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THE INTERFACE BETWEEN THE TRADITIONAL AND CRIMINAL JUSTICE SYSTEMS: A REVIEW OF THE HIGH COURT'S DECISION IN KANYAMUNYU MATHEW MUYOGOMA V UGANDA[1]

Courage Ssewanyana*

Abstract

Traditional justice mechanisms (TJMs) were the hall mark of dispute resolution and justice in the different African societies before the colonial era started in the 1880s. With the import of the Victorian justice system in Uganda, the customary laws that governed traditional justice mechanisms were relegated to a test of repugnancy. The recently decided case of Kanyamunyu Mathew v. Uganda brought into light the position of traditional justice systems in the legal arena. The Judge noted that the traditional justice system (Mato-Oput) is shrouded in legal ambiguity and its interface with the criminal justice system is opaque. The author takes the stand that this decision was a missed opportunity for courts to recognize the applicability of traditional justice mechanisms in Uganda's jurisprudence. The paper takes cognizance of the arguments against traditional justice systems. This paper seeks to deconstruct these arguments and advocate for the acceptance of this module of justice.

1.0 INTRODUCTION (THE APPLICATION)

1.1 FACTS

In 2016, the media was awash with the alleged killing of a child activist Kenneth Akena after a scuffle at Nakawa Kampala on the 12th of November. The prime suspects were Mathew Kanyamunyu, his girlfriend Cynthia Muwangari and Joseph Kanyamunyu.[2] The three were charged and committed for trial before the Nakawa High Court by the DPP[3]. With a lot of adjournments, bail applications, the protracted case finally came to an end in November 2020.[4]

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1 Misc. Criminal Application No.151 of 2020. Available at https://ulii.org/ug/judgement/hc-criminal-division-uganda/2020/144 [accessed 6 July 2021]

2 NTV, "Mathew Kanyamunyu, his brother and girlfriend charged with murder and remanded to Luzira" November 22, 2016". Available at https://youtu.be/FyUxbtna1nc [accessed 6 July 2021}

3 NTV, "Kanyamunyu and co-accused committed to High Court for trial" January 31, 2017 available https://youtu.be/G7kzWdciQa8 [accessed 6 July 2021]

4 Justice Mubiru gave the procedural history of the application in his Judgement. The

The sensitivity of the case due to the different background of the parties created a lot of interests and analysis on the case. In the process of the trial, an interesting twist of events occurred. The accused had access to the Ker Kal Kwaro Acholi (Traditional Institution of the Acholi), where the victim and his family hailed, in an effort to seek reconciliation by submitting to the process of *mato oput*.[5] It is alleged that he admitted to have killed Kenneth Akena after a car accident.

The institution initiated the *mato oput* process and was bound to come to a conclusion before the accused was sentenced. The above application was therefore brought by the accused seeking for an adjournment under Section 53 of the Trial on Indictment Act[6] and Rule 2 of the Judicature (Criminal Procedure) (Applications) Rules[7] so that he could conclude the *mato oput* process that was ongoing.

1.2 ARGUMENTS OF THE PARTIES

The accused argued that the purpose of the adjournment was to enable him conclude a reconciliation initiative which will in turn enable a more meaningful and judicious plea bargain to be undertaken.[8] He also contended that the process was an elaborate one that provides meaningful reconciliation between the family of the victim and theirs.

He noted that he had initiated a plea bargain process on 26th October 2020 and as such it would be important to first finish the reconciliation process before plea bargain can be meaningfully undertaken. The applicant also averred that the pre-trial publicity of the case had created a divisive tribal line between the people of the Northern part of the country and Ankole region. That the successful completion of the *Mato oput* process may help in

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accused was arrested on 12th November 2016, was charged on 22nd November 2016. He was granted bail on 4th October 2017, when the case came for commencement on 18th December 2018, it was adjourned to 21st January 2019. When it came up that day, it was again adjourned to 8th January 2020. It was again adjourned for 21st February 2020 and it finally came for hearing on 27th October 2020 after which the present application was made.

5 Anthony Wesaka, Kanyamunyu meets Acholi elders over Akena's killing, Daily Monitor September 14, 2020. Available at https://www.monitor.co.ug/uganda/news/national/kanyamunyu-meets-acholi-elders-over-akena-s-killing-1938656 [accessed 7 July 2021]

6 Trial on Indictment Act Cap 23, Laws of Uganda

7 Judicature (Criminal Procedure) (Applications) Rules S.I 13

8 Stephen Mubiru, paragraph 5, Page 5 of the case

restoring the inter-tribal unity between the people of Ankole and those of Acholi. He also noted that the three processes of the trial, plea bargain and the traditional justice system can be supportive.

