



# EAST AFRICAN LAW JOURNAL

(2024)

Ordinary Issue

A Journal of the Faculty of Law, University of Nairobi

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ISSN 0070-797X

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Design, Layout and Printing by Digital Process Works Limited, Nairobi, Kenya.

Available online at:

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*David Otieno Ngira\**

# TRAVELLING CUSTOMARY LAW: CULTURAL IDPS AND INFORMAL JUSTICE SYSTEMS IN INFORMAL SETTLEMENTS IN NAIROBI-KENYA

David Otieno Ngira\*

## ABSTRACT

*Most research on customary law are generally domiciled within rural spaces. This article departs from this notion and explores the prevalence of customary law in urban areas in Nairobi. It explores the nature of customary law and informal justice systems in urban spaces and examines the underpinning factors that emerge from its transmission from rural to urban informal settlements. Part one of this paper provides the background for customary law and informal settlements. The second part explores the study methodology. Part three examines the nature of informal justice in urban informal settlements and maps out the actors, principles and modes of transmission of customary laws from rural to urban areas. The section also explores how violators of customary law in the rural areas often seek refuge in the urban informal settlements. The paper concludes by revisiting the role of customary law in the proliferation of informal settlements in urban areas and how ethnic cosmopolitanism in informal settlements promote the cross-pollination of customary laws.*

## I. INTRODUCTION

Urban informal settlements in Kenya possess unique experiences to both the inhabitants and 'outsiders' because they act as a cultural melting point of many communities. However as has been shown by previous researches, urban slums in Kenya are organised along ethnic lines.<sup>1</sup> Since people often migrate towards spaces where they can find their friends, relatives and speakers of their native languages, urban informal settlements actually reflect the manifestation of this reality. Kibera an informal settlement in Nairobi is an apt reflection of this zoning as the Kamba, Kikuyu, Luhya, Kisii, Nubians and Luo occupy certain locations.

At least four categories of individuals can be identified in any Kenya urban slum.<sup>2</sup> (A) Individuals who are driven into the city by economic factors but

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1 O Okoth and S Olang. (2010) *The Challenge of Mending Ethnic Relations in the Nairobi Slums*. Nairobi: FES accessed from <https://library.fes.de/pdf-files/bueros/kenia/07884.pdf>

2 Security Research and Information Centre (2014) *A study of crime in urban slums in Kenya: The Case of Kibra, Bondeni, Manyatta and Mishomoroni Slums* accessed from [http://srickenya.org/publications/slum\\_Crime\\_Survey\\_Report\\_Thur\\_2.pdf](http://srickenya.org/publications/slum_Crime_Survey_Report_Thur_2.pdf)

who are unable to find economically rewarding jobs (b) Individuals (especially women) who are escaping from customary obligations in the rural villages. These include women who are running away from female genital mutilation, wife inheritance and widow cleansing. These individuals consider urban slums to be sites of cultural refuge (c) Individuals who having lived in the affluent parts of the city, face unforeseen economic downturn and opt to relocate to the slums (d) Individuals who were born and brought up in the slums.

The first part of this paper explores the cultural dynamics that push individuals out of rural areas into urban informal settlements as well as how customary law is transplanted from rural to urban areas. It examines how the ethnic-based zoning perpetuates the prevalence of customary law in the informal urban spaces and how urban cultural IDPs interact with the customary realities in the urban informal settlements, especially in view of the fact that they are essentially escaping from the same customary law in the rural spaces.

The second part of the paper explores how urban chiefs navigate their multiple identities, especially in the informal spaces where customary law from various communities co-exist and feed into each other. On one hand, chiefs are seen as the face of government and are thus obligated to perform and explain government policy. However, on the other hand, they find themselves mediating in disputes that are premised on customary law and therefore have to engage with it. But unlike the rural spaces where the chief often comes from the same customary background as the disputants, urban chiefs more than not come from a variety of backgrounds. This paper takes this conversation further by exploring the realities of chiefs in informal urban spaces. The paper also explores the interphase between the 'urban elders', the youth groups and gangs the office of the urban chief in informal dispute settlement. They, therefore, have to engage in 'collaborative dispute resolution' with other dispute resolution actors such as gangs, youth groups and 'urban elders'.

## **II. METHODOLOGY**

This research embraced an exploratory qualitative approach. It was conducted in the Kibera informal settlement and involved interviewing 12 chiefs and assistant chiefs in Kibera. To understand the dynamics of customary law in the urban space, the study purposively selected 25 respondents from the informal settlements who had either reported cases to the chief or been placed into the Kazi Mtaani programme due to their extreme vulnerability. Of the 25, 17 had escaped from the rural spaces to Kibera due to cultural factors. These were basically people who had sought refuge in urban informal settlements as a way of escaping harsh cultural obligations in the rural areas. Due to COVID-19,

the researcher used interviews rather than focus group discussion as the main data collection method. The collected data was transcribed and analysed using NVIVO based on the underlying themes emerging from the interviews.

