

Utility of indigenous methods of dispute resolution in intra-African Trade

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Abstract

Africa's economic growth depends in part on the growth of intra-African trade. Intra-African trade is lower than trade between Africa and the world. A number of reforms, including legal reforms, have been undertaken, in Africa in order to boost economic growth in general. Most notably, the recent past has seen the introduction of the so-called alternative dispute resolution methods (ADR), featuring mediation as its predominant aspect, with the purpose to enhance the rule of law, which it is believed is important for attracting and retaining foreign direct investment. However, the imported mediation has failed, due in part to its irrelevance to the African cultures and traditions. The innovations could be made useful by adapting them to the cultural context of the African dispute resolution landscape on the one hand, and by reflecting on the indigenous methods of ADR on the other hand.

In order to determine how the indigenous methods of ADR can be utilised this study takes an in-depth look at the relationship between law and economic development. The conclusion is that there is a causal relationship between law and development. However, this relationship does not augur well for intra-African trade. For the law to have a positive causal effect to development, it must be relevant. Consequently, it is important to examine the nature of the imported mediation based on the legal transplant theory. Furthermore, the indigenous ADR landscape is reviewed with the idea to determine its fertility and therefore conduciveness to the mediation transplants.

In the many reforms that have taken place in the past, indigenous ADR has been overlooked. There are, however, certain of its principles that can be used in developing a model of ADR that is relevant to Africa. Most of those elements are comparable to some of the principles of common or civil law. This is highlighted further by the peculiar informal justice systems operational in the context of cross-border informal trade.

A comparative analysis between the African region and other regions of the world reveals that integration should steer the legal reform towards the production of a regional system of dispute resolution that takes into account the cultural uniqueness, albeit diverse, of Africa. However, state commitment and political will are lacking in this regard. Fewer African countries give express recognition to indigenous or customary law or even include

use of customary law in mediation. The introduction of ADR in most African countries in the form of court-annexed mediation, and in various other forms, provides an opportunity to adapt the innovations to the African needs, by revising the existing indigenous customary law. In the adaptation process, the utility of indigenous methods of dispute resolution in promoting intra African trade will be revealed. This dissertation contributes to this question by highlighting the need for more research into the usefulness of indigenous customary law in resolving particularly commercial disputes in intra-African trade. It concludes that, largely indigenous methods of dispute resolution, as gleaned from customary law can be used to resolve commercial disputes emanating from intra-African trade. However, there is need for more research in the possibility of a more universal mechanism that allows use of these processes in the context of Africa, with a possibility of exporting to the rest of the world.

Key Words

Alternative dispute resolution; mediation; intra-African trade; indigenous methods; informal cross border trade; law-growth nexus; legal transplants; colonialism; reform.

Preface

Glory be to the Lord, the God of my ancestors and my parents!

I also wish to express my heartfelt gratitude to the North-West University (Potchefstroom Campus) for allowing me this precious opportunity to study for the LLD. The Dean and the rest of the faculty members were always wonderful to me.

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1 A gavel is a wooden hammer-like tool that is used by a judge in court to call for attention. When he was still my student, Adv Mosae gave me a gavel engraved with "Dr Kometsi", as a token of appreciation of me as his lecturer. The engraving has remained a constant if not nagging inspiration from the time I enrolled for LLD throughout my research.

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List of Abbreviations

AAP	Africa's Action Plan
ACDS	African Commercial Dispute Settlement Centre
ADR	Alternative Dispute Resolution
AEC	African Economic Community
AEC AU	African Economic Community of the African Union
AMU	Arab Maghreb Union
ASEAN	Association of Southeast Asian Nations
CCC	Cape Chamber of Commerce
CCMA	Commission for Conciliation, Mediation and Arbitration
CCR	Centre for Conflict Resolution
CEAO	(Francophone) West African Economic Community
CEGPL	Economic Community of the Great Lakes Countries
CEMAC	Central African Economic and Monetary Community
CFTA	(Pan-African) Continental Free Trade Area
CIDA	Canadian International Development Assistance
CIMA	Inter-African Conference on Insurance Markets
CISG	United Nations Convention on the International Sale of Goods
CMC	Citizen Mediation Centres
COMESA	Community of Eastern and Southern Africa
DDPR	Directorate of Dispute Prevention and Resolution
EAC	East African Community
ECCAS	Economic Community of Central African States
ECJ	European Court of Justice
ECFI	European Court of First Instance
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EFTAC	European Free Trade Area Court
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreements on Tariffs and Trade
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
ICJ	International Court of Justice

ICL	Indigenous Customary Law
ICSID	International Convention for Settlement of Investment Disputes
IJS	Informal Justice Systems
IMADR	Indigenous Methods of Alternative Dispute Resolution
INCOTERMS	International Commercial Terms
IOC	Indian Ocean Commission
MMU	Multilateral Monetary Union
MRU	Mano River Union
NEPAD	New Economic Partnership for Africa's Development
OAU	Organisation of African Unity
OHADA	Organisation for the Harmonisation of African Business Law (<i>Organisation pour l'Harmonisation en Afrique du Droit des Affaires</i>)
PTAESA	Preferential Trade Area for Eastern and Southern Africa
RBCCS	Regional Border Consultative Committees
ROL	Rule of law
RSA	Republic of South Africa
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordinating Committee
SPCA	Short Process Court (and Mediation in Certain Civil Cases) Act
TFTA	Tripartite Free Trade Area
TNCs	Transnational Corporations
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UDEAC	Central African Customs and Economic Union
UDEAO	West African Economic Customs Union
WTO	World Trade Organisation

CHAPTER 1

Indigenisation of alternative dispute resolution through *ubuntu*

1.1 Introduction

Total disregard of indigenous methods of alternative dispute resolution renders the so-called Alternative Dispute Resolution (ADR) methods useless for African trade and growth.¹ The focus of this study is on the utility of indigenous methods of ADR (IMADR) in resolving disputes that arise because of intra-African trade. The main research question is, "To what extent can African traditional or indigenous methods of dispute resolution be applied to commercial disputes to enhance intra-African trade?" The objective is to argue that IMADR can be used to resolve intra-African commercial disputes. The underlying presumption is that law has a link with economic growth. That link is particularly visible in trade as the booster of economic development.

In this chapter therefore an overview of the internal trade situation in Africa, both at the national and the regional level, and the methodology for achieving the general objectives as outlined below are provided. It is apposite to first explore the deeper meanings of such concepts as customary law, indigenous customary law (ICL), alternative dispute resolution (ADR), IMADR, transplants, and the West, because they will prominently feature throughout this dissertation. The whole idea is to explore how ADR can be enhanced to relate it directly to the unique circumstances of intra-African trade.

1.1.1 Alternative dispute resolution²

The most useful and simplistic definition of ADR is that it is,

a structured dispute resolution process with third-party intervention, which does not impose a legally binding outcome on the parties. Mediation is the archetypal ADR process falling within this classification.³

1 Greco 2010 *Pepp Disp Resol LJ* 2.

2 Chapter 3 looks at this concept as the newest Western export to Africa.

3 Mackie *et al The ADR Practice Guide* 8-9.

For purposes of this dissertation, ADR excludes arbitration because of its adjudicatory nature.⁴ In this context, ADR may be inclusive of customary law where such customary law falls outside the purview of litigation and its processes. Hence, in some cases reference is made to IMADR.

1.1.2 *Indigenous methods of alternative dispute resolution (IMADR)*⁵

IMADR refers to methods, which have their origins and history in certain localities. With regard to Africa, therefore, such methods would be historical customary methods of dispute resolution, which originate from and are indigenous to Africa.⁶ Their "alternativeness" is, like all ADR, defined relative to litigation as the mainstream method of dispute resolution. In this study, a simplistic view is taken to regard IMADR synonymously with ICL.⁷ A distinction is drawn merely to emphasise the difference between substantive and procedural law: IMADR refers more to the procedure in the law and ICL refers more to the substance in the law.

1.1.3 *Indigenous Customary law (ICL)*⁸

The definition of customary law that is adopted for purposes of this chapter is that given by the Black's Law Dictionary as follows

customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital or intrinsic a part of a social and economic system that they are treated as if they are law.⁹

What makes such custom law, is that it is "dynamic and constantly evolving and often incorporates legal concepts and measures drawn from other legal systems."¹⁰

The idea is however to distinguish between customary law and ICL. In addition to the

4 Huang 2007 *Modern China* 184; Pyles 1990 *Australian Dispute Resolution Journal* 116; Erlank *Dispute Resolution Clauses* 1. For more on ADR and its ramifications see Chapter 2 below.