It should be noted that the applicant did not in his application seek to overthrow the formal legal regime but merely sought for adjournment to complete the process. The application was supported by affidavits from the chief mediator Mr. David Okello and Okot Ambrose Olaa, the Prime minister of Ker Kal Kwaro Acholi.

The prosecution, on the other hand, vehemently opposed the application. The learned chief Attorney argued that the ground for the application which was the anticipation of completion of *mato oput* was not one of the grounds provided under the law. He noted that Section 53 of the Trial on Indictment Act did not envisage such since it only provided for absence of a witness and "other reasonable causes". To him, this application did not fall under any of those since it was speculative and that the court cannot be asked to adjourn a case basing on future events. He also submitted that the adjournment would violate the right to a fair and speedy trial under the constitution.[9]

Justice Stephen Mubiru laid down the considerations to be taken when deciding whether or not to grant an adjournment. He noted that the paramount consideration when granting a prayer of adjournment is to allow a party to present his or her case as full as necessary within the limits of the law or to fully respond to the evidence or arguments of the other party.

The other considerations that are worth noting include; whether the reason for the application is a legal issue that is set up for adjudication in the future, whether the adjournment would frustrate or undermine the object of any applicable legislation, the reasons for the adjournment and the consideration for a fair and speedy trial provided for under Article 28(1) of the Constitution.

1.3 THE DECISION

The Judge went on to discuss the models of justice which include retributive, restorative and deterrent models of justice. He defined restorative justice as the process through which remorseful offenders accept

[9] Article 28 (1), 1995 Uganda Constitution

responsibility for their misconduct to those injured and to the community that in response allows reintegration of the offender into the community. This form of justice according to the learned justice includes scope for compensation as a way of correcting wrong doing and achieving justice. He noted that the contemporary criminal justice of Uganda is driven by the retributive objective of punishment. He rejected the application and gave the following reasons.

The Judge referred to literature on transitional justice as the basis upon which restorative justice can be achieved. He however quickly threw transitional justice deliberations under the carpet for being more theoretical than practical.[10] He noted that the courts have not been equipped enough or in simple terms, do not have enough resources to achieve the peacebuilding role that the applicants were asking for. He also opined that the courts have not been well informed about *mato oput* and its processes because of the little data published on it. That as such, the courts could not aid reconciliation in the manner asked by the applicants.

He held that *mato oput* has no effective regulation and system of review in place and that "it is shrouded in legal ambiguity and as a result its interface with the criminal justice system is opaque." He expressed fears that the process may deviate from the accepted constitutional principles, human rights and gender equality modules achieved in the modern era.

The Judge also opined that the traditional justice mechanisms like *Mato oput* do not extend beyond the localized area of its application. He noted that such kind of justice mechanisms assumes that the parties are of the same moral or social community and that they live in close proximity to one another. It was therefore unimaginable to the Judge that *mato oput* could effectively govern a crime that was committed hundreds of kilometers from the Acholi community and by persons who are not members of that community. He said that *mato oput* had in the application been "romanticized as a kind of magic bullet to resolve virtually any type of crime."

He noted that the mechanism is necessary where accountability, healing and reconciliation are key for peaceful and harmonious reintegration and coexistence. He held that the deferring of the continuation of a criminal trial to *mato oput* would occasion a miscarriage of justice.

It should be noted that many scholars express the same fears like the learned Judge as will be discussed later in this paper. This article seeks to confront these fears and advocate for acceptance of traditional justice mechanisms (hereafter referred to as TJMs) as a parallel justice mechanism to the formal ones or even as a complement. The next chapters explain the different TJMs that existed or exist in Uganda. It also reviews the literature where fears like those of the Judge are expressed and concludes by giving a fair rebuttal to those fears. It concludes by giving a way forward.

2.0 TRADITIONAL JUSTICE MECHANISMS IN UGANDA PRE-COLONIALISM AND POST-INDEPENDENCE.

"In this great future, we cannot forget the past"~ Bob Marley

2.1 LEGAL BACKGROUND

Uganda was declared a protectorate on June 18, 1894 which set the ball rolling for the colonial project in the territory.[11] One of the key aspects of display of authority by the British colonizers was the dictation of the laws to be used to govern affairs of the protectorate. Therefore, British laws became applicable to all its colonies including Uganda by virtue of the Foreign Jurisdiction Act.[12] This was the beginning of the end for customary law and traditional justice mechanisms which were viewed as barbaric and satanic.

