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THE RELEVANCE OF AFRICAN CULTURE IN BUILDING MODERN INSTITUTIONS AND THE QUEST FOR LEGAL PLURALISM

SEMAHAGN G. ABEBE*

INTRODUCTION

The clash of civilizations between the emergence of modern conceptions of democracy and principles of human rights on the one hand and the entrenched cultural traits in Africa on the other hand has left the continent at a crossroads in relation to the fundamental alternative forms of governance available to move Africa forward. Due to the fact that the colonial legacy has seriously undermined the relevance of traditional institutions that hitherto dominated the African way of life, the fate of such institutions has been put on the edge of peril.¹ Post-colonial state-building in Africa has been largely undertaken under the guise of transplanting a European institutional system that has made the state in Africa basically a neo-colonial one.² The fundamental change of the termination of the colonial legacy is in effect the replacement of colonial powers with new local elite leaders. Since the removal of the shackles of colonialism, there has always been a debate on the political, social, and legal framework needed to bring about change in Africa. Primarily, the new elites of Africa, in a bid to bring about speedy prosperity to the region, aimed at eliminating traditional African custom and traditions.³ The new elites claim that African traditional institutions are either repressive or that their legitimacy and role has been compromised by colonial powers.⁴

The alternative state formation endeavored in Africa is largely transplanting European style governance. Some African countries such as

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1. Forms of traditional institutions in Africa include chiefs, clan leaders, kings, clan or chief assemblies, accountability structures, traditional justice systems, and, additionally, the society's whole belief system.

2. Archie Mafeje, *Democratic Governance and New Democracy in Africa: Agenda for the Future*, Presentation Before the African Forum for Envisioning Africa 6 (Apr. 26–29, 2002) (transcript available from the United Nations Economic Commission for Africa, *available at* [http://www.uneca.org/itca/governance/Documents/Archie Mafeje2.pdf](http://www.uneca.org/itca/governance/Documents/Archie%20Mafeje2.pdf).)

3. *See id.* at 9–10.

4. *Id.* at 4.

Tanzania and Ethiopia even resorted to the socialist system of government.⁵ Due to the lack of objective situations in Africa to transplant either the liberal or socialist packages of government, the transformation of African governance has been largely characterized by repression, corruption, and inefficiency as well as the inability to address poverty and conflicts.⁶ In light of such failure of state formation in the region, researchers and policymakers are wondering how to take African governance forward. Particularly, there has been an increasing debate on the role of traditional institutions in advancing the African democratization process. Though the total exclusion of traditional institutions had been practiced since the end of the era of colonialism, the contemporary trend primarily grants some room to African traditional institutions in various forms.⁷ Since the African society is deeply traditional, the role of traditional custom and institutions has paramount importance. Particularly, the role of traditional institutions is highly influential in rural communities where the visibility of modern institutions is largely absent. Since there are not institutions such as local administration, police, or courts of law in remote African communities, people resort to traditional leaders such as chiefs, local councils, and religious leaders. In other words, whether formal institutions officially recognize traditional institutions or not, traditional institutions continue to have their own impact on the foreseeable future in Africa.

In light of their continued relevance, the viable option for improving governance in Africa is accommodating traditional custom and institutions within the existing state structure. A system of legal pluralism that allows traditional institutions to discharge their responsibility would greatly improve problems of governance in Africa. But there is a different critique forwarded against the accommodation of traditional institutions within the modern state structure. One of the critiques directed against the role of traditional institutions is that they are repressive and not compatible with modern liberal values. This assertion has its own merits and its own pitfalls. In light of the hereditary nature of power holders in traditional institutions and the harmful traditional practices that discriminate against women, traditional institutions are at odds with modern liberal values. On the contrary, however, the fact that those traditional institutions are participatory, consensual, transparent, and changing makes them not necessarily against the ideals of liberalism.

In light of such continued debate on the relevance and compatibility of traditional institutions to the modern state institutions in Africa, this Article attempts to highlight the significance of traditional institutions to improving governance in Africa and to prospects for improving the democratic features of traditional institutions to meet the demands of modern institutional

5. *Id.* at 8.

6. *See id.* at 7 (enumerating various deficiencies in the typical neo-colonial African state).

7. *Id.* at 10.

development. The Article in particular argues that dismissing the relevance of traditional institutions by claiming they are incompatible to modern institutional values is not only inaccurate, but it also may further alienate the role of traditional institutions in Africa. The Article addresses divergent issues that help put the issue in perspective. The Article consists of three parts. Part I of the Article discusses the debate on the universalist versus relativist approach in relation to democratic and human rights principles and the impact of the ongoing debate on the nature of governance needed in Africa. Part II of the Article continues to highlight the features of African traditional institutions that have wider relevance to the principles of modern democracy. The last Part of the Article argues for the emergence of a system of legal pluralism whereby the formal and informal institutions flourish side-by-side until the informal systems are gradually integrated into the formal institutional system.