5 See Chapter 4.

6 See Chapter 4.

7 See Chapter 4.

8 See Chapter 4.

9 Black *Black's Law Dictionary*.

10 Tobin and Taylor "Across the Great Divide" 7; further on the definition of customary law, see Chapter 4 below.

elements elucidated by the above definition, for customary law to be indigenous it must relate to tradition, politics and history as undisturbed by outside influence. It must relate to all rules of law that have not been influenced by legal transplants.¹¹

1.1.4 *Legal transplants*¹²

Legal transplants refer to all laws that have their origin outside of the country in which they are operational. They result from a process of transplantation, which entails incorporation of foreign laws into a domestic system of law either through legal reform or through colonisation.¹³ Modern legal transplants are a result of a high level of interaction between countries because of globalisation.¹⁴ These interactions replicate at the regional level as well. The "West" is regarded as the sponsor of legal transplants in Africa.

1.1.5 *The West*

The "West" concept has a controversial, albeit uncertain, pedigree.¹⁵ At some stage, it connoted the NATO members and other allies of the USA.¹⁶ Here it is used in its concurrent connotation to mean the United States of America and Canada, European Union (EU) and European Free Trade Association member states, Australia and New Zealand.¹⁷ In this context, therefore, the term "West" refers to these countries with the emphasis being on former colonisers of the African continent.¹⁸ It is thus used in contradistinction to Africa.

11 See Chapter 4

12 See Chapter 3

13 See Chapter 3.

14 Gaitán *Legal Transplants* 12-13.

15 Huntington 1993 *Foreign Affairs* 24, 26-27. See also Ferguson *The West and the Rest* 1-7

16 Gress *From Plato to NATO* 1-10.

17 Gress *From Plato to NATO* 1-10.

18 McClintock 1992 *Social Text* 84-98.

1.1.6 African

"African" means "relating to Africa or its people". Africa is a continent, that is, it is a collection of a number of countries, which have different economic backgrounds. It has not yet achieved the unionisation achieved by the Western countries and it has a history of colonialism. The scope of the study is Africa. Emphasis is on English speaking common law countries, although scant reference will be made to other civil law countries. In other words, the dissertation will look at the African experience in using the ADR to solve commercial disputes between citizens of African countries and the world, as well as between citizens of the African countries themselves (intra-African trade).

1.2 *Intra-African trade*

Intra-African trade refers to trade between individuals of different African states and between an individual from one state and another state. It refers to an activity whereby sellers and buyers transact business while keeping all transactions within Africa. Focus is on private trade between individuals and between individuals and states, and not state-to-state transactions.¹⁹ Intra-regional trade is as such reputed to promote economic development and growth.²⁰ Hence, integration forms the general context of this analysis, because it provides the atmosphere that is generally conducive to intra-African trade.

Africa is largely classified as least or less developed, with the exception of a few countries.²¹ African trade is low.²² Todaro and Smith put it in a rather dramatic manner:²³

19 This form of trade excludes state to state transactions and focuses mainly on private trade transactions. The law dealing with this kind of trade is commonly referred to as private law of international trade. See Murray et al Schmitthoff's Export Trade 1.

20 Dlagnekova 2009 *Fundamina: A Journal of Legal History* 1; Sempasa 1992 *International and Comparative Law Quarterly* 405. The idea that international trade influences economic development is referred to by others as the integration view. See Rodrick *et al* (2004) 1.

21 According to Gouden *ADR and Arbitration in Africa* 6: Africa's participation in world trade is only 3% despite its resource endowment. Of the 3% only 11% is intra-African trade; see also The World Bank *50 Things about Africa*.

22 Gonzales 2015 www.worldbankgroup.org.

In 1989, the GNP of all SSA countries put together was approximately equal to that of Belgium. They are also among the poorest in the world, with a per capita GNP of \$340 in 1989...and are very poorly endowed with human and physical capital.

According to the African Union Action Plan:

Intra-African trade stands at around 10 per cent compared to 60 per cent, 40 per cent, 30 per cent intra-regional trade that has been achieved by Europe, North America and ASEAN respectively. Even if allowance is made for Africa's unrecorded informal cross-border trade, the total level of intra-African trade is not likely to be more than 20 per cent, which is still lower than that of other major regions of the world.

Intra-African trade is even lower.²⁴ Addressing specifically the major regional groupings that facilitate integration and acknowledging that trade integration is the vehicle by which intra-African trade could be improved, Foroutan and Pritchett postulate that of the undiversified economic structures, economic and cultural differences are among the factors that have caused stagnation in the Economic Community of West African States (ECOWAS) agenda.²⁵ This is true of other regional blocks as well. The level of development in Africa has thus been attributed to low levels of trade, particularly intra-regional trade.²⁶ Todaro and Smith²⁷ hold that the level of trade between African countries has never improved since the Second World War. Intra-African trade is low despite the fact that African trade is continuously increasing with the other countries outside Africa.²⁸

For decades, intra-African trade has been on the agenda of not only individual African countries, but also on part of African economic integration and regionalism driven by various African economic groupings. The mechanism intended to facilitate intra-African trade is the African Economic Community (AEC), which was established in 1991 in pursuance of article II (2) of the 1963 Charter establishing the

23 Todaro and Smith *Economic Development* 41-42; Foroutan and Pritchett *World Bank Publications* 1,5.

24 According to the WTO, the 2014 statistics show that Africa had lower intra-regional trade than other regions. For instance, intra-European trade stood at 52%, North America at 50% and intra-African trade at 18%: World Economic Forum 2016 <https://t.co/WwMKqIUVOZ> Benson *The Enterprise of Law* 1, refers to this phenomenon as depicting Africa's economic ills.

25 Foroutan and Pritchett *World Bank Publications* 4.

26 Nijnkeu and Fosso "Intra-African Trade" Tunis 2006 4-5; Muna 1993 *International and Comparative Law Quarterly* 101-118; Gbenga 1994 *JAL* 125-143; Gonzales 2015 www.worldbankgroup.org.

27 Todaro and Smith *Economic Development* 807.

28 Longo and Sekkat 2004 *World Development* 1310; Foroutan and Pritchett *World Bank Publications* 4.

organisation. The AEC also implemented the provisions of the Lagos Plan of Action²⁹ and the Final Act of Lagos³⁰, which had African integration, and the promotion of development both within and among African states as one of its central themes.³¹ The Africa Action Plan (AAP), which was adopted by the 2002 G8 summit in Kananaskis in response to the New Economic Partnership for Africa's Development (NEPAD), had as one of its engagements, support for Africa's economic integration and intra-African trade.³²

There is a glimmer of hope for Southern African members of SADC as it is reported that this region has seen more of an increase in intra-regional trade than other regions.³³

In order to conclude that the low level of intra-African trade does not augur well for Africa, it must be established that firstly, Africa needs to trade in the conventional Western manner, and secondly, that its rate of trade affects its development. Based on different diagnostic conclusions, there is a general call for Africa to improve its internal trade.³⁴

The extent to which trends in growth can be comparable depends amongst others on the economic systems of countries. Economic systems of countries determine how resources are allocated. It is widely acknowledged, albeit with a little qualification, that markets are a natural way of allocating resources, especially in this new order of globalisation.³⁵ However, not much is known about how markets drive economies in

29 Preamble of the *Treaty Establishing the African Economic Community* provides: "CONSIDERING FURTHER the Lagos Plan of Action and the Final Act of Lagos of April 1980 reaffirming our Commitment to establish, by the year 2000, an African Economic Community in order to foster the economic, social and cultural integration of our Continent; Ikome *From LPA to Nepad 2*.

30 Ikome *From LPA to Nepad 2*.

31 UNECA UNKNOWN <http://uneca.org>.

32 Lockwood 2006 *Journal of Transnational Law and Policy* 341-345.

33 Behar and Edwards "How Integrated is SADC?" 3.

34 Inkumbi "*The Future is intra- African Trade*"; UNCTAD "Boosting Intra-African Trade"; AU has established Permanent Presidential Committee to promote intra-African trade. Suggestions for improving intra-African trade abound. Kenya and Ghana lament that membership of different trade blocs has created barriers to trade and that the solution is creation of an all-Africa company (Pan-African Trade Hub System (PATHS)) to provide continental markets for goods and services and promote trade among African countries. See Saurombe 2009 *Journal of International Commercial Law and Technology* 102.

35 Wang 2014 www.worldbankgroup.org; The "new structural economics" theory calls for a combination of both government intervention and market forces in the allocation of resources: See Nallari 2010 www.worldbankgroup.org; Fafchamps 1999 *Journal of African Economies* 110.

Africa.³⁶ It is important therefore to characterise Africa's exchange systems in order to determine the relevance of ADR in resolving resultant disputes.