In 1900, the first legal arrangement between the British and the people of Uganda came into existence. It was the 1900 Buganda Agreement that established rights and obligations between the parties to the agreement.[13]

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11 Patrick T. English, Archives of Uganda, in The American Archivist (Baltimore Maryland p 225) available at https://meridan.allenpress.com/american-archivist/article-pdf/18/3/225/2743571/aarc-18-3 [accessed 6 July 2021]

12 Foreign Jurisdiction Act 1890 available at https://hansard.parliament.uk/lords/1902-11-03/debates/7461c3bb-412e-48df-a159-92f075af6f5f/ForeignJurisdictionAct1890 [accessed 6 July 2021]

13 1900 Buganda Agreement

After the 1900 Buganda Agreement, a series of Order in Councils and Ordinances were enacted and they were all in agreement when it came to stifling customary laws that informed the practice of traditional justice mechanisms.

This included the 1902 Order in Council (OIC) which established the High Court of Uganda with jurisdiction over every person in Uganda.[14] It exercised jurisdiction basing on Indian Laws which were imported into Uganda. By virtue of this OIC, Indian and English law became supreme over the traditional norms and laws that had been practiced for years. It provided that in circumstances where the written Indian law did not apply, jurisdiction should be applied in conformity with common law, principles of equity and statutes of general application in force in England.

The OIC subjected the application of African traditional norms and customary law to the "white man's test" called the repugnancy test.[15] For a custom to be applicable, it must have conformed with the principles of equity and good conscience which in ordinary sense was the white man's justice. Thus, in *Rex v Amkeyo*[16], the court declared the African way of marriage as a "wife purchase" which was not in conformity with the white man's monogamous view of marriage and thus did not pass the repugnancy test.

It should be noted that the 1902 OIC created the foundation for the current legal regime of Uganda. Upon getting political independence, Uganda as a state did not try much to gain legal independence. Most of the laws that undermined the application of customs and TJM remained intact. The Judicature Act[17] for example maintained the repugnancy test. Section 15 of the Act provides that the High Court shall observe and enforce customary law which is not repugnant to natural justice, equity and good conscience and not incompatible with any written law. Much as the application of

14 Article 20 of the 1902 Order in Council
15 ibid
16 (1917) 7 EALR 14
17 The Judicature Act Cap 13, Laws of Uganda

statutes of general application has been outlawed[18], all the remaining tests are still in existence.

It can safely be concluded that right from 1902, the stage was set to frustrate the application, growth and development of the different customary laws and TJMs. The 1995 Constitution of Uganda under Article 2 makes it clear that every norm or custom to be applied must be in conformity with it and so any derogation shall warrant it to be declared null and void. The same constitution recognizes traditional institutions and the right to practice culture.[19]

Only one legal document has been able to recognize the importance of TJM and advocated for their use in an effort to bring peace in Uganda. This is the 2006 Juba Peace Agreement which was characterized by different agenda items. Agenda Item No.3, Agreement on Accountability and Reconciliation detailed the Acholi, Lango and Iteso TJMs to be used in resolving the crisis.[20]

2.2 THE DIFFERENT TRADITIONAL JUSTICE MECHANISMS IN UGANDA.

How did we get here? What were the systems of administering justice before the protectorate was declared? Is it true that the indigenous tribes were barbaric and anarchists with no sort of safe guards for administering justice? Do we need to look back at these mechanisms yet they are no longer applicable in the modern formal setting? This chapter seeks to answer the above questions.

The third schedule of the 1995 Constitution laid down 56 indigenous communities in Uganda as of 1st February 1926.[21] It is my opinion that all these communities had or have their justice mechanisms before and after

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18 Uganda Motors Limited v Wavah Holdings Limited, [1992] UGSC 1

19 Article 151 and Article 37 of the 1995 Constitution respectively

20 Agreement on Accountability and Reconciliation between Government of Uganda and the Lord's Resistance Army, available at, https://peacemaker.un.org/sites/pecaemaker.un.org/files/UG-070629-AgreementonAccountabilityReconcilaition.pdf [accessed 6 July 2021]

21 1st February 1926 was the day the formal boundaries of Uganda were marked. Every tribe that within the boundaries at that time was scheduled in the constitution.

colonialism. TJM has been defined as a system of justice that usually follows customary law or an uncodified body of rules of behavior enforced by sanctions.[22] Most observers have castigated the TJM as only the product of the Northern part of the country as many tribes in the country do not have such TJMs which is quite unfathomable because no society existed without a mechanism for reprimand and administration of justice.