### III. THE NATURE OF INFORMAL JUSTICE IN URBAN INFORMAL SETTLEMENTS.

#### A. THE CONCEPT OF JUSTICE

Although the concept of justice has been subject to intense philosophical debate for centuries, scholars are yet to agree on what constitutes justice or the mechanism of achieving it. Debate on the concept has considered justice to be; a virtue of social institution and therefore an element of (re)distribution in society (Rawls and Plato), liberty and equality (Rawls and Ake), as an element of character and personality (Aristotle), respect for other people's property, fidelity and respect for the law (Hume), retribution and the treatment of others as one would want to be treated (Kant).<sup>3</sup> Scholars like Hutcheson consider justice to be anchored in universal benevolence while for John Stuart Mill and Aristotle, justice means impartiality.<sup>4</sup> Other scholars see justice as a feature of dispute resolution system. That is, the extent to which the system acts fairly to both the offender and the offended. This conception of justice that borrows heavily from Mill is best reflected in *R v Sussex Justices, ex parte McCarthy*<sup>5</sup> where Lord Hewart famously noted that 'justice must not only be done but must be seen to be done'. In other words, the person determining a dispute must not only be impartial but must also be seen to be impartial, both by the disputants and the society.

Although scholars and judges differ over the true meaning of justice as noted above, there is at least a tacit agreement that justice encompasses equity, equality, fairness impartiality, liberty and reciprocity. State and non -state legal systems share a similarity in that they both possess (at least) some of these features. This paper proceeds from this understanding to explore how individuals escaping from what they consider to be customary injustices in the rural areas find themselves sandwiched within contexts that are essentially customary in the urban informal settlements. The paper also explores how informal justice systems in urban areas, such as chiefs, 'urban elders' and youths dispense justice in the informal settlements such as Kibera.

<sup>3</sup> M LeBar, and M Slote (2016) 'Justice as a Virtue', *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2016/entries/justice-virtue/> accessed on 12/5/2021

<sup>4</sup> Ibid

<sup>5</sup> 1924] 1 KB 256



## B. INFORMAL JUSTICE SYSTEM AND CUSTOMARY LAW

Tilmann Roder defines informal justice system as institutions that resolve disputes based on social practices that are distinct from state policy or laws.<sup>6</sup> Their informality is premised on the fact that they apply non-state laws such as customary law, use quasi-state officials such as chiefs as well as or non-state 'justices' such as elders and religious leaders in dispute resolution. At the same time, they do not have formal structures, rules and technicalities that characterise formal justice systems. To this end, they are sometimes referred to as non-state justice system or customary justice systems. This view is shared by Kerrigan *et al*, who consider informal justice system to encompass:

...the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law."<sup>7</sup>

This conception considers the informal or non-formal nature of informal justice systems not as emerging from their mode of operation but only with regard to their positioning in relation to the state. The wide scope of this definition would easily encompass dispute resolution mechanism among sports teams and gangs in urban informal settlements.

Before European colonialism, customary law was not perceived as a static body of law. Rather its application was guided by the unique circumstances of the disputants and the changing socio-cultural dynamics.<sup>8</sup> What is considered as customary law in the current context was essentially part of societal culture.

Tom Bennet has noted that customary forms of normative ordering are meant to develop spontaneously in its community of practice, However as currently used in legal research, the term customary law could mean; (a) the official body of customary law employed in the formal justice systems (b) customary law employed by academics in law schools for academic purposes (c) the living customary law which is found among the people.<sup>9</sup> The first two conceptions while markedly differed from the actual practice of customary law among the

6 T Roder (2012) Informal Justice Systems: Challenges and Perspectives, in JC Botero et al (eds) *Innovations in Rule of Law A Compilation of Concise Essays*. World justice project, 58-61 accessed from [https://worldjusticeproject.org/sites/default/files/documents/wjp\\_hiil\\_compilation.pdf](https://worldjusticeproject.org/sites/default/files/documents/wjp_hiil_compilation.pdf)

7 F Kerrigan et al. (2009). Informal justice systems: Charting a course for human rights-based engagement accessed from <<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>>

8 W Kamau, (2015) Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya. *East African Law Journal*, 2015 (1), 140-151

9 T Bennett T. (1991) *A sourcebook of African customary law for Southern Africa*. Cape Town: Juta.

people, have continued to influence the interpretation of customary law both in academic and legal circles.

This study will define customary law as the unwritten norms and practices of small-scale communities which date back from pre-colonial times but have undergone transformation due to colonialism, globalization and capitalism.<sup>10</sup> It must be emphasised that customary law is not a static unified body of law. Rather like all other laws and forms of normative ordering, customary law is continuously being contested, made and remade in a scenario that often results into its continuous change and modification.