Markets are but one mechanism whereby resources can be allocated. Other methods include gift exchange and command and control (hierarchies).³⁷ In Africa, all these systems of resource allocation coincide with each other. Due to the nature of trade, being largely in the informal sector, where it is not intra-industrial, much of the gift exchange system could be said to prevail.³⁸ Oppong³⁹ concludes that this characterisation makes Africa oblivious to the importance of private international law. Private international law connotes regulation of transactions between private individuals and entities across borders.⁴⁰ It may be added that private international law has largely been influenced by Western developments at the exclusion of the ICL of African countries.⁴¹ There is a need to extend the reach of international private law to the African informal cross-border trade.

Informal cross-border trade is an aspect of informal trade. Informal trade is often defined by contrasting it with formal trade. Formal trade is the trade that is regulated by and complies with employment, taxation, registration and other laws. Formal trade is often looked at as a result of Western influenced civilisation, such that African traditional trade is seen as largely informal in nature. Thus formal cross-border trade entails trade that is officially recorded at the customs border while informal cross-border trade is all trade that goes unrecorded at the border.⁴²

Using household economics as a variable, Sherneberger and Van Stam⁴³ conclude that there is a Western economic influence, particularly in the cities. That is, there is a typical Western system of banks, markets and regulation although these

36 Fafchamps 1999 *Journal of African Economies* 109.

37 Fafchamps 1999 *Journal of African Economies* 110.

38 Fafchamps 1999 *Journal of African Economies* 110; Fafchamps *Community and Market in Economic Development* 186-215; Meillasoux *The Development of Indigenous Trade and Markets* 82; further on the gift exchange systems see pages 94 and 116.

39 Oppong 2006 *TSAR* 3.

40 Kiestra *The Impact of the European Convention on Human Rights* 14-15.

41 Kiestra *The Impact of the European Convention on Human Rights* 16-17.

42 Chapter 5 highlights the distinction by focusing more on the informal exchange and justice systems.

43 Sherneberger and Van Stam *Economics and Finance Review* 29-30.

institutions are not easily accessible in the rural areas of Africa. Sherneberger and Van Stam⁴⁴ characterise the exchange systems of Africa as follows:

Each individual actor has an unwritten account, which is managed by a greater society. One makes 'deposits' into this account through displaying good character, following social norms and obligations and by unquestionably releasing resources as they are needed; one makes 'withdrawals' by displaying poor character, breaking taboos, and - to a lesser extent - requiring resources of others.

The status of an individual in society and how he/she relates to others gives him/her an added advantage over others in accessing both short-term and long-term resources. In other words, although the elements of trust and relationship are not necessarily exclusive to the Western approach, in the African exchange systems they occupy a high position. Disputes that arise in the context of African exchange systems therefore warrant a different approach to their resolution. It must be borne in mind that market systems are based on precision and adherence to contractual terms, whereas gift systems rely on good faith or reciprocity, which do not necessarily have to be based on predetermined contractual terms.⁴⁵ However, where the exchange goes beyond the borders of each country, such exchange will be based on one form of international commercial agreement or another, depending on the prevailing custom between the relevant traders.

1.3 International commercial agreements

Trade is driven by commercial agreements. Commercial agreements define business relationships between individual entities and persons within states, business relationships between states and citizens of other countries or between citizens of different countries. At the interstate level, such business relationships can be divided into trade facilitation agreements in the form of bilateral or multilateral treaties, conventions and protocols on the one hand, and international sales transactions or contracts on the other hand. The focus of this dissertation is on international sale of goods transactions, specifically between African countries.

44 Sherneberger and Van Stam 30; see also Heiseler *Economic Development and Cultural Change* 161-170.

45 Trollip *Alternative Dispute Resolution* 1991 2.

A transaction in the context of intra-African trade is understood simply as an exchange of things; that is to say, it is a relationship where something is given up in return for something else.⁴⁶ Money may not necessarily be the mode of payment. There may not be *quid pro quo* in the sense of English law as it was held in the case of *Conradie v Rossouw*.⁴⁷ Thus, an international sales transaction refers to the sale of goods involving parties from different countries.⁴⁸

By its nature, an international sales transaction is bound to give rise to disputes. It takes place at an international level, it involves many parties, it deals with goods that travel over long distances across frontiers, and it involves application of foreign jurisdiction or law.⁴⁹ In an international sales transaction, there is a need to engage agents and intermediaries at either the formation or execution of the contract.⁵⁰ Because of the involvement of many players, delays in the execution of contracts and breaches of contracts are frequent. These result in dissatisfaction and/or disputes as one or both parties to the underlying contract of sale seek to address the dissatisfaction; in other words, it leads to international commercial disputes.

1.3.1 *International commercial disputes*

Disputes in trade rise with increases in commercial activities. In commercial activities that involve so many role players there are bound to be conflicts. Such conflicts are referred to as commercial disputes if they take place in the context of business or commercial relationships.⁵¹ A commercial dispute arises where a party to a commercial transaction allegedly fails to fulfil his or her obligation as provided in the agreement, the so-called "breach of contract".⁵² Such a dispute must affect parties from different states and involve movement of goods or services and payment across frontiers.⁵³

46 Fafchamps 1999 *JAL* 109.

47 1919 AD 279.

48 Van Niekerk and Schulze *The South African Law* 2.

49 Mo *International Commercial Law* 9.

50 Bonell 1984 *The American Journal of Comparative Law* 717.

51 Ferguson 1980 *British Journal of Law and Society* defines them as "disputes arising in connection with trading contracts between business enterprises" 141.

52 Perlman and Nelson 1983 *Int'l Law* 215.

53 Perlman and Nelson 1983 *Int'l Law* 215.

The legal systems of different countries and private international law have been used to resolve international commercial disputes. As a pre-requisite, there must be a contract between two parties. However, the contract does not have to be formal or in written form, even in formal common law systems. Nonetheless, a legal system invariably determines how to deal with a dispute.

For investors, the whole problem of stagnation or under-development in Africa between African states had a lot to do with the way the legal systems of African countries function.⁵⁴ International role players therefore regarded legal reform as part of development assistance.⁵⁵ In 1996, the Canadian International Development Agency (CIDA) convened a National Round table on legal and judicial reform.⁵⁶ Soon thereafter, many international donors sought to make legal systems that had transformed or were in the process of transforming a condition of their development assistance.⁵⁷ Recent reforms have seen the introduction of the so-called Alternative Dispute Resolution (ADR).

54 Milhaupt and Pistor *Law & capitalism* 2008 1-8; Davis and Trebilcock *What Role Do Legal Institutions Play in Development?* 6-7.

55 Nader and Grande *Law and Social Enquiry* 574; Faundez *Law in the Pursuit of Development* 181; Milhaupt and Pistor *Law & capitalism* 1-8; Davis and Trebilcock *What Role Do Legal Institutions Play in Development?* 6-7.

56 Toope 2003 *McGill LJ* 357.

57 Santiso 2001 *Geo Public Pol'y Rev* 1.

1.3.2 *Alternative dispute resolution*

A commercial dispute may be resolved by various means, including litigation and ADR. Known methods of ADR include the following: negotiation, mediation, conciliation and arbitration.⁵⁸

Negotiation is common to all the methods,⁵⁹ hence needs further elaboration. Moreover, negotiation would appear to be a feature even of the most informal methods.⁶⁰ As a method of ADR, negotiation is regarded as a voluntary and consensual process whereby parties attempt to resolve their dispute without the involvement of a third party.⁶¹ Parties can involve a third party in a similarly consensual method known as conciliation. Conciliation and mediation are sometimes used interchangeably to refer to the use of a facilitating third party in resolving a dispute.⁶²

The most prominent of these alternative dispute resolution methods is arbitration, the history of which dates back to the 17th century, and which is semi-judicial in nature.⁶³ Arbitration is semi-judicial in the sense that, whereas a neutral third person sits over the dispute as an umpire he ultimately makes a decision (an award) that is binding on the parties just like the courts. As an alternative to litigation, ADR is generally intended to result in the full achievement of emotional and psychological acceptance.⁶⁴

There seems to be disagreement as to whether arbitration should be regarded as part of the alternative dispute resolution processes, because of its adjudicative nature.⁶⁵ The debate raises a very critical question regarding the use of the word

58 Wolski *Legal Skills* 387.

59 Edwards 1986 *Harvard Law Review* 676-679.

60 Benson *The Enterprise of Law* 12-15: "even where a sanction is imposed as a result of an adjudication over a case in terms of customary law, such punishment is 'negotiated' between the parties."

61 Havenga *et al General Principles of Commercial Law* 298.

62 Many regard it as a form of assisted negotiation. See Wolski *Legal Skills* 343; Vidmar *Procedural Justice* 225.

63 Vidmar *Psychological Science* 224.

64 Wolski *Legal Skills* 327.

65 Carbonneau 1995-1996 *Tul L Rev* 1960, clearly draws the distinction between the two; contrast with Wanis-St John who includes arbitration in her description of ADR, 2000 *Harvard Negotiation Law Review* 346.