A study done by the Uganda Coalition on International Criminal Court (UCICC) in various parts of the country found that many tribes have their TJMs that are still in practice up to date.[23] The study noted that most of the TJMs were only different in names and procedure but the restorative nature was a cross cutting aspect. The jurisdiction of the TJMs also covered criminal offences like murder and manslaughter.

Buganda which is one of the largest ethnic establishment in the country and with one of the strongest traditional institution was found to have practiced and still practices a TJM called Embuga.[24] Embuga is a word which means a courtyard or court. The courtyard was where disputes were handled and the jurisdiction covered murder, manslaughter, rape, incest among others. The aim of the *embuga* sitting was to dispense justice and restore harmony in the society.

The Iteso have a TJM called *Ailuc* which covers inter alia crimes committed by other tribes against the Iteso.[25] Among the Madi people of West Nile, *Tolu, Vuria a lejjo jo ka* existed as a form of TJM and it is still being used by those whose access to justice is limited by the monetized formal justice system.[26]

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22 United Nations Human Rights, Office of the Commissioner, Human Rights and Traditional Justice Systems in Africa, New York and Geneva ,2016. 34 available at https://www.ohcr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf&ved=2ahUKEwjd4-KexdfxAhul1RoKHcOqBROQFjAAegQIBRAC&usg=AOvVawOb4PAI52VsOHshbkq1L3vY [accessed 7 July 2021]

23 Uganda Coalition on International Criminal Court, (March2002) *Approaching National Reconciliation: Perspectives on Applicable Justice Mechanism,* available at https://land.igad.int/index.php/documents-1/countries/uganda/conflict-7/1172-approaching-national-reconciliation-in-uganda-perspectives-on-applicable-justice-systems/file [accessed 8 July 2021]

24 Ibid p.45-51

25 Ibid p.15 -20

26 Ibid p.22-30

Under this system if a crime is committed by a member of another tribe against a Madi person, the *Opi* (Chief) would approach the leader of that tribe so that they can resolve the dispute amicably. The objective of this procedure as reported was to bring peace among the tribes and promote peaceful coexistence.

The Lugbara community in West Nile also have the *Ondaa Suu* and *ejuke* which means reconciliation as their system of resolving disputes.[27]

Among the Langi of Northern Uganda, *Kayo Ocuk* which closely resembles the *mato oput* of the Acholi people as their TJM.[28]

The Jopadhola in Eastern Uganda have *Kayo Choko* which means biting of a bone as their form of TJM.

Among the Banyakigezi of the Kigezi region, TJM mechanisms existed to handle murder, early pregnancy, theft and other disputes among the different clans. They encouraged *okuhonga* intermarriages to resolve disputes among the clans.[29]

The Basama and Banyole people had the *Ohutangara or Okusasania* as their TJM which encouraged reconciliation between the perpetrators and victims.[30]

Among the Bamasaba/ Bagisu community, the TJM that existed was *Lukhobo Lwesikuka.*[31] This process sought to hold persons accountable for their wrongful acts. It governed a wide range of cases including criminal cases like murder, civil ones and even failure to perform or attend cultural functions like circumcision.

Lastly, the Acholi people in Northern Uganda practice a series of TJM processes that are concluded with *mato oput* which was the subject of the

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27 Ibid p.32-37

28 Ibid p.37-40, Atim, Teddy and Keith Proctor (2013), *Modern Challenges to Traditional Justice: The Struggle to Deliver Remedy and Reparation in War Affected Lango*, Feinsten International Center, Tuffs University: Medford, USA

29 Ibid p.40-42

30 Ibid p.55-59

31 Ibid p.59-64

application by Kanyamunyu.[32] It has a series steps to be practiced before it is completed. This includes purification also known as *nyono tong gweno* which means breaking of the egg to cleanse the offender. The next step is *tito lok* which means confession and truth telling by the offender and *culo kwor* which means compensation or reparations for the wrong done. The process is concluded by *mato oput which is the* drinking of the bitter herb which signifies non repetition. The event is thereafter celebrated by merry making to signify reconciliation.[33]

The TJMs as noted above were frustrated by the invent of colonialism and the import of their laws. Nonetheless, many of the communities have continued to apply and practice the TJMs within the confines of the formal law. Where the exercise has been arbitrary and excessive, the law has swiftly been invoked. Indeed, what we cannot deny is their accessibility and the reconciliatory nature.