### **C. 'FUGITIVES' FROM CUSTOMARY LAW: CUSTOMARY LAW AND THE GENERATION OF URBAN CULTURAL IDPS IN INFORMAL SETTLEMENTS.**

Literature on forced displacement has largely focused on physical displacement of people from one location to another. They range from literature on refugee law, where the displaced persons cross international boundaries, to research on internally displaced persons where the individuals are displaced from one region of the country to another. Ordinarily, such displacement often results from conflicts.

Customary law offers the underlying principle behind dispute resolution and much of the social practices in rural areas.<sup>11</sup> In other words, customary law prescribes a way in which members of a given community must undertake their actions. It prescribes what members can or cannot do within a given social space. At the same time, customary law, as argued by scholars like Talcott Parson, become a mechanism for including and excluding individual.<sup>12</sup> In other words, those who belong to a given community, and adhere to its customary laws are seen as upright members while those who reject it are also rejected by the community. This study revealed that customary law is also a push factor for (forced) rural-urban migration. This is a trend in which individuals, who were deemed to have offended customary law (or who were unable or unwilling to comply with customary law) opted to migrate to Kibera to escape from the 'fangs' of customary law and its enforcement agencies. They operate on the premise that the rural setting, where customary law is most active is hostile to them and thus the less restrictive urban space would be much more receptive. One woman (Jane) interviewed during the study observes:

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10 D Ngira (2019) *Examining the Role of Informal Justice Systems in Child Rights Protection in Kenya: A Case Study of the Kipsigis*. Thesis (Ph.D.). Utrecht University, p 37

11 Ibid

12 T Parson, (1962) *Towards a General Theory of Action*. CA: Harvard University Press. P 192

They accused me of infecting my husband with HIV and eventually Killing him. I could no longer stay because they were always threatening me. They even stopped me from participating in bride price ceremonies in the family. Eventually, they even stopped me from going to funerals. I had to leave with my children and come here.<sup>13</sup>

The above scenario revisits earlier discussions by Sally Falk Moore. According to Moore, societies are characterized by semi-autonomous social fields which are communities that are partly regulated by the law and partly by unwritten norms (customary law).<sup>14</sup> The internal relationships between members of the semi-autonomous social field are not regulated by state law but by unwritten informal norms that members adhere to out of the belief that they are beneficial and legitimate (Ibid). Thus, although state law-Constitutional law, family law and property law protects Jane, the protection offered by these laws does not permeate the semi-autonomous social field. Accordingly, her fate seems to be subject to the customs of her community rather than to the state law, notwithstanding the fact that she is a subject of the polity that state law guarantees protection. As more observes, unless state law is imbibed by the semi-autonomous social field (which in most cases is resistant to any legal intrusion by the state) and 'domesticated' through the language of the community into acceptable rules of claims and social ordering, the same may be outrightly rejected or in a worse situation generate unintended outcomes.

Moore's analysis best explains the situation of most cultural urban refugees. Before their departure from the village, they are seen as subjects of customary law and state law. However, upon being seen to have violated customs the protection offered by both customary law and state law disappears. State law, that holds an emancipatory promise become unreachable and orders given by state agents such as the chief are generally ignored. Within this space, the semi-autonomous social field completely excludes the little remnants of state law that would protect such vulnerable women and leaves them at the mercy of customary law. Customary law, that also offers protection becomes an instrument of oppression and human rights violation in the hands of its enforcers. The individual is thus compelled to escape both from the customary law as well as from its enforcement agencies. One woman laments;

The reason why I came to Kibera was because my relatives dispossessed me of my land. After the death of my husband, they

13 Female interviewee in Katwekera, Kibera.

14 S Moore, (1973). Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study. *Law & Society Review*. 7 (4), 719-746. doi:10.2307/3052967 P 722

claimed that I had come with children who were not theirs. So they said my children can't inherit land belonging to their son. They chased me away and took the land. I reported to the Chief but he couldn't help. He visited my home several times and talked to them but they refused to listen to him. Eventually, he gave up and even refused to listen to me anymore. I had to leave and come to Mashimoni.<sup>15</sup>

As seen in this quote, the semi-autonomous social field has a rulemaking capacity which it uses to induce compliance not only through coercion but through a feeling that the said rules are functional and customarily legitimate. The consideration over enforcement, it was noted, has nothing to do with human rights or individual well-being but more to do with an attempt to enforce a particular code of behaviour. It is within this complex interaction that rural communities end up creating urban cultural IDPs. Thus although state law, such as the Constitution, international human rights law such as International Covenant on Civil and Political Rights, CEDAW, and regional instruments such as the African Charter on Human and People's Rights entitle citizens to rights, the process through which such rights are claimed highly relies on the nature of their interaction within the community. In other words, the rural community is a space through which a unique set of rights are created and enforced. Such rights and entitlements emerge from compliance with customary law and sometimes violate state law as observed in the above case.

