonisation by stating that 'it is the opposite of the process of colonisation or westernisation which began in the 15th century as a result of the imposition of colonial systems on Indigenous people.'[254] Batchelor provides the following definition, which purports to encapsulate the requisite definitional elements:

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[251] Juma (n226) 418.
[252] Price (n43) 397.
[253] Price (n43) 398.
[254] B Batchelor, 'Incorporating Afrocentric Alternative Dispute Resolution in South Africa's Clinical Legal Education' (2021) 25 *Law, Democracy and Development 484*.

> Decolonisation can be understood as the process of transformation which takes place when a country achieves its colonial independence from erstwhile colonial powers.[255]

This definition is fitting as it is broad enough to cover the broad objectives of change and restoration that must be undertaken to restore what was removed by colonisation. The inception of the decolonisation movement can be traced back to the ending of World War II, which ushered in political changes that were accompanied by a 'dramatic transformation of international law and legal institutions, many of them purporting to facilitate a decoloni[s]ed world'.[256] Although the strides taken to implement the decolonisation project have been minor and slow to gain recognition, the spirit in which they have been presented has held the promotion of justice and ensuring the certainty of the law at its core.[257] Further to the above, it must be bore in mind that the fact that decolonisation made it onto the thoughts and agenda of many colonised states around the world; it does not mean that this way of thinking was met with acceptance and the willingness to implement by those who had introduced colonisation to these regions. In fact, one may go a step further and state that the idea of decolonising colonised territories was met with much resistance because of the political and economic impact that it would have on colonising states.

As indicated above, colonisation was multifaceted, and it follows that decolonisation would have to follow in these footsteps to be effective. This paper will, however, only focus on the decolonisation aspects that pertain to the law, more specifically indigenous African law.

Friedman's teachings highlight some fundamental points regarding the law and the significant impact that colonisation had on it. Friedman contends that indigenous laws had a 'holistic conception of law but were supplanted by Eurocentric-based systems'.[258] This was the process of side-lining indigenous laws and promoting European laws in their

[255] Batchelor (n36) 484.
[256] Saito (n209) 5.
[257] Batchelor (n36) 492.
[258] Batchelor (n33) 491.

stead. As a result of this relegation, 'African legal systems were denied the current legal order of a more holistic view of the law, which encompasses expressions of culture and includes social norms and values affecting behaviour'.[259] McDougal supports Friedman's observation and further indicates that the stunting of the development of African laws means that these laws currently 'do not espouse a 'legal realism'.[260] In other words, because African laws were not used sparingly and within certain confines and limitations, they became excluded from community processes and could no longer affect or contribute to the distribution of values inherent in the legal system.[261]

This research explores the possible redress that must be considered to see the restoration of African indigenous laws come to fruition. It must also highlight that these points of redress are from the perspective of action steps that require the African continent itself to affect the suggested interventions and not seek the contributions of other continents.

The first point of redress is 'Indigenous empowerment'.[262] This term, 'suggests that conflict management transformation must actively envision, include, respect, and promote the human and cultural resources from within a given setting'.[263] His argument is simply that laws in a particular region should be rooted in and centred around the cultural ideologies and beliefs of the people of that region. To transform the current state, the posture to be promoted validates and builds on people within that setting.[264] Solutions to African conflicts should emanate from Africa and not be imported from external parties. This way, the indigenous laws can take centre stage and assist the continent in promoting its own resolutions.

[259]Batchelor (n33) 493.
[260]Batchelor (n33) 495.
[261]Batchelor (n33) 495.
[262] Juma (n55) 490.
[263] Juma (n55) 492.
[264] Juma (n55) 492.

The second area to be examined is that of 'ownership of the peace initiatives'.[265] History has proven that community-centric ingenuities are most effective when the 'beneficiaries 'own' the project'.[266] The same is true for dispute resolution and peace-making processes. The communities that must receive dispute resolution outcomes must be part of the process so that they do not perceive the initiatives as foreign and removed from them.[267] We have witnessed the un-progressive implications of imported conflict resolution processes often monopolised by external parties with their own agendas. Many UN peace processes have failed because they are either directly or indirectly contaminated by third-party ideals and interests that derail the train to a state of resolution.[268] By retaining ownership of our peace processes, Africa would be better placed to counter these elements and increase the probability of attaining peaceful resolutions to conflicts.[269]

The third area for consideration is the 'structural integration of the cent[re] and its peripheries', which requires discourse and social compact in relation to the use of traditional legal systems.[270] This will not only collate the input of communities that will be subjected to the laws and processes but will also give insight into the 'aspirations of marginalised and rural communities to the national agenda for economic development and political participation.'[271] By ensuring widespread participation, the bricks for sustainability will be stacked in favour of the revival of traditional dispute resolution methods while safeguarding against the exclusion of communities when it comes to actual legislative reform.[272] This approach would have prevented the Liberian crisis of 1940, which was exacerbated by the exclusion of local indigenous communities from the Legislative Council in Monrovia.[273] Had the local indigenous communities been privy to