"alternative" in ADR. The main question is "alternative to what?"⁶⁶ Some authors have answered this question by exploring the epistemology of the ADR processes. It seems the word "alternative" has been replaced by such words as "additional", "appropriate", and "amicable", amongst others, in some jurisdictions, thereby discarding the use of ADR processes as alternatives.⁶⁷ In this sense, ADR is therefore a term of convenience commonly used to exclude litigation and/ or arbitration.⁶⁸

In this study, the meaning of ADR, which excludes both litigation and arbitration, is adopted.⁶⁹ In this sense, ADR therefore resorts under what is commonly known as non-adjudicative law,⁷⁰ which has mediation as its most common process.⁷¹ In the context of this dissertation, therefore ADR means informal intervention by one or more parties in a dispute between two parties, with the aim to find a lasting solution to the disputed and related problems. This meaning allows for the exploration of indigenous methods of ADR.

1.3.3 Indigenous methods of ADR (IMADR)

IMADR refers to methods that have their origins and history in certain localities, and are familiar to and applied by the people belonging to the same community.⁷² "Indigenous" in the context of Africa refers not only to a period pre-dating colonialism, but also to the colonial era when large-scale business began to grow. A major characteristic of ADR in sub-Saharan Africa is that it is based on the restoration of peace and social harmony without distinction in respect of the type of dispute.⁷³ Indigenous methods have undergone a metamorphosis of their own,

66 Stipanowich 2004 *Journal of Empirical Legal Studies* 845.

67 Kenfield "Taking the 'A' Out Of 'ADR'" 18; Fulton *Commercial Alternative Dispute Resolution* 74; Mowatt 1989 *SALJ* 349.

68 Stipanowich 2004 *Journal of Empirical Legal Studies* 1.3.

69 Pryles 1990 *Australian Dispute Resolution Journal* 116; Erlank *Dispute Resolution Clauses* 1; Huang 2007 *Modern China* 181-182.

70 Chinkin 1988 *International and Comparative Law Quarterly* 38.

71 Fiadjoe 2000 *Caribbean Law Review* 49.

72 Galanter 1981 *The Journal of Legal Pluralism and Unofficial Law* 1.

73 Dieng *ADR in Business* 613.

resulting in hybrid systems of diversified characteristics throughout Africa.⁷⁴ Customary law affected colonial law as much as colonial law affected it.⁷⁵

On the question of whether indigenous law could provide a panacea for Africa's legal economic ills, Benson⁷⁶ suggests that based on historical precedent, a privatised system of customary law could provide the necessary remedy to the legal problems of Africa. He appears to have the support of the AEC in that one of the principles of the AEC Treaty, which seems to envisage a single legal system, is "observance of the legal system of the community."⁷⁷ The question is whether it is possible to have a single system of law that is universal in Africa. Such a universal African system could perhaps contribute towards enhancing Africa's participation in trade and hence economic growth. Perhaps a unified approach to dispute resolution could breed the necessary system of law in the form of substantive principles. This is a question of reform.

1.4 Problem analysis

The ADR reform projects that have been implemented in Africa have neglected to incorporate customary law or IMADR in the reforms.⁷⁸

One of the ways in which it was hoped Africa could solve its low participation in trade was through institutional and/or legal reform.⁷⁹ The reforms were targeted at ensuring security of property and contract enforcement.⁸⁰ Dam⁸¹ argues very strongly that legal institutions are important in facilitating economic development. He further states that these legal institutions must be "brought down from their ivory towers".⁸² This can only be done by contextualising such institutions into the customary circumstances on the ground, because different cultures and legal

74 Dieng *ADR in Business* 614.

75 Care 2006 *Oxford U Commw LJ* 28.

76 Benson 1990 *Journal of Libertarian Studies* 26.

77 Dlagnekova 2009 *Fundamina: A Journal of Legal History* 3.

78 See chapter 2 on the discussion of legal reforms in Africa.

79 Dieng *ADR in Business* 621.

80 Dam *The Law-Growth Nexus* 2007 18.

81 Dam *The Law-Growth Nexus* 2007 18.

82 Dam *The Law-Growth Nexus* 2007 23.

traditions have brought about sluggishness, as well as diversity in economic development.⁸³

1.4.1 *The problem*

The problem is that those reforms in the area of ADR are in general mere Western transplants, which are facilitated by trade agreements.⁸⁴ According to Carfield,⁸⁵ the legal reforms are required as a condition for financial assistance in most cases. Chukwumerije⁸⁶ adds as follows:

Even though these international organisations often do not directly subsidise rule of law initiatives, they promote these initiatives by encouraging member states to adopt best practices anchored by the rule of law and by sometimes conditioning financial assistance to developing countries on their adoption of institutional reforms aimed at enshrining and extending the rule of law.

Moreover, legal transplants are based on the assumption that all people will respond in the same manner regardless of their backgrounds. However, most of these transplants are irrelevant to the peculiar circumstances of Africa.⁸⁷ Most importantly, these reforms through transplantation of laws have not been replicated at the regional level, nor is there sufficient recognition of the extant informal justice systems at the regional intra-African level.

It was hoped that the legal reforms would immediately translate into economic growth. It has been argued that legal reforms do not necessarily result in economic development.⁸⁸ Speaking particularly about human rights, and citing China as an example, Ellickson⁸⁹ argues that there is no empirical evidence to prove that human rights protection is a major consideration for foreign investors when they decide to invest in a country. In any case, reform in ADR does not particularly seek to address

83 Dam *The Law-Growth Nexus* 23; see also Alexander 2001 *Bond Law Review* 1.

84 Gillman 2009 *Geo J Int'l L* 263; Goodale 2002 *Law & Social Inquiry* 601, says the reforms were part of globalisation: "...the global ADR is only one part of a wider process of globalisation, in which the extension of Western legalities throughout the world - particularly in commercial and political contexts - is one important component in the larger project of modernity."

85 2011 *U Colo L Rev* 739.

86 2009 *Ermory International Law Review* 385.

87 Benson 1990 *Journal of Libertarian Studies* 26.

88 Ellickson *Order without Law* 422.

89 Ellickson *Order without Law* 422; Also see Jayasuriya "Analysis of Legal Institutions" 1.

human rights issues. There is a clarion call on all donors to sponsor reforms that recognise the existence of indigenous law. This can be achieved by, among others, indigenisation of ADR itself. Furthermore, indigenisation should not overlook the role of the recipient community in accepting and appreciating the reforms.

1.4.2 Indigenisation of ADR through ubuntu

In order for Africa to grow, it must first trade with itself.⁹⁰ One of the ways in which such trade can be achieved, is by revamping the legal systems of Africa to adopt "Africanness",⁹¹ as well as by replicating the same at the regional intra-African level. African IMADR should be studied in order to improve the current dispute resolution methods.⁹² *uBuntu*, as a universal African philosophy, offers the opportunity to make ADR adaptable and relevant to Africa.⁹³

uBuntu is difficult to define,⁹⁴ especially in the context of commercial relationships. The widely accepted description of the concept is "humanism"⁹⁵ or "personhood".⁹⁶ In the case of *S V Makwanyane*,⁹⁷ *ubuntu* was defined as follows:

Metaphorically, [*ubuntu*] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

Emphasis is thus on social harmony and reconciliation. Authorities abound in South Africa recognising *ubuntu* as an important African philosophy of life.⁹⁸ Legislatively,

90 Lockwood 2006 *Journal of Transnational Law and Policy* 341-345; ANON 2015 www.bizcommunity.com/Article/410/87/61613.html (08/01/2015).

91 Sloth-Nielsen and Gallinetti 2011 *PER* 63-90.

92 Holleman 1973 *Law and Society Review* 607.

93 Sloth-Nielsen and Gallinetti 2011 *PER* 63-90; Bennett 2011 *PER* 29-61; English 1996 *S Afr J on Hum Rts* 641.

94 Kevy 2009 *Journal for Judicial Science* 32.

95 Bennett 2011 *PER* 31.

96 Van Niekerk 1998 *The Comparative and International Law Journal of Southern Africa* 167; see also Chivaura *International Conference, Endogenous Development and Bio-Cultural Diversity. The interplay of worldviews, globalization and locality*. 2006.

97 1995 6 BCLR 391 paragraph 308.

98 Boniface 2013 *PER* 378-401; see also *S v Makwanyane* 1995 (6) BCLR 665 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); Sloth-Nielsen and Gallinetti 2011 *PER* 63-90.

the Child Justice Act offers a classic example of the recognition of the philosophy through legislation.⁹⁹

uBuntu transcends boundaries and recognises the involvement of communities in dealing with disputes prevention and resolution.¹⁰⁰ *uBuntu* challenges the ideological basis of international trade, namely capitalism. In this context, Nussbaum¹⁰¹ asks the following questions:

What would capitalism look like if infused with *ubuntu*? What would the world's economic order be? What would the legal system be in America? How much more heartfelt economic and political generosity might there be?