The next chapter investigates the different literature where fears have been expressed about the TJMs as being below the standards of justice, inhumane and often violating human rights and that they perpetuate gender inequality. The chapter incorporates the arguments by the state attorney and those of the Judge in denying the applicant an opportunity to complete this reconciliatory process of *mato oput*.

3.0 ARGUMENTS AGAINST THE APPLICATION OF TRADITIONAL JUSTICE MECHANISMS IN THE CURRENT LEGAL REGIME

"That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable."~Justice Guha Roy, 1961

Various scholars have criticized TJM as being outdated and inapplicable in the current legal regime. It is difficult for them to fathom a system where the formal regime which has been set up for years is complemented or

32 The Judge reproduced the UCICC report's procedure in his Judgement.

33 Lyandro Komakech, "Traditional Justice as a form of adjudication in Uganda," in *Where Law Meets Reality: Forging African Transitional Justice*, ed. Moses Chrispus Okello, Chris Dolan et al, (Cape Town: Pambazuka Press,2012), 64

replaced by the TJM. They indeed prefer to stick to the black letters of the law like it was displayed in the Kanyamunyu case. To begin with the reasoning of counsel for the respondent, his argument against the adjournment to allow room for the completion of the *mato oput* was that such ground was not envisaged under Section 53 of the Trial on Indictment Act.

Justice Stephen Mubiru agreed with the argument of counsel. He went ahead to lay down the assumptions for TJMs like *Mato oput* to apply. He noted that the mechanism assumes that the disputants are part of the same moral community and that they live in close proximity to one another. He expressed fears that *Mato oput* cannot appropriately deal with crimes committed away from the community concerned and by persons who are not part of that community.

He noted that the mechanism was not well documented and tested for the court to use it as a reconciliation tool. The learned Judge also added that the court has not been well equipped and with enough resources to engage in the application of the TJMs. He concluded that TJM should not serve to displace or undermine or delay the formal justice system.

Scholars like Brian Kagoro share the same views like those of the learned Judge. In his article "*Where Law Meets Reality*", he noted that TJM like *mato oput* applies in a country or society that is mono-ethnic or bi-ethnic with close culture like Rwanda.[34] He dismissed the view that a TJM of a particular culture can be used to solve a conflict between persons of different communities and culture.

TJM has also been attacked on the ground that they are below the standards of justice expected of any legal regime.[35] Most observers have noted that TJM entrenches violation of the recognized international human

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34 Brian Kagoro, The Paradox of alien knowledge, narrative and praxis: transitional justice and politics of agenda setting in Africa, in *Where Law Meets Reality: Forging African Transitional Justice*, ed. Moses Chrispus Okello, Chris Dolan et al, (Cape Town: Pambazuka Press,2012), p.9

35 United Nations Human Rights, Office of the Commissioner, Human Rights and Traditional Justice Systems in Africa, New York and Geneva ,2016. 34 available at https://www.ohcr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf&ved=2ahUKEwjd4KexdfxAhul1RoKHcOqBROQFjAAegQIBRAC&usg=AOvVawOb4PAI52VsOHshbkq1L3vY [accessed 7 July 2021]

rights with their retribution measures coming out as inhumane and cruel.[36] Article 24 and 44 of the Constitution provide for the right to be free from torture and inhumane treatment.

It is true that many of the punishment under the TJM were cruel and inhumane. For example, it is reported that in 2010, a suspected witchdoctor Mr. Otemo was killed in Alebtong during a clan meeting.[37] The meeting was attended by 243 clan members after the police referred the case back to the elders, he confessed to killing using witchcraft and was later sentenced to death by beating. The perpetrators were arrested and charged with murder.

It should be remembered that under the Constitution, death penalty can only be confirmed by the highest appellate court which is the Supreme Court.[38] Other forms of punishment under TJM include corporal punishment which has been outlawed by the Supreme Court in the case of Kyamanywa Simon v Uganda.[39]

The other fear is that TJMs entrench patriarchy and undermine the principle of gender equality. It is argued that the TJMs are dominated by male elders and as such may not be considerate to the gravity of gender-based crimes.[40] Women, youths and children usually do not have any active participation in the TJMs except when they are part of the victims or perpetrators.[41]

It has also been argued that the rituals bring reconciliation and societal healing but ignore the interests of individual victims.[42] The rituals being spiritual in nature has been attacked by some observers that they may conflict with the right of a person to choose his or her religion because they will be forced to subscribe to traditional beliefs yet they maybe Christians, Muslims or any other religion.[43]