I. THE DEBATE ON UNIVERSALISM VERSUS CULTURAL RELATIVISM AND THE WAY FORWARD IN THE CONTEXT OF AFRICA

Though there are different views on the definition and scope of democracy, the Western liberal democratic model has emerged as the uncontested form of modern governance. Particularly, the turn of events after the fall of the Berlin Wall seems to have greatly changed the democratic demography of the world. The dynamics of political changes since 1990 have resulted in a resurgence of liberal democracy that triumphed during the Cold War to the extent of compelling Francis Fukuyama, in *The End of History and the Last Man*, to argue that the Cold War marked the endpoint of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.⁸ Furthermore, the horizon of democracy has been expanded since December 2010 when the vibrant power of democracy once again dismantled the age-old repressive regimes in North African and Arab countries that were living under the veil of "Islamic values." The revolutions that have rocked the Middle East once again proved democracy is not something reserved to Western societies. In light of such unprecedented moves towards democratization and freedom, liberalism has been largely treated as "universally valid and everlasting."⁹

Though this spread of democracy has been viewed as appropriate within the liberal ideological context of the West, the administration of democratic governance is problematic in African societies that have different historical backgrounds.¹⁰ In the case of Muslim, Asian, and African countries, there has been an argument that liberal democracy cannot be transplanted into their

8. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 36–37 (1992).

9. Mafeje, *supra* note 2, at 11.

10. See Sammy Adelman, *Constitutionalism, Pluralism and Democracy in Africa*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 73, 78 (1998).

societies because of the “speciality” of their cultures.¹¹ Defenders of Asian values have claimed that Western-style liberal democracy is neither suitable to nor compatible with Confucian East Asia, where collective welfare, a sense of duty, and other principles of Confucian moral philosophy are deeply rooted.¹² For two decades, African scholars have questioned the role of democracy in Africa.¹³ The debate is particularly intense as to the role of traditional institutions in African democratic transformation. As scholars recognize, “there is a widely held perception that democracy . . . is inappropriate for Africa as it is antithetical to African values and culture.”¹⁴ Their claim is this:

African democracy is a different species of democracy, which has roots in African culture and history. African societies are plagued by ethnic, tribal, and religious conflicts which can be solved not by Western-style liberal democracy, but within the framework of the traditional African institutions of consensus-building, elder mediation, and conciliation.¹⁵

According to this assertion, since African communities from the village upwards have traditionally decided their course through free discussion, they have much to learn from their own traditions and to teach others about the true meaning and spirit of democracy.¹⁶ Due to such claims of peculiarities, some argue that liberalism is at odds with African culture and tradition.¹⁷ There is even a “widespread tendency to equate democracy with liberal capitalism in a way that reinforces the cultural imperialism to which the developing world has long been subjected.”¹⁸ In light of this, one of the prominent leaders of the pan-African movement, Julius Nyerere, has claimed that “Western constitutionalism represented a foreign element which had no place in African history, tradition or practice and that notions of individual rights or the separation of powers were incomprehensible to the African masses.”¹⁹

11. *Id.* at 86; Chong-Min Park & Doh Chull Shin, *Do Asian Values Deter Popular Support for Democracy? The Case of South Korea 5* (Asian Barometer Project Office, Working Paper No. 26, 2004), available at <http://www.asianbarometer.org/newenglish/publications/workingpapers/no.26.pdf>.

12. Park & Shin, *supra* note 11, at 5.

13. See Mafeje, *supra* note 2, at 12.

14. Kristina A. Bentley, *Reflections on Perceived Conflicts Between Culture and Democracy in Africa: The South African Case 1* (Nov. 2005) (draft paper), available at http://www.hsrc.ac.za/research/output/outputDocuments/3514_Bentley_Reflectionsonperceivedconflicts.pdf.

15. Alemayehu G. Mariam, *The Democracy Before Democracy in Africa*, PAMBAZUKA NEWS (Jan. 25, 2010), <http://www.pambazuka.org/en/category/features/61799>.

16. Bentley, *supra* note 14 (citing Kofi Annan, *Africa's thirst for democracy*, THE INT'L HERALD TRIB. (Dec. 5, 2000)).

17. See Adelman, *supra* note 10, 77–78.

18. *Id.* at 75.

19. *Id.* at 77.

But contrary to the socio-political realities in the continent, post-decolonization African leaders resorted to a liberal constitution-making process that aimed at building a modern state. Some of the African countries had also resorted to a Marxism-Leninism model of state formation. Many of the newly independent African countries installed the state model of the British parliamentary system or the French strong presidential system.²⁰ The liberal constitutions that have been enshrined in many of the post-colonization African countries provides for free and fair elections, separation of powers principles, protections of human rights, freedom of opinion, transparency, and accountability.²¹ Furthermore, “[t]hese constitutions have also taken many forms and sought to address a range of social, political, ethnic, tribal and regional problems, suggesting the existence of a high degree of pluralism.”²² Based on such constitutional systems, formal political institutions such as parliament, administrative institutions, the judiciary, and other relevant organs have been put in place.²³ Those countries that resorted to Marxism as state ideology, on the other hand, argued that “liberalism was incompatible with their developmental needs, for which a strong state was required.”²⁴ But attempts to adopt such liberal democracy or Marxist state models in Africa succeeded only in producing one-party dictatorships under a veneer of European bureaucratic structures and procedures, which is neither African nor European.²⁵ It is believed that “African society has suffered a rupture and crisis of thought and culture as a result of the encounter with liberalism.”²⁶ This is because the path to development through the liberal ideological context of the West is much “more problematic in societies with different histories.”²⁷

The interaction between liberal values and traditional ways of life in Africa seems to have created some kind of anomaly due to the differences of the two systems in societal values. The values rendered by liberalism are basically divergent from the entrenched cultural traits prevalent in Africa. Liberalism considers the individual an entity whereas African thought “respects individuality but abhors individualism.”²⁸ Liberalism concentrates on individual materialistic concerns while African society focuses on the material and spiritual welfare of the community. Apparently, the system of

20. Elliot P. Skinner, *African Political Cultures and the Problems of Government*, 2 AFR. STUD. Q. 17, 18–19 (1998).

21. Akwasi Aidoo, *Africa: Democracy without Human Rights?*, 15 HUM. RTS. Q. 703, 709 (1993).

22. Adelman, *supra* note 10, at 73.

23. *Id.* at 75 n.4.