At the same time, the study noted the unequal power relations affect the extent to which individuals are expected to comply. People who wield more power in rural societies, such as wealthy individuals and men generally are more tolerated when they violate customary law. However, women, due to their unequal power relations both in the family as well as in society are often under more pressure to comply with customary law, even when those customary laws are inconsistent with their rights, well-being and interests. This reality revisits Woodman's argument that:

Of a number of rules emanating from one group with rulemaking capacity, some may be complied with by a certain group, others by a smaller group, others by a group which coincides partly with each of the first two groups but includes persons who are in neither.<sup>16</sup>

15 Respondent from Mashimoni-Kibera.

16 G Woodman (1998) Ideological Combat and Social Observation: Recent Debate about Legal Pluralism *The Journal of Legal Pluralism and Unofficial Law*. 30: 21-59 P 53

The underlying assumption in Woodman's view is that there must be a group (or groups) of people that make the social rules and impose it on other members within the semi-autonomous social field-the grassroots community. Women cultural IDPs thus belong to the group that are subject to customary law that is enforced by rule creators and enforcers-men who operate outside the context of the state and state law. Thus although state law exists to protect every citizen, it appears that it is unable to protect female cultural IDPs. This is because customary law elicits coercion through the principle of interactionism.

Accordingly, the study noted that cultural IDPs are mostly women who run away from FGM, forced marriage, widow cleansing, wife inheritance, widow dispossession or punishment for 'disrespecting in-laws.' Since majority of them are often poor women who have just lost their husbands, or poor women married to poor men who are unable to protect them against customary agents. they almost inevitably end up in urban informal settlements and therefore within the jurisdiction of the urban chiefs. This category also includes widows who are accused of killing their husbands. The accusations often result from a belief that the widow is either a witch or HIV positive.<sup>17</sup> The women, especially widows thus become victims of customary law that is made and often enforced by men in the rural spaces.<sup>18</sup> But although they run away from men and their customary law, they often end up before urban chiefs who are also mostly men.

#### **D. THE ROLE OF RURAL CULTURAL SPACES IN GENERATING CULTURAL IDPS**

This study observed that to a great degree, continuous living in a rural community is seen to obligate the individual to comply with certain obligations including the obligations to adhere to (harmful) customary practices. Customary law is seen to generate customary rights and duties which the individual is meant to comply with as part of her obligations to the community. Resisting such cultures is seen as derogation of duties resulting into coercion which often forces the member in question (often the women) to leave the community in favour of a safe space in urban informal settlements. Customary spaces are thus characterised by competition, coercion and reciprocity which reproduce forms of oppression that sometimes push the members to urban informal settlements. As argued by Talcott Parson;

<sup>17</sup> Interview with respondents in Kibera

<sup>18</sup> K Mbote (2002) *Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenya Women's Experience*. Nairobi: International Environmental Law Research Centre. For additional analysis, see C Musembi (2003). Review of experience in engaging with 'Non-state' Justice Systems in East Africa accessed from <http://gsdrc.ids.ac.uk/docs/open/ds37.pdf>

Collectivities may act in concert toward their own members or toward objects outside themselves. In the latter case, complementarity of expectations and the associated shared value system exists among the actors within the collectivity but it will not exist to the same extent with the actors who are part of another social system. In the case of the former, the complementarity of expectations and the shared value system might well exist among all the actors in the situation, with all reorganization of the action of the members being in accordance with shared general value-orientations and with specifically complementary expectations. Even in this case, there will always be involved some orientation toward social and/or non-social objects which are outside the collectivity.<sup>19</sup>

Thus although scholars locate the validity of customary law as lying within the Judicature Act and Constitution (that recognize it as a valid law), this study noted that customary law (and by extension customary obligations and duties) emerge from the continuous interaction of the members within the semi-autonomous social field (or collectivity as Talcott Parson calls it). This interactional reality, in turn, creates obligations and claims. In other words, the way people, especially at the grassroots level, interact with each other generates rights and duties. It is this mutual creation of rights and duties that results into the withdrawal of the rights of the would-be-cultural refugee, resulting into his migration into the urban informal settlement. What is customary law is therefore what is enforced against the individual at the grassroots level and not necessarily what law books. However, it must be clarified that this conception of customary law is open to misinterpretation. Thus, although the eviction (of mostly women) from the village into the urban informal spaces was justified on the premise of customary law, the interviewees contended that their evictors had misinterpreted the customary law in question. This contention is however not new. Scholars like Ubink and Chanock have long held the position that customary law is often misappropriated to exclude or persecute poor and vulnerable women.<sup>20</sup> Mbote particularly notes that the very development of customary law, both in the living sphere as well as in the restated texts has been a male enterprise. This she argues, explains why women are more often than not, victims of misinterpreted customary law.<sup>21</sup>

19 Parson, note 11 p 192

20 M Chanock (1989) Neither Customary nor legal: African customary law in an era of family law Reform. *International Journal of law and the Family* 3: 72-88 ; J Ubink J.(2011) Stating the Customary: An innovative approach to the Locally Legitimate Recording of customary law in Namibia in J Ubink. and T McNerney. (eds) *Customary Justice: Perspectives on Legal Empowerment*. Rome: IDLO;

21 K Mbote et al (2013) *Ours by Right: Law Politics and Reality of Community Property in Kenya*. Nairobi: Strathmore University Press.