There is a need to look into methods of dispute resolution in Africa and to relate them to the economic interrelationships of African countries. While there is agreement that legal reform may provide some remedy to the ills of African trade generally, little has been said about the nature of such reforms, particularly in dealing with intra-African trade or in contextualising it into Africa.¹⁰² In particular, the reforms have missed the important elements of African culture, namely the philosophy of *ubuntu* and the involvement of communities in dispute resolution. According to Sheneberger and Van Stam,¹⁰³

... the full potential of an Ubuntu-based model of economic rationality has eluded academia...the significance of recognising this facet of African uniqueness is most crucial to Africa's economic success.

This suggests that many of the development projects carried out in Africa could be successful and sustainable if they are approached with this idea in mind. In this context, therefore, *ubuntu* informs the manner in which the IMADR are related to commercial disputes.

99 Child Justice Act 75 of 2008. One of the objectives of the Act as contained in section 2 (b) is to "promote the spirit of ubuntu in the child justice system through- (i) fostering children's sense of dignity and worth; (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community; (iii) supporting reconciliation by means of a restorative justice response; and (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children.

100 Mbigi *In Search of the African Business Renaissance* 39; Cilliers "In Search of Meaning between Ubuntu and Into" 1; Shutte *Philosophy for Africa* 46.

101 Nussbaum 2003 *Reflections* 21.

102 Devarajan *et al* (eds) *Aid and Reform in Africa: Lessons from Ten Case Studies* 1-11.

103 Shernerberger and Van Stam *Economics and Finance Review* 30. See also Wallerstein 1988 *Canadian Journal of African Studies/La Revue canadienne des études africaines* 331-333.

It follows that methods of dispute resolution, which are based on *ubuntu*, can ensure reconciliation, harmony and better welfare for most communities. IMADR that are informed by this philosophy are bound to provide acceptability by and sustainability amongst the members of the business community.¹⁰⁴The remarks of Yacoob J are apposite,

the values embraced by an appropriate appreciation of Ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution.¹⁰⁵

1.4.3 Hypothesis and objectives

The theoretical basis of this dissertation will be to argue that the new ADR movement in Africa offers a platform for reviving and resuscitating the IMADR. Whereas IMADR have traditionally been used in resolving mainly non-commercial disputes, it is theorised that they can be used in commercial disputes. If incorporated into the legal systems of Africa, they can help achieve a uniform practice in intra-African trade relationships. This in turn could improve intra-African trade and African trade with other countries of the world.

It is further assumed that the *raison d'etre* for legal reforms in Africa was misconstrued as similar to that in the West. Nevertheless, the basis for legal reforms in the West is not the same as the basis for reforms in Africa. The prognosis did not follow the diagnosis. The model of reforms ignored the fundamentals of economic goals or the exchange systems of Africa. That is to say, African economic development meant or indeed should mean a different thing from what it is understood to mean in the West or in the developed countries. This is more so where the participation of Africans in many of the *fora* that map development paths, leaves much to be desired.

104 Benson 1990 *Journal of Libertarian Studies* 27.

105 *Everfresh Market Virginia Pty Ltd v Shoprite Checkers Pty Ltd* 2012 (1) SA 256

Africans are never fully represented in the *fora* that deal with the international conventions deciding most of the international rules because of disparities in bargaining power or, where they are represented, scales of negotiating power tilt against them.¹⁰⁶ Hence, the methods of ADR that have been introduced into Africa by way of transformation are not fully reflective of the economic needs of African countries, particularly in the sphere of intra-African trade. After all, those *fora* hardly have intra-African trade on their agendas.

The objectives of this study are:

- To look at the nature of the exchange systems in Africa,¹⁰⁷
- To evaluate the nature of trade relationships between African countries,¹⁰⁸
- To investigate the relationship between rule of law or legal reform and economic development,¹⁰⁹
- To investigate the IMADR, particularly in the context of commercial relationships in Africa,¹¹⁰
- To examine the extent to which the legal reforms have promoted domestic business intercourse or domestic investment in the individual countries of Africa,¹¹¹
- To examine what is known or unknown about the introduction and effect of ADR in Africa in the courts, particularly in the business sector,
- To compare and contrast the established methods of dispute resolution in different African countries in dealing with commercial disputes,¹¹² and
- To evaluate the extent to which the conventional methods of commercial dispute resolution have replaced the traditional customary ones in today's systems.¹¹³

1.4.4 Methodology

106 Alam S et al International Environmental Law 31.
107 Chapter 4.
108 Chapters 2 and 5.
109 Chapters 2 and 5.
110 Chapter 4.
111 Chapter 2.
112 Chapters 2, 5 and 6.
113 Chapters 2 and 3.

Methodology occupies a central position in research. Methodology refers to "... the overall approach to the research process, from the theoretical underpinning to the collection and analysis of data."¹¹⁴ Methods "... refer only to the various means by which data can be collected and/or analysed."¹¹⁵ Methodology is a "set of methods and principles" whereas a method is a research tool used to collect and analyse data.

It is neither tradition nor modernity, which dictates what method is most useful: that is determined by the nature of the research question.¹¹⁶

There are two most well known methodologies in social sciences research, namely quantitative and qualitative research methodologies. According to Hussey and Hussey,¹¹⁷ research can be classified according to purpose, process, logic and outcome into four types, namely explorative, descriptive, analytical or predictive research; quantitative or qualitative research; deductive or inductive research and applied or basic research. These types of research can be used in social sciences research. The underlying difference seems to be in the approach adopted by each. The difference actually marks a distinction between social sciences research and natural sciences research. Notwithstanding that, they may all be used in combination through triangulation.

Triangulation has been defined as "the use of different research approaches, methods and techniques in the same study".¹¹⁸ The purpose is to create more reliability and validity. Methodological triangulation occurs "where both quantitative and qualitative methods of data collection are used".¹¹⁹ In this study, therefore the Existential Phenomenological¹²⁰ method of research shall be combined with the Hermeneutics¹²¹

114 Hussey and Hussey 54.

115 Hussey and Hussey 54.

116 Schrama 2011 *Utrecht L Rev* 149.

117 Hussey and Hussey *Business Research* 9-10.

118 Hussey and Hussey *Business Research* 74.

119 Hussey and Hussey *Business Research* 74.

120 Existential phenomenological research method applies in two stages of the research: "In the data collection phase, participants embedded in a social phenomenon are interviewed to capture their subjective experiences and perspectives regarding the phenomenon under investigation. Examples of questions that may be asked include "can you describe a typical day" or "can you describe that particular incident in more detail?" These interviews are recorded and transcribed for further analysis. During data analysis, the researcher reads the transcripts to: (1) get a sense of the whole, and (2) establish "units of significance" that can faithfully represent participants' subjective experiences." Per Bhattacharjee *Social Science Research* 109 .

121 Hermeneutics " takes the case of reading a text as paradigmatic of all forms of

method, as well as others that will be necessary during the study to bring about the fairest results in the study of the utility of IMADR in intra-African trade. The comparative analysis tool is used therefore to buttress the effect of triangulation.

Europe and Asia will form the focus of comparison for determining the recognition and application of ICL in modern commercial dispute resolution mechanisms at the national and regional levels. Europe is ahead in regionalisation and harmonisation.¹²² While it comprises all countries that had been colonial masters, and that therefore influenced legal development in the colonies, they also have lived the experience of economic and legal development.¹²³ European countries continue to be the highest contributors to global economic development.¹²⁴ European countries are amongst the biggest sponsors of legal reform in African countries.¹²⁵ European countries do not only provide the biggest combined market for African exports, but this has been the case over a long period.¹²⁶ Asia, on the other hand, represents the front-runners in the 21st century development initiative;¹²⁷ they share a colonial history with Africa, but have managed to develop more quickly.¹²⁸ Their traditional legal systems are different from Western systems, and their uniqueness and ability to develop may nonetheless provide a learning curve for Africa. Much like Africa, Asia's intra-regional trade has remained low after colonialism, yet individual economies grew because of, among others, trade with countries other than Asia.¹²⁹ Out of all the Asian countries, China will be more frequently used for reference, because of its primary role in moving integration in Asia.¹³⁰

uBuntu will provide the epistemological basis of the methodology in order to come up with an Africanised model of commercial dispute resolution. Grande¹³¹ posits that:

interpretation, throughout the arts and sciences, and in everyday life. It would treat a painting, for example, or a price, as a 'text,' which needs to be 'read'. "Per Lavoie *Economics* 1.