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36 Stephen Oola, A conflict-sensitive justice: Adjudicating traditional justice in transitional contexts, in *Where Law Meets Reality: Forging African Transitional Justice*, ed. Moses Chrispus Okello, Chris Dolan et al, (Cape Town: Pambazuka Press,2012),53

37 Ibid., P. 57

38 Article 22 (1) of the 1995 Constitution

39 Criminal Appeal No. 16 of 1999

40 UCICC op.cit., p.46

41 Lyandro, op. cit., p 74

42 UCICC, op.cit., p67

43 UCICC, op.cit, p.65

The other arguments against TJMs are legal and largely structural. The UN Office of Human Rights noted that the reconciliation focused and non-adversarial procedures employed in TJMs may conflict with the right of the accused to presumption of innocence.[44] The Constitution provides for the right to a fair hearing and presumption of innocence under Article 28. The structural problems that have been advanced are that the traditional leaders that usually mane TJM lack skills, capacities and resources to substantially deliver justice. Additionally, that there are no codified TJMs measures because they are scattered.[45] The scholars have also expressed fears that the traditional leaders lack integrity and may easily be bought off to favor one of the parties in the dispute.[46]

The above discussion lay a path for us to argue for TJM and try to mitigate the fears expressed by the Judge and the different scholars. The next chapter handles this by first arguing for the adjournment to have been granted by the Judge. It sets out to justify the need for the adjournment. The chapter then steps out of the case to confront the fears expressed by the different scholars and observers.

4.0 CONFRONTING THE ARGUMENTS AGAINST THE APPLICATION OF THE TJMS IN UGANDA.

"Forgiveness should not be ruled out from the toolbox of justice."~OHCHR

For the record, this paper, just like the counsel for the applicant, is not arguing that the Judge should have acquitted the accused in favor of *Mato oput* or even that *Mato oput* should serve to undermine the formal criminal justice system. It instead argues that the Judge should have granted the adjournment and allowed the TJM to complement the formal criminal justice mechanism and achieve what the applicants called a "meaningful plea bargain or justice." This chapter therefore looks at the justification for such a proposition.

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44 UN OHCHR, op.cit, p.44

45 Atim, Teddy, op. cite p.13

46 Tim Allen, The International Criminal Court and the Invention of Traditional Justice in Northern Uganda, January 2007, Politique africaine (Paris, France: 1981), available at https://www.cairn.info/revue-politique-africaine-2007-3-page-147.htm [accessed 8 July 2021] p.4

4.1 ANALYSIS OF THE ARGUMENTS MADE IN THE CASE BY THE PROSECUTOR AND THE JUDGE

Article 37 of the Constitution provides for the right of every person to culture and similar rights as long as they are in conformity with the constitution. The National Objectives and Directive Principles of State Policy under objective XXIV provide that cultural and customary values which are consistent with the constitutional principles of human rights and freedoms may be developed and incorporated in aspects of the Ugandan life. The state is obligated under this policy objective to promote and preserve those cultural values.

Policy Objective III also enjoin all organs of the state including the judiciary to work towards the promotion of national unity and stability.[47] The Constitution, in the same spirit, under Article 126(1) provides for justice to be administered in conformity with the law and with the values, norms and aspirations of the people. Under Article 126(2)d, courts shall while adjudicating criminal cases promote reconciliation subject to the law.

The Constitutional provisions above were set out to show that the Judge would have been perfectly within the confines of the law had he granted the adjournment. One would argue that all these provisions are entrenched with the qualification, "subject to the law". It is hard to imagine that the granting of the adjournment would have been outside the law to justify its rejection.

As earlier noted, Section 53 of the Trial on Indictment Act provides for two reasons for granting an adjournment that is the absence of a witness and any other reasonable reasons. The conclusion of the *Mato oput* process could have fitted perfectly within the second reason had the Judge desired to be alive to the values norms and aspirations of the people. The rigidity of positivism when it comes to looking for things outside the law has always been the frustrating factor in the growth and development of the law to meet the present demands of the populace.