24. *Id.* at 77.

25. Mafeje, *supra* note 2, at 4.

26. Harvey Sindima, *Liberalism and African Culture*, 21 J. BLACK STUD. 190, 190 (1990).

27. Adelman, *supra* note 10, at 78.

28. Sindima, *supra* note 26, at 190.

transplantation of Western legal and political ideals was made by way of disregarding the well-entrenched, informal traditional values that guided the lives of ordinary Africans for centuries. Unlike the experience of other development models such as Japanese and the Turks, post-colonial Africans decided to culturally Westernize without economically modernizing themselves.²⁹ This unmerited transplantation of systems has resulted in a series of discrepancies between the formal and informal system in Africa. Incompatibility between the visible and the invisible institutions has led to the simultaneous existence of different rules in relation to property rights laws and customs that lead to conflict, which usually results in different notions of rights and obligations.³⁰ In addition to this, the incoherence of the two systems has created “different socioeconomic spaces and citizenships, characterized by exclusion, corruption and patronage . . . [which] . . . result in the application of different ways of conflict resolution and decision-making . . . deepen[ing] conflicting relationships rather than sustainable peace.”³¹

There is no any easy way out of this paradox. Adhering exclusively either to the modern systems of government or to the traditional institutions is costly to African governance. Since the modern institutions already have wider appeal due to the impact of globalization, African states cannot ignore the relevance of such institutions. In addition to this, not only is it doubtful whether the existing traditional institutions are in a position to efficiently regulate complex social and economic relations in modern society, the colonial heritage has seriously weakened the role of traditional institutions.³² In the same token, African societies could not entirely depend on modern institutions. Not only are the modern institutions installed in Africa incompatible with the social and economic realities in Africa, but the institutions also are characterized by inefficiency and corruption, and they are only visible in urban centres.³³ The large majority of rural Africans still depend on traditional institutions for their day-to-day life. In light of such multiple institutional developments in the region, it seems Africa could transform its challenges of democratic governance through integrating the old system with the new legal order.

29. Ali A. Mazrui, *Who Killed Democracy in Africa? Clues of the Past, Concerns of the Future*, 9 DEV. POL’Y MGMT. NETWORK BULL. 15, 17 (2002).

30. HUM. SCI. RES. COUNCIL, RECONCILING AFRICA’S FRAGMENTED INSTITUTIONS OF GOVERNANCE: A NEW APPROACH TO INSTITUTION BUILDING 8 (Feb. 20, 2009), [hereinafter FRAGMENTED INSTITUTIONS], <http://www.hsrc.ac.za/News-document-1120.phtml>.

31. *Id.* at 9.

32. See Sindima, *supra* note 26, at 193 (providing, as an example, the loss of control suffered by traditional African chiefs in their own societies).

33. Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, 22 HUM. RTS. Q. 838, 845 (2000).

The way forward to resolve the conflict between formal and informal institutions in Africa seems to be reconciling the application of traditional institutions with modern systems of governance. In finding an appropriate balance between the two systems, it is primarily inappropriate to assume that African traditional systems are entirely incompatible with the values of liberal democracy. In light of the universality of democratic values, it is erroneous to assume that every aspect of liberal values are alien to Africa just because they are not upheld, practiced, or expressed in Western forms. In fact, though liberal values seem to be alien to the African culture, there are African traditional elements such as social justice and leadership accountability that can serve as fertile ground to grow the seeds of basic liberal values.³⁴ Rather, the challenges of adopting democracy in Africa are of approach rather than mere adoption of liberal values. Since many of the African countries attempted to implant a liberal system by completely disregarding African values, African constitutional development remains elusive.

Though such official discouragement of cultural values has weakened many of the rich cultures in the continent, there are still numerous traditional values that, if nurtured and supported, could serve as sound frameworks for transforming values of democracy in Africa. Traditional values could support the development of democracy because they still have significant appeal to the African masses.³⁵ It has now become clear that “contemporary debates . . . [and] . . . transitions to democracy in Africa suggest that viable democratic alternatives can emerge only with the consent of the African masses.”³⁶ In other words, the most viable venue to take African democracy forward is through the recognition of diverse forms of traditional institutions to which the majority of African people prescribe. In light of such significance, the fusion of traditional and modern institutions is likely to lead to a democratic system that is more compatible with African socioeconomic realities by integrating the parallel socioeconomic spaces.³⁷ In light of these invisible hands of culture controlling the lives of ordinary Africans, the way forward for African constitutional development is to search out mechanisms to transform African cultural institutions rather than to leave them to extinction.