The study also revealed that customary law implies the extent to which members of society can reliably predict the behaviour of other members of the society and therefore anticipate their own response within this customary context. Thus women who got married under customary settings were expected to live upto the customary expectation of the husband (and clan) and provide care both for the husband, his clan and family members. This conception of women as carers generated multiple roles for the women resulting into what Rai calls 'depletion of social reproduction'.<sup>22</sup> Women who rejected this depletion were rejected by the clan and divorced by their husbands. Since the woman's family also had an expectation that their daughter would provide care to her in-laws, they were generally unsympathetic to a woman whose marriage ended as a result of her failure to meet caring expectations. Millicent, a respondent explains;

My husband chased me away because I refused to take care of his mother. He used to live in Kakamega and left me in the village. However, whenever he came home, relatives told him bad things about me. That I had left my mother-in-law hungry. He chased me away and when I went to, my parents, they refused to accept me with my three children. I then decided to come to Nairobi to live with my sister.<sup>23</sup>

As indicated above, the failure to comply with customary law expectations often result into the withdrawal of rights which often pushes the individual out of the community into the informal settlement. The interphase between expectation, anticipation, and prediction thus creates rights and duties at the community level. In other words, there are social rules that outline how men women boys and girls should behave in any given context. Accordingly, part of the rights of members of the society is that the other party has to demonstrate normative consistency by acting in the prescribed manner or risk sanctions for failing to do so (and therefore creating normative confusion) which negatively affects the rights realization of the other members of society. These sanctions range from, frustration, ostracism and discrimination which collectively result into the individual having to leave the rural space and escape to the urban space. One interviewee opines;

I was active in women groups and in church. We had been told that FGM is bad but my husband insisted that my daughter had to undergo FGM. I went to hide in Kisii town then eventually came to Nairobi to save my daughter.<sup>24</sup>

<sup>22</sup> R Shirin (2013) Depletion. *International Feminist Journal of Politics*, DOI:10.1080/14616742.2013.789641

<sup>23</sup> Interviewee in Kianda, Kibera

<sup>24</sup> Woman interviewed in Gatwekera, Kibera

Such customary sanctions, become a language and form of communication symbols through which the individual is re-socialised into what the community sees as 'acceptable patterns of conduct'.<sup>25</sup> However, these 'acceptable patterns of conduct,' as noted by the respondent above may be inconsistent with the right and well-being of the individual. Within this context, the individual faces exclusion which results into her (and in a few cases him) having to leave the villages for the urban space.

It must however be observed that although some respondents reported physical eviction by their in-laws and clan members, the majority opted to move away due to indirect coercion. From the interviews, it appeared that not even formal security agencies are able to protect such individuals. When asked if they reported their cases to the chief or police, majority of the respondents observed that they did report but that the chief refused to act. In instances where they acted, their orders were disregarded. Such women were also victimised for reporting internal family problems to the Chief an issue which only generated more threats that eventually pushed them out of the rural villages. Such evictions, according to the victims often started with land. Since land is the primary tool of production in rural settings, dispossession of land often means that the woman can no longer feed her family. This inability to cater for one's livelihood becomes an additional factor for relocation into urban spaces.

The above reality revisits Ann Hellum's argument that each given community has 'rule generating' and rule upholding normative processes through which human interactions are organised.<sup>26</sup> Thus, as Fuller suggests, people interact based on 'intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn.'<sup>27</sup> These intermeshing codes constitute customary law so that what is customary in customary law is not merely habit or repetition of a pattern of behaviour, but the behavioural predictability provided by customary law as a normative process. However, such normative processes exclude and include specific categories of women (and children) based on the extent to which they are seen to comply with customary law. However, unlike Lon Fuller who sees the processes as being gender-neutral, Hellum argues that normative considerations that regulate male and female behaviour is negotiated in a way that has a negative outcome for women.<sup>28</sup>

25 Ngira note 9 p 112

26 A Hellum, (2000) Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism. *Law & Social Inquiry*, 25(2), 635-655. Retrieved January 25, 2021, from <http://www.jstor.org/stable/828993> .P 639

27 L Fuller (1969) 'Human Interaction and the Law' *American Journal of Jurisprudence*, accessed from [ajj-14-1.pdf](http://www.ajj-14-1.pdf)