122 Dinan 2007 *Fordham Int'l LJ* 1141.

123 Dam "Institutions, History, and Economic Development" 1-3.

124 See <http://ec.europa.eu/trade/policy/eu-position-in-world-trade>.

125 Kirsti "Rule of Law Reform" 6.

126 International Trade Centre *Africa's Trade Potential* 2.

127 Collins *et al* 1996 *Brookings Papers on Economic Activity* 135-203.

128 Stiglitz and Yusuf (eds) *Rethinking the East Asian Miracle* 57.

129 Dobson 2001 *The World Economy* 104-105.

130 Dobson 2001 *The World Economy* 1007.

131 Grande 1999 *JAL* 69; see also Ranger "The Invention of Tradition" 211-262

In the attempt to understand dispute resolution, epistemological models are required, which are able to capture the complex and multi-layered structure of law, power and tradition ... characteristic of social conflict.

The intention is not to dwell on the theoretical ramifications of *ubuntu*, but to apply what is known of *ubuntu* in order to come up with a system of dispute resolution that addresses peculiarly intra-African commercial disputes. The most up to date study reference to this concept, albeit in the context of constitutional law, is by Rautenbach.¹³² Rautenbach alludes to the allegation that in fact *ubuntu* entails all the principles of ICL. As such, it provides the bedrock against which the uniqueness of ICL can be identified, and related to commercial disputes in intra-African trade.

That will require revision of the existing systems in Africa, both at the regional and national levels.

1.5 Conclusions

Africa needs to trade in order to develop. One of the obstacles in the path of economic growth in intra-African trade is inefficient dispute resolution methods. The ADR, which was brought to Africa to facilitate access to justice by business persons has not worked. It has not worked because it is irrelevant. It is irrelevant because it seems not to take into account the indigenous methods of dispute resolution.

In Chapter 2, "The role of commercial disputes resolution methods in enhancing trade (and promoting economic development) in the context of Africa" the role of commercial dispute resolution methods in enhancing trade in the context of Africa is investigated in greater depth. The underlying presumption is that increased trade between states promotes economic development. The state of the law at the national level with a view to influence the development of a regime of law capable of addressing the region's trade problems is considered. At a theoretical level, the question is what the relationship is between alternative dispute resolution methods and economic development. This question is addressed by looking at the recent innovations through legal reform in Africa.

132 Rautenbach "Exploring the Contribution of *uBuntu*" 1.

The gist of this chapter is that, despite the world-held view that the rule of law promotes economic development, it has been argued that legal reforms geared at rule of law do not necessarily result in economic development. The truth may be that economic development leads to increased legal reform and/or rule of law.

In Chapter 3, "Analysis of the recent innovations in the African commercial dispute resolution landscape" ADR as the "newest import"¹³³ into Africa's legal systems in order to determine its impact in increasing intra-African trade is analysed. Essentially, the argument is for the transplantation that considers the local circumstances. In this chapter the transplant theory is used to test the general hypothesis that law development is always influenced from outside. The question remains whether the trends in ADR transplantation so far and the models adopted will ensure firstly, an increase in intra-African trade that will translate to development within countries of Africa, and secondly the extent to which conventional ADR answers pertinent questions of poverty and underdevelopment in Africa. How does it affect the most vulnerable and yet most populous members of African communities?

Chapter 4, "Tapping into the indigenous knowledge: continuity and change in indigenous methods of dispute resolution" addresses ICL principles as a source for a universal African system of law. In this chapter, the main dispute resolution methods and their uniqueness in Africa are highlighted. In pre-colonial Africa, the approach to dispute resolution was based on the restoration of peace and harmony, driven by *ubuntu*. This important ingredient (and several others) of the legal systems of African countries has found minimal expression in the newly established ADR.

In Chapter 5 the focus is on "relating indigenous dispute resolution methods to intra-African trade disputes: Introducing the IMADR through IJSs". In this chapter the fundamental question is whether the IMADR as gleaned from ICL bear any relevance to the nature of the commercial disputes plaguing intra-African trade today. Argument is made that the nature of trade dictates what methods are relevant at any given point in time, and that indigenous methods are characteristically flexible and would therefore suit any circumstances all the more so where they are predominantly indigenous.

133 See Greco 2009 *Pepp Disp Resol LJ* 649.

In this chapter, customary law-based ADR is reviewed at two levels, namely at the national level and the regional level, i.e. within African states and between African states. The level of and the trends in intra-African trade are highlighted, followed by a look at how the disputes arising therefrom have been solved. Lastly, suggestions are put forward regarding how the ICL-born alternatives could help.

In Chapter 6, "Addressing Africa's problems through IMADR: lessons from Asia and Europe" a comparative analysis is undertaken that seeks to address Africa's problems through lessons from Asia and Europe on the recognition and utility of ICL in commercial disputes. The question that remains is whether there is anything to learn from the experiences of other regions in "indigenising" ADR and/or legal reform. In other words, does culture really matter in law reform. In this dissertation, therefore the pertinent question is to what extent indigenous law has helped relate legal development to economic development, particularly in the context of integration. The comparison with other regions enables one to draw conclusions on the value of transplants from outside Africa. The argument is that in Africa there is much more need and room for inclusion of IMADR in the commercial dispute resolution regime at the regional level, than in other regions of the world.

In the last chapter conclusions are drawn by dealing with the relevance of ADR to African dispute resolution. Drawing from the conclusions in the previous chapters, the underlying question raised by this study, namely whether ICL can be utilised in resolving mainly intra-African trade disputes is answered. Finally, recommendations for a theoretical, albeit abstract way forward are suggested.

CHAPTER 2

The role of commercial dispute resolution methods in enhancing trade (and promoting economic development) in the context of Africa

2.1 Introduction

The nexus between law and economic development is undeniable.¹ What is not very clear is the causal relationship between Alternative Dispute Resolution (ADR) as an aspect of law, and economic development.² However, whatever the relationship, it does not augur well for intra-African trade and therefore African development. The reforms (that include ADR) work mostly for promoting trade between Africa and the rest of the world, but not internal trade in Africa. Africa benefits less from the trade between African countries and the rest of the world, because of the dominance by multinational corporations, which eventually siphon the profits to the West,³ at the expense of African development, or without re-investing in Africa. According to the AU/ECA Report "...when profits are illicitly transferred out of African countries, reinvestment and the concomitant expansion by companies are not taking place in Africa." ⁴

Intra-African trade is key to Africa's economic development.⁵ Hence, Africanised legal reform (including reform through ADR) may affect intra-African trade and African development positively. In order to determine the relationship between economic development and ADR in the context of Africa, the debate on the relationship between law and development generally is revisited in section 2. In section 2.3 the definition of ADR in the context of law or the rule of law (ROL) is given, for it is assumed here that the goal of ADR is promotion of the ROL. The question is whether ADR does provide the necessary and better protection of commercial or trade rights, which protection in turn leads to enhanced participation in commercial activities and therefore economic development. Section 2.2.4 discusses the definition of "economic" development is in the search for a working meaning in

1 Levine 1999 *Journal of Intermediation* 24; Levine 1998 *Journal of Money, Credit and Banking* 596-605.

2 Davis and Trebilcock 2008 *The American Journal of Comparative Law* 895-946. Ultimately, the question remains whether law does matter for economic development. See Ginsburg 2000 *Law and Society Review* 829-856.

3 Onuoha *The Elements of African Socialism* 11.

4 AU/ECA Report 2014 52.

5 Mwangi *et al* "Intra-African Trade in Context" 1; Kagame 2015 <http://www.gov.rw>.

the context of Africa. This exercise will require examination of an "Africanised" perspective of development. The argument is that as development has different connotations with regard to rural as opposed to urban needs and to developing as opposed to developed countries, ADR could be useful and relevant in the context of backward economies typical of rural Africa. Lastly, the conclusion is drawn that the present model of ADR is full of *lacunae* that have stalled its efficacy in fostering economic development through intra-African trade.

The aim is to argue that although there is no clear correlation between trade and dispute resolution, the availability of clear and easily accessible rules of dispute resolution, which are understood by the participants, should provide a fertile ground for economic growth. The point made here is that each region or country should be able to function best under rules of law with which it is familiar. Only relevant rules of law that are familiar can contribute to a country's economic growth and/or development.

2.2 The "law-growth nexus"⁶ revisited

Should law concern itself with economic development? The question of the relationship between law and economic development is vexed, especially in the so-called developing countries.⁷ There are those authors who think that law should not make it its goal to promote economic development.⁸ In addition, there are those who consider that development is but a collateral consequence of law reform.⁹ Much has been written¹⁰ on the nexus between law and economic development simply because of the phenomenon of the pursuit of development through foreign investment. Some commentators regard security, commercial, humanitarian and cultural outcomes¹¹ of development as more important than the ROL.

6 Inspired by Dam *The Law–Growth Nexus* 26-55.

7 Levine 1998 *Journal of Money, Credit and Banking* 596-613, looks at this question specifically in the context of development of banks and banking, and affirms that law contributes to development.