34. See, e.g., Apollos O. Nwauwa, *Concepts of Democracy and Democratization in Africa Revisited*, in *DEMOCRACY & GLOBALIZATION*, (Charles L. Nieman ed., 2005), available at http://upress.kent.edu/Nieman/Concepts_of_Democracy.htm.

35. Adelman, *supra* note 10, at 80.

36. *Id.* at 86.

37. *Id.*

II. THE ROLE OF AFRICAN TRADITIONAL INSTITUTIONS AND THE NEED TO ADAPT TO MODERNITY

As has been indicated earlier, because of the legacy of colonialism and Westernized education systems, there has never been a coherent development of institutions in Africa. The primary institutions of governance in Africa are those formal structures which are state-sponsored institutions inherited from the colonial legacy. On the other hand, there are traditional institutions that entail pre-colonial forms of governance with different forms of traditional authority systems. Though many of these pre-colonial systems have either been destroyed or incorporated into colonial systems of governance, traditional institutions in sub-Saharan Africa remain very influential elements in society. Traditional chiefs in particular have tremendous power in many parts of Africa, whether they have been officially recognized or not.

In many of the African societies, different traditional institutions still play a significant role. For instance, “in many pre-colonial African societies, community-wide gatherings known variously as *pitso* (Lesotho), *kgotla* (Botswana), *shir* (Somalia), *baraza* (Kenya), and many other names, offered an opportunity for a wide array of community members to voice their opinions on community affairs and participate in consensus-based decision making.”³⁸ According to a report from the Human Sciences Research Council and Pennsylvania State University on Africa’s institutions of governance, in the southern part of Ethiopia, “the Borana and the Gujii have administered themselves according to the traditional socio-political and economic organization known as the *Gadaa* system based on age-grade. It has . . . been essentially an egalitarian and democratic institution which had also been practiced in a similar fashion among the . . . Sidama and the Gedeo”³⁹ While the *Gadaa* system used to operate smoothly, transferring power between incoming and outgoing *Gadaa* groups, “following the creation of the empire . . . the traditional institution was officially disrupted and dismantled, but has survived the centralization systems of governance of the past Ethiopian regimes at the local level.”⁴⁰ Despite this attempted dismantling, the *Gadaa* system demonstrates its legal significance “in the establishment of property rights, allocation of resources as well as in the prevention and resolutions of conflicts.”⁴¹

In conjunction with the *Gadaa*, the Borana-Gujii council of elders, called the *Hayyu*, “play a very important role in settling inter-ethnic and intra-ethnic

38. Carolyn Logan, *Traditional Leaders in Modern Africa: Can Democracy and the Chief Co-Exist?* 3 (Afrobarometer Working Paper No. 93, 2008), available at <http://afrobarometer.org/index.php>.

39. FRAGMENTED INSTITUTIONS, *supra* note 30, at 22.

40. *Id.* at 23.

41. *Id.*

conflicts and disputes.”⁴² When group conflicts arise between two ethnic entities, the council of Oromo elders and *Gadaa* deliberate with the elders and chiefs of the non-Oromo ethnic groups regarding the matter “for days and decide on compensation usually paid in cattle to the victimized group.”⁴³

In western Ethiopia, “the Anuak and the Nuer mediated disputes and conflicts through the office of the chiefs and elders.” In particular, the Nuer prevent blood revenge between different groups by designating an individual the “leopard skin chief.”⁴⁴ This individual “provides sanctuary to a murderer and attempts to negotiate compensation with the victim’s lineage.”⁴⁵ Similarly, the Anuak resolve conflicts through the mediation of elders.⁴⁶ The Gurages employ traditional conflict resolution mechanisms referred to “as *Yajoka* and *Gordanna* (Shengo council), which have been in existence for centuries and are still widely used by the local population.”⁴⁷

In Somali communities, traditional institutions play a significant role in the absence of a functioning government in the country. Particularly, traditional institutions play an important role in self-autonomous regions of Somaliland and Puntland. In Somaliland, “the first category of traditional institutions consists of the *Sultans*, who are senior leaders drawn from major clans.”⁴⁸ Under them are *Boqor* and *Garaad* representing the major clans.”⁴⁹ “The *Boqor* and *Garrad* are the clans’ highest authority. They mobilize and chair meetings, and are the custodians of the *Xeer* (customary law).”⁵⁰ These traditional institutions are not unaffiliated with the democratic government, but “their appointment is decided on consensus (Pastoral Democracy).”⁵¹ At the sub-clan level, the *Caaqils* are paid by the government and “function as a link between government and local community.”⁵² In Kenya also, traditional institutions play an important role. One of the important institutions, the Kaya Elders of Mijikeda, are communities living near Mombasa. This institution plays an important role in the allocation of land, the management of resources, and dispute resolution.⁵³ There are also numerous traditional institutions in the western and southern parts of Africa.⁵⁴

42. *Id.*

43. *Id.*

44. *Id.* at 25.

45. FRAGMENTED INSTITUTIONS, *supra* note 30, at 25.

46. *Id.*

47. *Id.* at 26.

48. *Id.* at 28–29.

49. *Id.*

50. *Id.*

51. FRAGMENTED INSTITUTIONS, *supra* note 30, at 29.

52. *Id.*

53. *Id.* at 33.