28 Hellum note 24



## E. OF TRAVELLING CUSTOMARY LAW

This study noted that customary law travels across spaces. Thus, when urban cultural IDPs' migrate to urban slums, they do not necessarily disconnect from all customary laws. Instead, they carry some customary laws with them. More often than not, they move into enclaves where their ethnic groups are most dominant. Since informal settlements are often inhabited based on ethnicity, customary law ends up being a means of social interactions in homogenous ethnic spaces in informal settlements. Within these contexts, the rights and obligations conferred by customs are transferred from the rural spaces to the urban areas. Cultural IDPs who migrate into ethnically homogenous enclaves within the informal settlements thus find out that the culture that they were running from in the rural spaces also has anecdotes in the urban areas where they expected state law rather than customary law to provide them with protection. This finding mirrors observations by Alison Macfarlane and Efua Dorkenoo who have observed that although FGM is not native to the British people, immigrants from cultures that practice FGM have transplanted it into the UK resulting into over 137,000 cases of FGM in England and Wales.<sup>29</sup> For instance in *S-P (FGM; [2018] EWFC B101 (12 July 2018)*, a British judge convicted a Ugandan woman to 11 years in prison for subjecting her daughter to FGM.<sup>30</sup>

Escape from culture is thus becoming a ground for both international and domestic refuge. The image of a traveling culture, one that has a compulsive effect beyond geographical and political borders perhaps explains why attempts at using state law to eradicate harmful cultural practices and promote human rights across the globe are failing. Indeed, several instances exist where asylum seekers in Europe have made the claim that returning them to their mother countries would subject them to FGM, a culture which they were running from.<sup>31</sup>

The study also observed the prevalence of customs along ethnic lines. Thus, in Katwekera and Kisumu Ndogo a village primarily occupied by Luos in Kibera wife inheritance, and disputes around wife inheritance were very prevalent while cases of individuals running away from FGM were prevalent in the areas inhabited by the Kisii. But these customs were only practised by members of specific ethnic groups. Non-members were excluded even when they lived together. This is because existence in the same political jurisdiction does not guarantee customary rights and obligations. At the same time, the exclusion is based on the presumption that the duties and obligations of individuals

<sup>29</sup> A Macfarlane, and D Efua (2015) Prevalence of Female Genital Mutilation in England and Wales: National and local estimates. London: City University London in association with Equality Now, accessed from <https://openaccess.city.ac.uk/id/eprint/12382/9/FGM%20statistics%20final%20report%2021%2007%2015%20released%20text%20corrected%20Jan%202016%2020%2001%2016.pdf> p 3

<sup>30</sup> *S-P (FGM; fact finding) [2018] EWFC B101 (12 July 2018)* (bailii.org)

<sup>31</sup> See for instance PA053452016 [2017] UKAITUR PA053452016 (22 June 2017) accessed from PA053452016 [2017] UKAITUR PA053452016 (22 June 2017) (bailii.org)

in a collectivity are restricted to those within. Those within is understood in terms of ethnicity rather than geographical space. One can therefore be within geographically but seen to be without culturally within the same geographical urban space. Those from other collectivities are therefore excluded from the customary laws and obligations because those within cannot, with adequate precision, predict their behaviour nor do they have specific expectations of them.<sup>32</sup> As Parson avers;

The boundary of a collectivity is that criterion whereby some persons are included as members and others are excluded as non-members. The inclusion or exclusion of a person depends on whether or not he has a membership role in the collectivity. Thus, all persons who have such roles are members; they are within the boundary. Thus, the boundary is defined in terms of membership duties.<sup>33</sup>

Thus, although urban spaces have been deemed to manifest a mixture of cultural varieties, it appears that customary law is generally resistant to such boundaries and are generally able to permeate a variety of spaces in informal settlements. Notwithstanding these realities, the study observed a cross-pollination of customs within Kibera. At the same time, the customs seemed to face a significant modification. For instance, although wife inheritance in rural areas is largely carried out by relatives of the deceased husband in rural Luo-Nyanza, the study observed that in urban slums, wife inheritance bordered on remarriage. For instance, the man in Kibera need not come from the ethnic group or clan of the woman being inherited. He can come from a different ethnic group. The only similarity between wife inheritance in rural areas and wife inheritance in the urban informal spaces like Kibera was that in both cases the man moves into the woman's family house and any children born would take the identity of the deceased man rather than their biological father. However, women who had been ejected from their husband's homes in the rural areas were more reluctant to give these children the identities of their deceased or ex-husbands. Instead, they modelled a unique identity centered on themselves, and occasionally on their families.