In the alternative, the Judge would have used this chance to make a legal pronouncement on the reconciliatory nature of these mechanisms and

47 Objective III (i), 1995 Constitution

encourage their development since they were frustrated by the imposition of the English law. The constitution was alive to the precarious nature of relationships among the tribes of Uganda based on past injustices. It therefore provided for reconciliation as an objective that should be harnessed anytime when the opportunity arises.[48]

This paper is in agreement with the argument of counsel for the applicant who stated that the pre-trial publicity of the case had created a sharp divide between the people of Acholi and those of Ankole.[49] The TJM of *mato oput,* as much as it would have been symbolic in this case, would have provided the necessary healing that would have dismantled this sharp divide. The Judge therefore let go of an opportunity to promote national unity, peace and stability as envisaged by the constitution.[50]

The Judge in denying the application also noted that the TJM of *mato oput* was designed only for those in the Acholi community and that it would be impossible to imagine it solving crimes committed hundreds of kilometers from the Acholi community and worse still by a person not of the Acholi community.[51] This same view as noted above is expressed by different scholars like Brain Kagoro and Tim Allen as they argue against the application of TJMs.

However, this kind of view presumes that the TJMs are static, rigid and cannot change at any point in time to address a given need. Bourdillon commented on such understanding of culture and customs. He said that "we think of culture and tradition as coming from the past, something proven and stable on which we can rely. In fact, tradition and culture constantly change according to the choices we make. We choose things from the past that serve our present needs."[52]

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48 Article 126 2(d), Objective III of the Constitution

49 Uganda Update, Why Kanyamunyu got only for killing Akena, November 13, 2020 available at https://www.ugandaupdatenews.com/why-kanyamunyu-got-only-5-years-for-killing-akena/ [accessed 6 July 2021]

50 Objective III of the National Objectives and Directive Principles of State Policy

51 Misc. Criminal Application No. 151 of 2020

52 Bourdillon, M.F.C, *where are the ancestors? Changing culture in Zimbabwe, (*University of Zimbabwe: 1993) p.9

The South African Constitutional court in *Shilubana and others V. Nwamitwa*[53] held that "customary law by its nature is a constantly evolving system." Therefore, its content must be determined with reference to both history and usage of the community concerned.[54] In this case, the court allowed the installation of a female traditional chief. Just like in the case, there is no way one can argue that the *mato oput* is static and cannot change to address the then pending issue between Akena of the Acholi community and Kanyamunyu of the Ankole community.

Besides, the traditional leaders and the family of the victim had accepted the proposal and the process was halfway done. They had completed the confession and compensation. Indeed, what was left was the final *mato oput* ceremony. One wonders why this was even an issue of concern since the mechanism was flexible enough to adopt the current challenge. This applies to all the TJMs where need arises.

In fact, the Madi community had a TJM that handled crimes committed against its people by those of another community and the Ailuc of the Iteso also handled such cases.[55] The other arguments raised were structural and will be handled under the general arguments against TJMs.

4.2 CONFRONTING ARGUMENTS OF SCHOLARS AGAINST TRADITIONAL JUSTICE MECHANISMS

There are genuine fears that the TJMs undermine the principles of human rights. Indeed, like observed above, some of the punishments are derogatory and inhumane which goes against Article 24 and 44 of the Constitution. This however is far from the Kanyamunyu case where reconciliation was being pursued. This in effect addresses the above worry and provides reason as to why the TJMs ought to be recognized as a legal avenue of accessing justice by the state.

This will ensure that the TJMs are brought within the ambit of Article 14 of the International Covenant on Civil and Political Rights and encourage

53 2009 (2) SA 66 (CC) available at https://africanlii.org/content/case-shilubana-and-others-v-nwamitwa-2009-2-sa-66-cc [accessed 8 July 2021]

54 ibid

55 UCICC op. cit., p. 22-30

observance of human rights in their processes. Article 14 sets out the standards that each legal mechanism must up hold when it comes to criminal prosecution.[56] This will ensure that the International principles in criminal law are adhered to. These guiding principles include presumption of innocence until proven guilty, equality before the law, and guidelines to achieving the right to a fair hearing,

Besides, international law and the national law recognize legal pluralism,[57] and the system is being applied in a number of countries.[58] The formal recognition of TJMs with well-defined regulation on their jurisdiction and powers will ultimately cure the fear that they undermine human rights. This also applies for the gender-inequality debate.[59] It has been correctly noted that most of the practitioners of TJMs are male dominated which leave out the Youths and Women. This can also be addressed by formal regulation and like stated above, customary law continues evolving and as such it is not static.

It has also been argued that the TJMs handled by traditional leaders are not fair in a way that the leaders may be compromised with money and favor one party.[60] Just like any institution for example the courts of law, there will be fears of partiality and corruption which can be easily be combatted. This should not be a ground to deny those who would wish to use the easily accessible TJMs to resolve disputes. The traditional leaders are in fact people whose integrity is considered to be of high value.