54. *Id.* at 32–33.

Despite the establishment of formal institutions in Africa, such informal traditional institutions remain significant. Studies reveal traditional institutions “still play an important role in the lives of many Africans,” particularly in their “pre-eminent role as mediators of violent conflict.”⁵⁵ Traditional institutions are also used as mechanisms for ensuring equitable access to land in rural areas and for moderating inequality.⁵⁶ In light of this, traditional institutions cater to rural populations, often alienated by the official state government.⁵⁷ Since lower-level chiefs and village leaders live in rural communities, they better represent the interests of their communities than state government officials.⁵⁸ According to one study, “popular perceptions of [informal] traditional leaders are slightly more positive than those for elected leaders.”⁵⁹ In fact, “the formal institutions of the modern state, those that regulate the structure of polity, property rights and contracting cannot be effective if they disregard or contradict the customary rules of the traditional institutions, which govern the lives and livelihood of large segments of the population.”⁶⁰ By failing to engage the traditional institutions adhered to by large segments of the population, formal institutions have remained ineffective in coordinating policy and resources with broad social interests, preventing conflicts, and promoting synergy in state-society relations.⁶¹ In particular, the fact that the African state could not guarantee access to justice for large portions of the population due to modern institutional weakness means that the role of traditional institutions is indispensable. The “effective legitimacy [of traditional institutions] within their respective societies could certainly offer an opportunity to develop new power structures better articulated with official institutions of power and offer a counterweight in some instances.”⁶²

African traditional institutions also have their own democratic features, albeit with some limitations. Scholars recognize that “[i]n pre-colonial Africa, many liberties co-existed, including liberty of religion . . . liberty of association, freedom of expression, the right to participate in affairs of the

55. See Logan, *supra* note 38, at 1.

56. Kidane Mengisteab, *Reconciling Africa's Fragmented Institutions of Governance: Is Somaliland Charting a New Path?*, in FAITH, CITIZENSHIP, DEMOCRACY AND PEACE IN THE HORN OF AFRICA 179, 180 (Sthlm Policy Group ed., 2009).

57. Jerry Bungu, *Making Use of Traditional Institutions in Modern African States*, MMEGIONLINE (July 17, 2009), <http://www.mmegi.bw/index.php?sid=6&aid=16&dir=2009/July/Friday17>.

58. See Mengisteab, *supra* note 56, at 182.

59. See Logan, *supra* note 38, at 1.

60. See Bungu, *supra* note 57.

61. See Mengisteab, *supra* note 56, at 185; see FRAGMENTED INSTITUTIONS, *supra* note 30, at 2, 8–9.

62. Jacques Frémont, *Legal Pluralism, Customary Law and Human Rights in Francophone African Countries*, 40 VICTORIA U. WELLINGTON L. REV. 149, 156 (2009).

state, and freedom of circulation.”⁶³ “[A]ll over Africa, the people essentially form a community-based culture” characterized by “[s]ocial harmony, solidarity and community values.”⁶⁴ Though the individual under African culture is only addressed in light of the wider communal values, it could be argued that there are elements of democracy in some of the cultural practices expressed in social associations such as the councils of elders, mutual aid organizations, and procedures dealing with conflicts and crime.⁶⁵ Though the African traditional institutions are primarily concerned with communal welfare, this does not mean that there is a tendency to disregard individual preferences. Rather, as Menkiti argues, “whereas the African view [of society] asserts an ontological independence to human society, and moves from society to individuals, the Western view moves instead from individuals to society.”⁶⁶ “For the African, it is the respect for life and community that is a priority” that “focuses on the material and spiritual welfare of the community and individual.”⁶⁷

The other fundamental feature of traditional institutions is “a decentralized participatory decision-making system, which allows the empowerment of local communities to control local decisions and matters of their self-governance.”⁶⁸ “The relatively centralized chieftaincy systems are generally more decentralized than the often autocratic post-colonial state.”⁶⁹ In light of this, “[t]he chiefs often delegate their powers to designate underchiefs” and “[t]hey share power with the sorcerers, witches and magicians who also hold hereditary titles and are in charge of the magico-religious dimensions of power.”⁷⁰ In addition to this,

[i]n many places, the chief is counselled by a privy council which advises him with regard to applying the rules flowing from ancestral traditions and helps in assuring that the decisions are taken in coherence with lineage. . . . The equilibrium and existence of such counterweights within any given society are typical of the contemporary elements of democracy.⁷¹

63. *Id.* at 159.

64. *Id.* at 150.

65. Siegfried Pausewang, Kjetil Tronvoll & Lovise Aalen, *Democratization in Ethiopia, Some Notes on Theory and Methodology*, in ETHIOPIA SINCE THE DERG: A DECADE OF DEMOCRATIC PRETENSION AND PERFORMANCE 3 (Siegfried Pausewang et al. eds., 2002).

66. Ifeanyi A. Menkiti, *Person and Community in African Traditional Court*, in AFRICAN PHILOSOPHY: AN INTRODUCTION 180 (Richard A. Wright ed., 1984).