[265] Juma (n55) 494.
[266] Juma (n55) 492.
[267] Juma (n55) 492.
[268] Juma (n55) 492.
[269] Juma (n55) 494.
[270] Juma (n55) 494.
[271] Juma (n55) 494.
[272] Juma (n55) 494.
[273] Juma (n55) 494.

the resolutions and decisions, there would not have been room for instigators of conflict to enter the fold and destabilise the peace process. The isolation of a significant part of the population only resulted in anarchy and more conflict.[274]

4.4 Indigenous dispute resolution methods: beyond the horizon

It is an undisputed fact that 'Indigenous dispute resolution processes have proven meritorious and effective since before recorded time'.[275] The indigenous communities that have benefited from these legal systems bear testament to the fact that indigenous dispute management, in all its forms, served them well enough to restore harmony to their communities.[276]

The arrival of colonial settlers may have caused momentous instability in African legal systems and, subsequently, political and economic strife, but one cannot ignore the fact that the colonial encounter has also spurred the need to improve and develop indigenous African law.[277] The African continent must, therefore, find a way to leverage its unfortunate fate of colonisation by sifting out all that is negative and detrimental to African communities and retaining that which can be used to build a better future for the continent. In relation to legal systems, this would entail finding 'elements of commonality between indigenous and formal systems and assess the viability of integration and the creating of a hybrid model.'[278]

Most scholars hold the view that the starting point to cementing the revival of indigenous dispute resolution methods lies within the formal recognition of African laws in African states. The level of recognition required to build a sturdy foundation for the survival and development of traditional processes is not superficial or secondary in

[274] Juma (n55) 494.
[275] Osi (n52) 213.
[276] Osi (n52) 213.
[277] Yadudu (n54) 22.
[278] Aiyedun (n60) 173.

nature. It must be recognised that it is unapologetic and hearty enough to hold its place with African societies and the world at large.

The rest of the continent can model the Kenyan approach. In 2010, Kenya amended its Constitution to include formalised 'Traditional Dispute Resolution Mechanisms (TDRMs)' and thereafter extended its TDRMs to land disputes through the promulgation of the Community Land Act.[279] This step has been crucial to the land redistribution disputes, which seek to effect redress for the land that was appropriated during colonisation and also usher in institutional fluidity in relation to the structures that will deal with this issue equitably.[280] African countries that embark on the same route as Kenya must, however, be cautious of their populations' context and cultural maturity so as not to suffer the fate of the people of Ghana, who sought a similar stride before the opportune moment arrived.[281]

At a continental level, the dilemma of future dispute management and resolution has been at the helm of the African Union's socio-economic development.[282] The African Union has bemoaned the view that conflict constitutes Africa's greatest impediment to socio-economic development. This is largely because it will be near impossible to realise the much-needed socio-economic emancipation if there is no 'peace, security and stability on the continent.'[283] As the collective body representing the interests of the African continent, the African Union must fulfil its mandate by 'understanding the dynamics of contemporary political disputes and violent conflict' and 'finding ways to prevent, manage, and resolve them' expeditiously. [284] This research contends that a pivotal part of fulfilling this duty lies in exploring indigenous dispute management, which presents diplomatic solutions to what would ordinarily be combative and violent conflicts.

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[279]K Witchger, 'Equality in Process: Community Land Dispute Resolution Mechanism in Kenyan Law' (2018) 37(1) *Columbia Journal of Gender and Law* 68.
[280] Witchger (n278) 70.
[281] Price (n43) 412.
[282] Juma (n157) 425.
[283] Juma (n157) 425.
[284] Juma (n157) 423.

Conclusion

A recurring feature in African conflicts and socio-political structures is the failure of the government of the day to nurture indigenous dispute resolution bodies. The neglect of rural communities or 'departicipation', as termed by the scholar Kasfir, is far too common in the African continent. Instead of actively preserving all facets of traditional life and introducing development in rural areas, African governments are allowing traditional ways of life to die natural deaths and leaving rural communities in a state of devastation.[285] Society is all too well aware that the same *modus* of disregard inflicted by colonial powers did not serve the people of Africa well; the perpetuation of the same treatment of desegregation at the hands of African leaders will shatter hopes for unity and a better life in African communities.[286]

Africa must be slow to adopt dispute resolution strategies presented and favoured by 'the donor community, bilateral and multilateral assistance programs, and international organisations'.[287] The reason for this caution lies in the fact that these suggested conflict resolution processes tend to 'ignore structural variations, cultural pluralism, and the complex internationalist impositions that inform the conflict situation'.[288] In addition to the aforementioned, the foreign dispute resolution methods are laden with foreign interests and tend to be the reason for the derailing of peace processes. They are also void of cultural understanding and basis and often yield empty and unsustainable outcomes in relation to African conflicts. Adopting a cautious approach will safeguard African interests until the dispute is concluded.

In conclusion, that the transformation of Africa's dispute resolution landscape is likely to worsen before it improves. The reluctance of African leaders to take the bold step of adopting a restitution measure in relation to indigenous dispute resolution methods will

[285] Juma (n226) 427.
[286] Juma (n226) 438.
[287] Juma (n226) 468.
[288] Juma (n226) 468.

continue to have a resounding effect on the African communities that will continue to be starved of their way of justice and redress.[289]

[289] Juma (n55) 513.

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