8 Dworkin 1980 *J Legal Stud* 191; Coleman 1980 *ETHICS* 649.

9 See Trubek and Galanter 1974 *Wis. L. Rev.* 1062; Trubek "The Rule of Law in Development Assistance" 1.

10 Cooter and Ulen *Law and Economics* 1-3; Polinsky *An Introduction to Law and Economics* 1.

11 Taylor "Rule-of-Law Assistance Discourse and Practice" 175.

2.2.1 *The development paradigm*

The discourse on the relationship between law and development has a long history, of over 40 years.¹² This period is marked by development assistance through institutional and or legal reforms. According to Newton,¹³ the history of donor-driven legal reform can be broken into five distinct stages, namely the prehistory of colonial legal development (up to the 1960s), the inaugural moment of US legal development cooperation (1965 to 1974), the critical moment (1974 to 1989), the "revivalist" moment (1989 to 1998) and the "post" moment (1998 to the present). The last stage¹⁴ appears to provide a rethinking on the meaning of development and the approach to legal reform. There is consensus that despite these efforts, development approaches to economic development have failed to achieve promised results after more than sixty years of development practice.¹⁵ The emphasis is now on providing reform that fits the context.¹⁶

The question remains, however, as to whether the donors do heed the calls for introspection. Such introspection could be facilitated by, amongst others, incorporating critical thoughts from Africa. What appears to be missing in the literature on this discourse is the contribution of Africa,¹⁷ both at the academic level of debating relevant models of reform, and as a source of models of reform. The modern view of the relationship between law and development seems to commit the same flaws committed by the Modernists, that of omitting the contribution that could be made by the indigenous knowledge from the developing countries.¹⁸ Most importantly, the reformers have failed to provide an appropriate and relevant definition of "development". They have failed to contextualise.

12 See Tamahana 1995 *Am J Int'l L'* 470 who says, "law and development has been a field of academic study for about 30 years"; see also Hammergren "With Friends Like These" 203-205; Palacio *The World Bank Law Review* 9.

13 Newton "The Dialectics of Law and Development" 174-202.

14 Trubek and Santos (eds) "The Rule of Law in Development Assistance" 1.

15 Palacio 2006 *The World Bank Legal Review* 9.

16 Taylor "Rule-of-Law Assistance Discourse and Practice" 162; Macmillan "Development" 68-96.

17 At the 2012 TEDxChange Conference in Berlin, Sowa is reported to have retorted as follows: "When people portray us as victims, they don't want to ask us about solutions. Because people don't ask victims for solutions." See Quinn 2013 <http://www.theguardian.com>.

18 Odinkalu 2003 *The World Development Review* 1-37.

Lack of consensus regarding the contribution of law to development seems to emanate from, amongst others, varied interpretation of the concept 'development' that is distinct from "economic development," although most authors seem to equate both concepts with growth and enhancement of people's lives.¹⁹ This boils down to conceptualisation or the question of epistemological basis of development;²⁰ that is to say, economic development must of necessity address the needs (and maybe wants) of the people it affects.

Development is a complex concept. It has been defined differently depending on the change in paradigm, ideology and many other perspectives.²¹ The best known extremes of these ideologies are capitalism and communism.²² For communists the emphasis is more on the socio-economic and political aspects of development, whereas for capitalists the emphasis has been on economic growth and the trickledown effect on socio-political development.²³ In the case of communism, human rights issues are secondary to the development agenda. For capitalists, human rights seem to occupy a primary if not pivotal position in ensuring economic development through investment.²⁴

There has been an attempt to provide an African paradigm to looking at development. Major contributors to the African perspective of development are the likes of Nkwameh Nkrumah,²⁵ Julius Nyerere,²⁶ Mahmood Mamdani,²⁷ Ali Mazrui,²⁸

19 Carothers *Promoting the Rule of Law Abroad* 7.

20 Carothers *Promoting the Rule of Law Abroad* 6-7; Trubek and Santos "The Rule of Law in Development Assistance"; Dam *The Law Growth Nexus*.

21 Much of the literature on the discourse on law development nexus comes, almost exclusively, from the West. This is what Carothers refers to as "The Problem of Knowledge": see Carothers (ed) *Promoting the Rule of Law Abroad* 8; see also Newton "The Dialectics of Law and Development" 178-179 and 180.

22 Other theories include the following: Modernisation theory also known as the stages of growth theory presented by Rostow as follows: first is the "traditional society", second is "the preconditions for take-off", third is "the take-off", fourth is "the drive to maturity" and fifth is the "age of high consumption"; there is the more colloquial "Canadian Staples approach" as presented by Watkins 1963 *The Canadian Journal of Economics and Political Science* 151-158.

23 Barkan *Beyond Capitalism* 101-127.

24 Communism is known for its lack of respect for human rights. Abuse of human rights discourages foreign investment. Without foreign investment, a country's progress can be hampered.

25 Nkrumah *Neo-colonialism* 1.

26 Nyerere J"Ujamaa" 2

27 Mamdani *Citizen and Subject* 1.

28 Mazrui *Africa's International Relations* 1.

Walter Rodney²⁹ and others. Most of these authors attempt to look for an alternative path for Africa's development by looking at how development initiatives evolved in Africa. The idea that "development" is defined more by looking at it from the viewpoint of Western conceptualisation, and that all development initiatives therefore perpetuate imperialism of the West over Africa is expressed in the dichotomy of Afrocentrism versus Eurocentrism.³⁰ Nonetheless, Baderin sets the stage for actually relating law to development by challenging African legal experts to engage in the discourse on law and development.³¹ His approach does not seem to depart from the general view of development as inspired by Western thinking and Afro-centrism as entailing mainly disentangling African development from the grasp of Westernisation.

Development has different, yet interconnected aspects, including social, economic, legal, political and geographic aspects.³² Although in some cases the law and economic development have both been pursued at once, one affects the other. Legal development affects economic development. Rodrik makes this point clearly.³³ Palacio³⁴ suggests what he calls "causal interdependence" as a framework of looking at the interconnections of different aspects of development. The question remains whether the interconnectedness is causal, in other words, whether legal development results in economic development. Development as a whole cannot be looked at separately from legal development. Legal development is integral to economic development issues.³⁵ The extent to which legal reform affects economic development positively can be measured by the relevance of the changes in the law itself, i.e. the relevance of the so-called legal reform,

29 Rodney *How Europe Underdeveloped Africa* 1.

30 The dilemma resulting from an attempt to find alternatives to looking at African development is expressed more succinctly by Chukwuokolo, J. Chidozie. 2009. "Afrocentrism or Eurocentrism: The dilemma of African development". *Ogirisi: A New Journal of African Studies*, vol.6, pp.24 -39.

31 Baderin 2011 *NIALS Journal of Law* 1-48.

32 Palacio (ed.) *The World Bank Legal Review* 9.

33 Rodrik *et al* 2004 *Journal of Economic Growth* 131-165; see also, Ginsburg 2000 *Law and Society Review* 829-856.

34 Palacio (ed.) 2006 *The World Bank Legal Review* 9.

35 Palacio A (ed.) 2006 *The World Bank Legal Review* 13.

even if legal development were not to contribute one iota to economic development...legal and judicial reform would be a critical part of the development process.³⁶

Whatever the case may be, development efforts made thus far have been questioned most commonly on their sustainability.³⁷ The call for sustainable development initiatives, however, does not focus on the northern industrialised countries at the exclusion of the southern countries. Whereas in the West there is increasing industrial demand and use of natural resources, these natural resources are usually sourced from the South.³⁸ Consequently, there is increased exploitation of these resources either for survival³⁹ or purely for development purposes. The result is that sustainability is risked at a comparable level in both major regions of the world. It is safe to add that climate change exacerbates the impact on the developing countries.⁴⁰

Development is not only about economic growth as measured by such indices as GDP per capita or capital accumulation.⁴¹ Development should also enhance people's capabilities. Therefore, in this context, law does not necessarily have to lead to economic growth, but has to be looked at categorically as an entity together with economic growth that contributes to development.⁴² In this context, the growth of the movement on just development is justifiable on the ability of law to bring about just development.⁴³

The debate should therefore not be on the nexus between law and development, but on the causal relationship between law and development. It is more of the proverbial Adam and Eve or the egg-chicken debate, which is circular and vicious in nature.⁴⁴ In

36 Palacio A (ed.) 2006 *The World Bank Legal Review* 10.

37 Authorities include the Award in *Bering Sea Fur Seals* arbitration between Britain and the United States 1898, *Trail Smelter* case between United States and Canada 1941, including a range of Environmental Law Instruments that relate environmental law to economic development; a more elaborate and fairly recent history of 'sustainable development' is given by Tlali *Sustainable Development* 12-38.