67. See Sindima, *supra* note 26, at 190.

68. Mengisteab, *supra* note 56, at 187.

69. *Id.*

70. Frémont, *supra* note 62, at 156.

71. *Id.*

African traditional institutions also have village councils where direct democracy is exercised.⁷² In many African communities, there are periodic public meetings that deliberate on the major social and economic issues of the village.⁷³ All such democratic exercises are compatible with the modern democratic conception.⁷⁴

Traditional institutions in African society also resolve conflicts through negotiations. Many aspects of traditional institutions involve communal justice, which is an integral part of the principles of fundamental justice.⁷⁵ Negotiated political solutions work in traditional institutions to resolve ethnic conflicts, but they can also be applied to mitigate conflicts among state political parties.⁷⁶ The “consensus-based system of decision-making” allows respect for dissent, protects minority interests, resolves conflicts and promotes communication between political parties.⁷⁷ In particular, “[t]he end result [in a traditional justice system] is based on sacrifice as well as just and fair compensation.”⁷⁸ The principle of accountability is also an important feature of the traditional justice system in Africa. The fact that traditional courts are open to the public increases accountability and builds confidence in the system.⁷⁹ Additionally, in traditional institutions, “litigants speak [local] languages, while modern justice is rendered and administered in French or English.”⁸⁰ Thus, the traditional institutions of governance are more accessible, readily understood, and participatory.⁸¹ Individuals from rural areas do feel foreign in a justice system that “applies complex, modern norms rather than well understood norms and principles aimed at preserving cohesion, harmony and collective values.”⁸²

Despite the value of traditional institutions, the development of a system that facilitates the development of traditional institutions poses numerous challenges. Primarily, the crude implementation of western institutions without consideration for traditional African institutions has seriously undermined the prospect for the development of traditional institutions. The fact that this

72. *Id.* at 157.

73. *Id.*

74. For instance, in Mali, every year, a ceremony called the *Espace d'Interpellation Démocratique* (EID; Democratic Addresses Ceremonial) is held. “All members of the Government and the population meet on that day to exchange views on whatever topic they wish and can discuss these topics directly and freely with Government ministers during a session which lasts up to fifteen hours.” *Id.*

75. Frémont, *supra* note 62, at 158.

76. Mengisteab, *supra* note 56, at 187.

77. *Id.*

78. Frémont, *supra* note 62, at 158.

79. Mengisteab, *supra* note 56, at 187.

80. Frémont, *supra* note 62, at 158.

81. Logan, *supra* note 38, at 3.

82. Frémont, *supra* note 62, at 158.

importation has completely disregarded traditional systems has not only weakened the traditional institutions but has harmed democratic transformation on the continent. In addition, since the development of traditional institutions “was blocked by the combined effects of Africa’s colonial experience and subsequent neglect by the post colonial state, traditional African democratic values and their conflict resolution mechanisms remained largely confined to the local level.”⁸³ Globalization also erodes the value of traditional institutions. Since the impact of western culture is reaching the most inaccessible parts of the continent, the young generation increasingly ignores the value of traditional institutions.⁸⁴ Considering the world is dominated by cultural, economic, and political ideologies of Western society, preserving traditional institutions has become more difficult. The attitude of African ruling elites towards traditional institutions presents another obstacle.⁸⁵ Though many of the African dictators reject democratizing the African state under the pretext that Western values are incompatible with African culture, many of the ruling elites consider traditional institutions a threat to their power.⁸⁶ Because of this threat, many African regimes deny the official recognition of traditional institutions.⁸⁷

The other challenge to the development of traditional institutions is related to problems of accountability and discriminatory practices within some customs in Africa. “Viewed from the perspective of contemporary principles of democracy, the formal mechanisms of accountability in the centralised African traditional institutions are rather weak since chiefs often combine executive and judicial powers.”⁸⁸ Additionally, “women and young adults, though not formally prohibited by rule, are often presumed to be represented by their husbands and fathers, respectively, and are customarily excluded from participating in the decision-making assemblies.”⁸⁹ Despite the apparent prevalence of harmful practices in many of the African traditions, there are also tremendous improvements. Because of the increasing adoption of international human rights principles in many of the African countries, traditional practices have changed over the last few decades.⁹⁰ Further, as modernization extends into rural families, traditional leaders are forced to adapt by abandoning outdated practices.⁹¹

83. Bungu, *supra* note 57.

84. Adelman, *supra* note 10, at 80.

85. Frémont, *supra* note 62, at 155.

86. *Id.*

87. *Id.*

88. Bungu, *supra* note 57, at 2.

89. *Id.*

90. See Frémont, *supra* note 62, at 163 (noting the international instruments concerning social change enacted in African countries since the mid-1960s).

91. *Id.* at 162–63.

III. IN DEFENSE OF LEGAL PLURALISM IN AFRICA

As previously indicated, the African constitutional system has faced conflict between the formal and informal systems of institution. Though a return solely to traditional institutions is impossible, “African culture, history and tradition still inform people’s lives in the twenty-first century.”⁹² Although African countries have adopted Western liberal constitutional systems, traditional institutions remain entrenched. Because of the significance of these institutions in Africa, political elites, academics, activists, and chiefs themselves “debate the proper position of traditional authorities in society at length.”⁹³ The issue of reconciling traditional authorities with modern political systems “becomes particularly acute at the local level, where . . . [traditional institutions] . . . exert the most influence on the daily lives of Africans, and where the contest with government authorities for resources and responsibilities is most intense.”⁹⁴