Justice Madlanga in the South African case of *Bandindawo and others v. Head of the Nyanda Regional Authority and Another*[61] commented that, "believers in and adherents of African customary law believe in the

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56 United Nations, International Covenant on Civil and Political Rights, available at https://treaties.un.org/ [accessed 8 July 2021]

57 Legal Pluralism is the existence of more than one legal system in a country.

58 Fombad C.M. (2020) Reconciling Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Age of Globalisation in Botswana. In: Tusseau G. (eds) Debating Legal Pluralism and Constitutionalism. Ius Comparatum – Global Studies in Comparative Law, vol41. Springer, Cham. https://doi.org/10.1007/978-3-030-34432-0_3 [Accessed 28 July, 2021]

59 Atim, Teddy op. cit., p13

60 ibid

61 1998 (3) SA 262 (TK)

impartiality of the chief or king when he exercises his judicial function." The people who lead the TJMs processes are chosen by the people and are often people of high integrity. This means that the fear about impartiality can be mitigated.

The Judge in the application noted that the criminal justice system in Uganda is primarily retributive implying that the restorative nature is of less value. Other commentators argue that the reconciliatory nature of TJMs encourage impunity which every sensible justice system will treat with contempt.[62] It is quite not true that the TJMs encourage impunity.

The system is composed of both retributive and restorative aspects of justice. For example, under *Mato oput* the perpetrator is required to compensate the victim's family inform of compensation. This alone is a kind of punishment that deters the person from committing such a crime against any member of the society especially since the weight of compensation is done on case to case basis. The different TJMs have forms of punishment and remedies that are given to the perpetrator and the victims respectively. The impunity argument therefore fails because the TJMs seek to hold the perpetrator accountable for the wrongs they have done.

5.0 CONCLUSION

"What makes any social-living system work is not how cleverly it is conceived and mapped but how wisely and mutually it is understood and valued, enabling those who have and take leadership to see and work with what is there and what is possible, and with each other."~(Reeler 2010)

The decision by Justice Stephen Mubiru has gained so much significance that it was cited in the ICC case of *The Prosecutor v Dominic Ongwen.*[63] It is worth noting that the Judge agreed that the contemporary Acholi traditional justice mechanism was not clear. Judge Schimit held that "it is quite clear

62 Luc Huyse and Mark Salter, ed., *Traditional Justice and Reconciliation after violent conflicts: Learning from African Experience*s, (Stockholm, Trydells Tryckeri AB,2008) IDEA

63 Summary of the sentence can be accessed at https://www.icc-cpi.int/Pages/item.aspx?name=pr1590 [accessed 8 July 2021]

to the chamber that Acholi traditional justice mechanisms are not in widespread use, to the extent that they would replace formal justice."

The chamber also noted that the Acholi traditional rituals were reserved for the Acholi community and as such victims of the alleged atrocities who are not Acholi would be excluded. The fears expressed by the chamber maybe understandable because of the complex nature of Dominic Ongwen's case given that it involved crimes of international scale. However, for the Kanyamunyu case, it was quite simple as the Judge simply had to grant an adjournment for him to conclude the process.

This paper argues that the worries raised by the chamber in the Ongwen case and even the judge in the Kanyamunyu case can be mitigated through recognizing and regulating the TJMs by formally adopting them into the national legal system.

One way of regulation of the TJM is through a thorough registration process of the recognized traditional mechanism platforms. Local leaders may be taken through a rigorous training on the principles of criminal law as stated in Article 14 of the International covenant on civil and political rights. With such regulation, the TJMs can be brought within the confines of the Constitution and other laws. A proper register of the decisions may be opened up for purposes of follow up, encourage a reasonable use of precedence in the TJMs and to help in providing a check to this mechanism.

The Traditional justice mechanisms will serve as a complement to the formal justice mechanism which most of the vulnerable people cannot access. This complementary model will be instrumental in ensuring the enforceability of the decisions in the traditional justice mechanism. Through recognition of the use of TJMs, traditional leaders can be empowered to make use of state organs like the police to ensure enforceability of the decisions.

Conclusively, the reconciliatory and retributive benefits of the traditional justice mechanisms shall be fully explored. Allowing the use of these traditional justice mechanisms will ensure the enjoyment of the right to culture in this modern era. Judges are therefore encouraged to be more flexible and pursue judicial activism to allow room for use of the traditional justice mechanisms.

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