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<sup>32</sup> Fuller, note 25, Parson note 11

<sup>33</sup> Parson note 11

## F. CUSTOMARY LAW AND INFORMAL JUSTICE IN URBAN INFORMAL SETTLEMENTS.

### 1. CHIEFS AND URBAN ELDERS

Studies have indicated that rural chiefs exist at the boundary of customs and state law. Their positions derive their validity from state law but their work, especially in dispute resolution is usually anchored on customary law. This study also noted that chiefs in urban areas although still using customary law to resolve disputes, are relatively more concerned about state law compared to chiefs in rural spaces. When asked about cultural IDPs in urban spaces, the chiefs noted that in many instances especially in parts of Kibera such as Kianda and Raila villages where the Kisii were prevalent, cases of women running away from FGM and hiding in the Kibera were prevalent. The areas inhabited by the Luo such as Kisumu Ndogo recorded high number of women seeking refuge from forced inheritance by their in-laws while areas associated closely with the Luhya inhabiting Laini Saba and Mashimoni seemed to have been pushed into Kibera by widow dispossession. However, unlike other asylum seekers in classical refugee law, cultural IDPs do not necessarily seek protection from the urban chiefs or claim any rights. Rather they see the informal urban areas as places of refuge where they could re-establish their lives after the disruptions in the rural areas. Accordingly, they engage in small-scale businesses and informal jobs like washing clothes in the neighbouring affluent estates. Others work in clubs or brew traditional liquor like *changaa* and *busaa*. A few of them are enlisted by the chiefs in government youth employment programmes such as *Kazi kwa vijana* (jobs to the youth) and *Kazi Mtaani* (jobs in the neighbourhood).<sup>34</sup> According to the chiefs, some of these women end up being lured into crime, prostitution or become grassroots associates of politicians.

The chiefs also noted that many cultural IDPs first come to the slum through relatives. This explains why they often join areas inhabited by members of their ethnic groups. However, over time, they establish their own households away from their relative's households but often within the same ethnic spaces. This however has two implications. On one hand they get the sense of security that ethnicity provides especially in times of political violence which recurs in the informal settlements during every electioneering period.<sup>35</sup> Since Kenyan elections (and elections-related violence) often take an ethnic angle, living among members of one's ethnicity is seen as a form of insurance and security

<sup>34</sup> These programmes were meant to respond to youth unemployment by recruiting jobless young people to work in community programmes in their neighbourhoods. These included clearing bushes, waterpoints and drainages in the community, tree planting, cleaning public facilities such as schools and hospitals and promoting public health. The youth are supervised by the local chief and paid by the government.

<sup>35</sup> Conversation with respondent

plan in informal settlements such as Kibera. On the other hand, remaining within the ethnic enclave generates customary obligations that the person is expected to fulfil. These two realities, therefore, reproduce each other. The individual, therefore, finds herself in a similar situation to the one she was escaping from in the villages. The presumption that one would be escaping from a space where customary law is most dominant to one in which she would receive protection from state law is thus invalidated by the strong ethnic and customary ties in the urban slums such as Kibera. At the same time, the study revealed that although state law is presumed to be relatively more active in the urban spaces due to their proximity to enforcement agencies such as the police and courts, customary law seems to have curved out its niche in informal settlements. The two sets of laws thus co-exist in the urban spaces. However, not much coercive enforcement of customary law takes place in the urban spaces and obedience is much more voluntary compared to the rural areas where elders, chiefs and relatives undertake much more coercive enforcement.

At the same time, chiefs in urban informal settlements seem to be much more involved in disputes more than those in more affluent neighbourhoods. Thus, although the Kibera law courts is meant to serve the people of Kibera, discussions with chiefs around the Court such as those in Makina indicate that they still handle a high number of cases which would be presumed to belong to the province of the court. These include cases of gender-based violence, child maintenance and other family-related disputes. The popularity of the chiefs over and above the courts can be explained by a couple of factors. First most victims of gender-based violence in slums often want a quick fix to their problems. This is because their violators –the spouses are often the main perpetrators of violence. Secondly, customs still play a significant role in their decisions. To this end members of society often discourage them from seeking the interventions of courts in favour of chiefs and youth groups that also serve to offer protection against gender-based violence and resolve disputes. Thirdly courts are seen to be expensive and procedurally technical. Thus, whereas courts could be relatively more proximal to them than chiefs, they are seen to be psychologically and socially distant from the communities of the informal settlements, especially the abused women.

The study also noted that in most cases chiefs often attempt to use the customary law of the parties to resolve disputes. Although the chiefs may not necessarily come from the ethnic group of the parties in dispute, they go a long way in establishing customary position and often proclaim the same. At the same time chiefs work closely with ‘urban elders’ from these areas who help them interpret customary law. Urban elders are often middle-aged individuals who work

closely with the urban chiefs to resolve disputes. They also double as grassroots leaders of political parties and self-help groups in the informal settlements. Unlike the rural chiefs who work with elderly individuals, the urban elders do not meet the age qualification that would be attached to the title in rural areas. A lot of them often drop the label of elders and even adopt the tag of youth in instances where government, NGOs or politicians launch projects or initiatives targeting the youth. The institution of elders in urban informal settlements is thus fundamentally different from that of elders in rural areas. This observation closely mirrors the finding of Ouma Akoth that the institution of elders is rapidly undergoing massive changes that have affected both its jurisdiction, composition and structure.