In light of the contentions between the two systems, there is a need to rethink the role of African traditional institutions within the current democratic setup. To achieve the goal of accommodating the two systems, African legal systems need to adopt principles of legal pluralism whereby the formal and informal systems work together to achieve transitional democracy. Rather than forcing Western liberal values on unwilling populations, the appropriate procedure would install the Western constitutional system within the context of traditional values. The primary step needed to reconcile the two systems is to realize the fact that, although there is tension between the two systems, they are not fundamentally incompatible. Rather than being alien to liberal values, as has been indicated earlier, African traditional institutions have their own features that could serve as the foundation to build a democratic system of governance. Traditional institutions that largely work on principles of consensus and reconciliation could serve as the foundation to build democratic transitions in Africa.⁹⁵ Particularly, through a system of decentralization, there are opportunities for creating conducive environments to expand the role of traditional institutions at the local level. Once the traditional and modern institutions are fully reconciled, and once state building is more developed, the effective institutions of democracy are likely to evolve.⁹⁶

In light of this comprehensive approach, different African countries have adopted diverse forms of legal pluralism to accommodate the informal traditional institutions. The first approach, adopted in countries such as Ghana and Uganda, incorporated traditional authorities into the governance structure

92. Adelman, *supra* note 10, at 85.

93. Logan, *supra* note 38, at 1.

94. *Id.* at 5.

95. *Id.* at 22–23.

96. *Id.*

with a largely advisory role.⁹⁷ In addition to recognizing the institution of The Chieftaincy, the Ghanaian Constitution established a National House of Chiefs that has wide responsibilities in determining the role of traditional chiefs, the interpretation and codification of customary law, the elimination of customs and usages that are outmoded and socially harmful, and additional roles related to regulating traditional institutions.⁹⁸ In Uganda, “[s]ubject to the provisions of the constitution, the institution of traditional leader . . . may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies.”⁹⁹ In particular, the restoration of the Buganda Kingdom in 1993 significantly resurrected the role of traditional institutions in Uganda.¹⁰⁰ In the last two decades, “[w]ith a king, a parliament [that included clan elders], a government, an administrative structure, buildings, representatives deep in the country and abroad . . . the Buganda kingdom has by and large acquired or recovered most of the political institutions which characterise states”¹⁰¹ Though such an approach has helped these countries to maintain traditional values, the role of traditional councils has been limited to advisory rather than having vital decision-making power.¹⁰² Thus, there has to be more political commitment to expand the horizon of legal pluralism whereby traditional institutions play a significant role in discharging their responsibilities.

A second approach, initiated by post-apartheid South Africa, incorporated traditional authorities into regional and local governance to avert conflicts between the new state and traditional authorities. The recognition of traditional leadership and indigenous law was enshrined in the 1996 South African Constitution.¹⁰³ The rights of “Cultural, religious and linguistic communities” are enshrined in Article 31 of the South African Constitution.¹⁰⁴ There are two distinct rights recognized by this section. The first is the right of communities to actively enjoy, practice, and use their culture, religion, or language.¹⁰⁵ The second is the right to “form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”¹⁰⁶ The Constitution further deals with the recognition of traditional leaders and outlines their role, but, most importantly, it allocates to them the power to deal with matters pertaining

97. CONST. OF GHANA of 1992, art. 272; CONST. OF UGANDA, art. 246.

98. *Id.* arts. 270–71.

99. *Id.* art. 246.

100. Pierre Englebort, *Born-Again Buganda or the Limits of Traditional Resurgence in Africa*, 40 J. MOD. AFR. STUD. 345, 349 (2002).

101. *Id.* at 351.

102. *Id.* at 350.

103. S. AFR. CONST., 1996, arts. 211–12.

104. *Id.* art. 31.

105. *Id.*

106. *Id.*

to African customary law and the communities that observe this law.¹⁰⁷ The various aspects of the traditional institutions in the Republic of South Africa is enumerated as follows by a scholar who studied the revival of traditional institutions in the country:

This recognition would among other things entail the right to a salary paid by the government, to adjudicate certain disputes according to customary law and to representation at various levels of government. [In addition to this], [p]rovision is made for the establishment of a House of Traditional Leaders . . . in each province which has traditional leaders and the establishment of a Council of Traditional Leaders at [the] national level. Each House of Traditional Leaders is empowered to advise its provincial legislature on matters relating to indigenous law, tradition and custom, while the Council of Traditional Leaders is empowered to advise the national government on the same matters.¹⁰⁸

A third approach that has been undertaken by countries such as Botswana and Somaliland is by far more successful than the previous two approaches. In these countries, traditional institutions have been granted wider decision-making powers. For example, in Botswana, “the traditional . . . chieftainship has been retained . . . after independence, and the traditional structures were given recognition and authority.”¹⁰⁹ By recognizing the traditional chieftainship, “the government . . . realiz[ed] that the people in rural areas continue to have respect for and faith in the traditional structures.”¹¹⁰ In addition to creating a House of Chiefs, Botswana utilizes traditional leaders in various capacities, including in its judiciary.¹¹¹ The traditional chief has a number of powers such as promoting the welfare of the members of his tribe, determining questions of tribal membership, arranging tribal ceremonies, and preventing the commission of offences within his tribal territory.¹¹² The House of Chiefs also serves as a forum for the traditional leaders to make their contribution on matters of interest to them or their tribes.¹¹³ Customary courts in Botswana play a significant role in rendering justice to the community:

One of the most significant roles of traditional leaders in Botswana is in imparting justice on customary lines through the customary courts. The customary courts handle approximately 80% of criminal cases and 90% of

107. *Id.* arts. 211–12.

108. Ineke Van Kessel & Barbara Oomen, ‘*One Chief, One Vote*’: *the Revival of Traditional Authorities in Post-Apartheid South Africa*, 96 AFRICAN AFFAIRS 561, 573 (1997).

109. Keshav C. Sharma, *Role of Traditional Structures in Local Governance for Local Development: the Case of Botswana* 4, WORLD BANK, <http://info.worldbank.org/etools/docs/library/153055/BOTSWANA.pdf>.

110. *Id.* at 5.

111. *Id.*

112. *Id.*

113. *Id.* at 7.

civil cases in the country [and] [t]hese courts are popular in the rural areas, as these are easily accessible, fast and comprehensible to the ordinary people.¹¹⁴

Somaliland's approach attempts "to fuse the traditional community-based consensual system of decision making with the modern institutions of democracy."¹¹⁵ In Somaliland, traditional institutions share power with the formal government structure.¹¹⁶ With respect to the role of traditional leaders in legislative organs, "[t]he country's House of Elders (the *Guurti*), a representative body of all of Somaliland's clans, reviews the laws passed by the House of Representatives . . . and acts as a constraint on the powers of the executive."¹¹⁷ In addition to this, the *Guurti* has other powers, including enacting laws concerning religion, culture, and peace; assisting and advising the government; and enquiring into the performance of the government's duties.¹¹⁸ The role of traditional leaders, "[t]he modern judicial system and the traditional court of clan [] elders also complement each other."¹¹⁹ Additionally, "[t]he governance structure at the center is replicated at the regional level, where representatives selected through multi-party municipal elections operate in tandem with traditional regional councils."¹²⁰ For over a decade now, Somaliland has been an island of relative peace in the volatile Horn of Africa region due to such a comprehensive approach used to integrate traditional systems into the formal constitutional structures.¹²¹

In light of the significance of traditional institutions in Africa, attempts undertaken by some countries to accommodate the traditional are commendable. However, many other countries in Africa have failed not only to recognize the role of traditional institutions, but also may ultimately fail to develop vibrant transitional institutions that may bring about a viable transition to democracy in Africa. More political commitment, research, and reform are needed to transform the role of African traditional institutions in the twenty-first century. Such an integrated approach is essential to transforming African democracy, which has been slow to develop because of the unmerited loyalty to Western institutional models without providing proper attention to indigenous traditional institutions.

114. Sharma, *supra* note 109, at 7.

115. See Mengisteab, *supra* note 56, at 189.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Mengisteab, *supra* note 56, at 189.

121. Muhyadin Saed, *Somaliland: 21 Years of Peace*, INSIGHT ON CONFLICT, June 11, 2012, available at <http://www.insightonconflict.org/2012/06/somaliland-21-years-of-peace/>.

CONCLUSION

The constitutional development process in Africa has been caught between two institutional systems. On the one hand, Africa has entrenched pre-colonial traditional institutions whose existence transcends the colonial legacy.¹²² These traditional institutions still play significant roles in the lives millions of ordinary Africans. On the other hand, African elites resorted to adopting the constitutional models of their former colonizers after the independence of Africa from colonial rule.¹²³ Despite the adoption of Western institutions, many of the African ruling elites discourage development of a democratic system of government by arguing that the Western conception of liberal democracy is alien to the African egalitarian traditional system.¹²⁴ Thus, African ruling elites were not loyal to either the traditional institutions or the modern state structures imported from Europe. This has created a governance crisis in Africa whereby the continent is plagued by authoritarian regimes, violation of human rights, poverty, and corruption.¹²⁵

In light of such compelling challenges, the way forward to improve African governance is to find mechanisms of reconciling the formal and informal institutional systems that have always been considered antagonistic. The primary step needed to reconcile the systems is to realize the fact that, though there is tension between the two systems, they are not necessarily incompatible. Rather than being alien to liberal values, African traditional institutions have their own characteristics that could serve as a foundation to build democratic systems of government. Particularly, African traditional institutions that largely work on principles of consensus and reconciliation could serve as a foundation to build democratic transformation in Africa. To achieve the goal of reconciling the two divergent systems of institutions, African legal systems need to adopt principles of legal pluralism, whereby the formal and informal institutions work together to achieve a transition to democracy. Such a transitional arrangement of reconciling the two parallel institutional systems is a more realistic option available to African countries to build a vibrant democratic tradition.

122. Nicola Gennaioli & Ilija Rainer, *The Modern Impact of Precolonial Centralization in Africa*, 12 J. ECON. GROWTH 185, 186 (2007).

123. Mafeje, *supra* note 2, at 7.

124. Rais Boneza, *The Path to a Cultural Democracy in Africa 2* (Jan. 22, 2005) (unpublished manuscript), available at http://authorme.com/nm/publish/news_16.html.

125. See generally Mojeed Adekunle Animashaun, *State Failure, Crisis of Governance and Disengagement from the State in Africa*, 34 AFR. DEV. 47, 48 (2009).