## **2. YOUTH GROUPS, NONE-STATE LAW AND INFORMAL DISPUTE RESOLUTION**

Urban informal settlements in Kenya are usually located at the outskirts of state law. What this means is that whereas residents are very important for the survival of the urban space as they provide labour and markets for industrial production, state agents such as the police are usually missing from urban informal spaces. This often leaves a gap that is ordinarily filled by gangs. The gangs exist as independent justice systems and often resolve disputes brought to them by members of the informal settlements. These range from gender and children's cases to cases about rent. It must be emphasised that these youths double as elders, agents of political parties, members of self-help groups, champions for various courses pushed by NGOs. Their positionality depends on the interest at play. These groups operate at the periphery of the state. Most of them receive protection from politicians, including payment of bail whenever they are arrested. Due to this political protection, they are seen as an indispensable aspect of life in the informal sector.

The study observed that several youth groups engage in dispute resolution as an enterprise. They not only solicit for cases but often constitute the de facto judicial authority in Kibera. These groups do not use any given form of law to resolve disputes. Therefore they neither use customary nor state law. Rather they are result-oriented and work to terminate the conflict without any reference to processes. This is done either through negotiation, mediation or coercion. Their main coercive instrument is violence against the perceived perpetrator. The study thus observed instances where aggrieved women often rely on the youths to 'discipline' violent husbands. Thus when the orders of the chief are defied by their spouses, some women in the informal settlements often resort to the youths to beat up the husband. But this is usually done at a fee. The fee

ranges from a minimum of Ksh. 200 to about Ksh. 500 depending on the nature of the dispute. For the youth, dispute resolution is a commercial enterprise. One woman explains;

My husband used to be very violent. Every time he would drink, come home and beat us and the children. So one day I called those youths who sit at Kamukukunji to deal with him. They caned him thoroughly. Since then he has become humble. Every time he threatens me, I threaten to call the youths again.<sup>36</sup>

Thus although these youth groups and gangs in informal settlements are associated with violence (including gender-based violence) some of them act as de facto justice systems. They thus serve as platforms where abused women seek justice and protection from their abusive spouses. Since the chief fears intervening robustly in family matters within the informal settlements and the police are often seen to be psychologically, socially and physically distant from the victim, a number of the women rely on the youth groups to have their disputes resolved.

Other than family disputes, they are often involved in help landlords in distress claim rent from defaulters as well as doubling up as acting vigilantes.

This is not to say that the youths are a force for good in the informal settlements. Rather its to recognise their dual identity. On one hand they are involved in extortion, gender-based violence, political violence, drug abuse and other forms of crime, but on the other, they act as a de facto dispute resolution system in the informal settlements, therefore helping maintain intercommunal harmony. This explains why the chiefs have a love-hate relationship with the youths and youth groups.

Despite these youth groups being seen to be an indispensable player in dispute resolution and the maintenance of law and order in the informal settlements and therefore a natural ally of the chiefs; they are also seen as a manifestation of lawlessness and are therefore inconsistent with the role of the chief. Either way, their consent is necessary for the smooth operation of the office of the chief in the informal settlements. A chief who is rejected by the groups would be deemed to be rejected by the community as his work would be both risky and unbearable.

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<sup>36</sup> Interview in Makina



#### IV. CONCLUSION

This study has revealed the role of culture in the creation of urban cultural IDPs. It has discussed how cultural obligation, expectations and coercions push people into urban informal spaces like Kibera. The study has also shown that despite the presumption that the urban space is a customary-law-free area, such spaces are replete with customs, customary duties and expectations. This is partly born out of the fact that informal settlements are largely inhabited along ethnic lines. Therefore in Kibera, there are villages dominated by the Kikuyu, Kamba, Luo, Kisii, Luhya and Nubians.

Individuals who escape from the rural areas into the informal settlements often find themselves dealing with a new set of cultural expectations and obligations.

Secondly, the study noted that Chiefs in informal settlements are highly involved in dispute resolutions. Such disputes range from family disputes to rent-related disputes. Due to the plurality of urban informal spaces, they alternate between using the customary law of the disputants to state law. In other instances, they rely on general moral principles and principles of logical reasoning to resolve cases rather than any specific legal framework. But the chiefs do not work alone. They are often accompanied by urban elders who help resolve customary disputes by advising them on the customs of the parties in question. Such elders are also involved in enforcing the orders of the chief.

At the same time the urban dispute resolution space is replete with what scholars like Beckmann call forum shopping.<sup>37</sup> Aggrieved parties forum shop between chiefs, youth groups, and very occasionally, courts. At the same time chief works closely with youth groups in the urban informal settlements although these groups sometimes form a parallel dispute resolution system. They are mostly involved in coercing individuals and resolving family disputes although they also undertake a lot of criminal activities. The study particularly noted that although they are considered as perpetrators of gender-based violence, the youths often act as a reporting platform for abused women who seek their services to coerce their husbands into abandoning violence.

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37 K Beckmann (1981) Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' *Journal of Legal Pluralism* (19) 117-159

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