38 Farole and Winkler (eds) *Making Foreign Direct Investment Work* 175.

39 Tlali *Sustainable Development* 2.

40 Gueye *et al* (eds) *Trade, Climate Change and Sustainable Development* 29-31.

41 Palacio (ed.) 2006 *The World Bank Legal Review* 38.

42 Palacio A (ed.) 2006 *The World Bank Legal Review* 38; A more fashionable way of looking at development is the so-called "just development"- see *World Bank: Just Development*.

43 The notion of "just development" is based on the relationship between the rule of law and development, notwithstanding that the relationship between rule of law and the many aspects of development is difficult to define. See Isser, Berg, and Porter 2014 *Just Development* 1-4.

44 Toope puts the question rather rhetorically by asking "whether law follows or leads" 2003 *McGill Law Journal* 362.

the end, looking at the nexus between law and development will only help in sequencing reform for sustainable development.⁴⁵

2.2.2 *The contribution of law to development: the ROL conundrum*

The discourse on the relationship between law and economic development can be divided into two schools of thought, namely the "Rights Hypothesis"⁴⁶ and "the anti-Human Rights Hypothesis".⁴⁷ On the one hand, advocates of the human rights hypothesis argue that where there is ROL, there is predictability on the security of property rights and on the sanctity of contracts.⁴⁸ The emphasis is on "predictability."⁴⁹ Trebilcock and Daniels associate this increase in the ROL with the existence of courts and other law enforcement mechanisms. They conclude that where there is ROL in the form of human rights protection, foreign investment can be attracted. It seems that many subscribers to the human rights movement see the ROL as the answer to many of the world's (including Africa's) economic ills.⁵⁰

ROL itself is an old concept.⁵¹ It is sometimes traced to Dicey's 19th century description of the British political system that,

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land⁵²

45 Palacio 2006 *The World Bank Legal Review* 13.

46 Clarke 2003 *Am J Comp L* 89-111; advocates of this theory belong to the New Institutional Economics school of thought and they include North *Institutions* and Dam *The Law Growth Nexus*, amongst others.

47 Proponents of which include Chukwumerije 2009 *Emory International Law Review* 383; Ginsburg 2000 *Law and Society Review* 829; Mayeda 2006 *McGill Law Journal* 547; Peerenboom (eds) *Asian Discourses of Rule of Law* 348-349; Trebilcock and Leng 2006 *Virginia Law Review* 1517.

48 Stromseth *et al Can Might make Rights* 312; Carothers *Promoting the Rule of Law Abroad* 6-7; Chwukwumerije 2009 *Emory International Law Review* 419; Trubek 1972 *Wis. L. Rev.* 720.

49 Predictability is defined by Trebilcock and Daniels *Rule of Law Reform and Development* 30 thus: "laws, once enacted or adopted, will be enforced in a predictable and consistent way, relatively free from the exercise of arbitrary discretion influenced by factors extraneous to the ostensible objectives of the law, such as corruption, cronyism, patronage, or discrimination related to ascriptive factors, such as race, religion or gender."

50 Carothers *Promoting the Rule of Law Abroad* 3.

51 Carothers 1998 *Foreign Affairs* 77; Although it was popularised in the 19th century by British jurist Dicey, the concept was familiar to ancient philosophers, such as Aristotle, who wrote "Law should govern". It can be traced back to 16th century England.

52 Dicey *Introduction* 187.

Notwithstanding its ramifications and metamorphosis, ROL is generally treated figuratively as an ass,⁵³ thus suggesting that ROL itself is a dubious and slippery, albeit flexible concept. However, two of the most prominent elements of the ROL can be identified, namely compliance with legal rules, that is to say, a legal system based on the ROL has it that citizens obey the laws and are guided by them,⁵⁴ and protection of rights.

ROL is measured by reference to the characteristics of the legal institutions and the extent to which there is compliance with the legal principles.⁵⁵ "High compliance rates" are sometimes used to measure efficacy of institutions.⁵⁶ It is argued that where the institutions are perfect there will be high compliance, meaning there will be less non-compliance. However, cases of non-compliance will usually increase because the system affords the complainants enough audience. The logic is simple; 'perfect' legal institutions incite companies to take more risks thereby encouraging more business interactions. Hence, chances of breach increase followed by recourse to the legal institutions.⁵⁷ According to Trebilcock and Daniels,⁵⁸

widespread compliance with the law might signify that a society possesses potent legal norms, but it might also signify that the society possesses potent informal mechanisms that facilitate the enforcement of legal norms or potent non-legal norms whose content happens to overlap with that of legal norms or the absence of social or economic factors that tend to induce law breaking.

Although formal institutions are important, in developing countries the contribution of informal institutions is equally important.⁵⁹ The question is how accessible are these institutions?

Accessibility can be measured according to the following criteria: just judgements; fair and seen to be fair; proportionate; speedy; understandable; responsive; certain;

53 Stephenson *Promoting the Rule of Law Abroad* 196; Tamanaha 1995 *Am J Int'l L* 3.

54 Raz *The Authority of Law* 212.

55 Trebilcock and Daniels *Rule of Law Reform and Development* 10; Kleinfeld *Advancing the Rule of Law Abroad*, refers to rule of law as the proverbial blind man's elephant from which he identified five meanings, namely government by law, equality before the law, law and order, predictable efficient justice and lack of state violation of human rights.

56 Romano *et al* (eds) *International Adjudication* 467.

57 Bigsten *et al* 2000 *The Journal of Development Studies* 2.

58 Trebilcock and Daniels *Rule of Law Reform and Development* 10.

59 Haggard *et al* 2008 *Annu Rev Polit Sci* 205; The World Bank has explicitly excluded the informal aspects of the law despite a recommendation in that line by one of its experts i.e. North *Institutions* 3-10, has suggested that reform should not overlook local circumstances.

and effective.⁶⁰ These criteria presuppose a formal system, hence the reform that seems to essentially seek to formalise everything. There is a need for more criteria for measuring accessibility in the informal systems as well. It is argued here that access to justice can be realised much more efficiently if IMADR is enhanced. According to Harper, the state cannot provide accessible justice to the entire population of a country.⁶¹ Even in cases where it does, it does not always do so efficiently.⁶² Customary systems of law can therefore complement the state where it is either inefficient or deficient in its provision of legal services.

Not all legal systems can accommodate ROL in its pure form.⁶³ For a system to accommodate the ROL, such a system must yield "formally sound, effective and legitimate rules".⁶⁴ Nonetheless, ROL will vary according to the legal system in which it is pursued. Africa has inherited different legal systems from the former colonisers, and these have different implications for contractual undertakings and related matters,⁶⁵ and hence on the ROL. Legal systems differ in their conduciveness to ROL. One of the tests is "user-friendliness" of a given legal system. Berkowitz, Pistor and Richard⁶⁶ divide laws into families. They conclude that countries belonging to the English common law have the most investor-friendly laws while countries that have inherited the civil law systems have the least investor-friendly laws.

For a system to give rise to ROL, the rules and principles must be deduced from the legal system. It is almost impossible to deduce such principles and rules where the formal norms have not yet taken root.⁶⁷ However, the fact that formal norms have not taken root may imply that informal norms predominate. This begs the question of whether to wait for such penetration to take effect and have the reaction of the people before one can impose another formalistic change in law. Put differently,

60 Fiadjoe 2000 *Caribbean Law Review* 55.

61 Harper *Customary Justice* 36.

62 Harper *Customary Justice* 36; see also Golub "Beyond Rule of Law Orthodoxy" 16.

63 Hachez and Wouters *Promoting the Rule of Law* 5.

64 Hachez and Wouters *Promoting the Rule of Law* 20.

65 In a common law country, contracts tend to be very detailed with all contingencies spelled out. Comparatively Meuwese *Brothers in Arms* 120, says "In a civil law country, contracts tend to be shorter and less specific because many of the issues that a common law contract would cover are already in the civil code"; Fefchamps *et al Towards a Growth Strategy for Africa* 12.

66 Berkowitz, Pistor and Richard *Am J Comp Law* 166; See also Mahoney 2001 *The Journal of Legal Studies* 503-525.

67 Ellickson *Order without law* 1.

should one wait until, in the words of Toope, there is an "indigenous demand?"⁶⁸ The answer is no, for it is known that law is a tool for effecting social change. What is important is contextualisation of the legal reforms, which in some cases will be a simple formalisation of the erstwhile informal legal principles.

There is a relationship between formal and informal sources of knowledge. In Africa, such coexistence has actually been formalised in other countries. For example, *Proclamation 2B* of 1884 for Lesotho provides for a dual system of law where customary law exists side by side with common law.⁶⁹ A recognisable system of law exists from which rules and principles can be deduced. In fact, the challenge is to study the informal norms even more in order to relate them to trade and development.

Different conceptualisations of the ROL exist depending on whether the context is politics, economics, sociology or even development in a broad sense. Even in the specific context of development, there are different opinions as to what the ROL actually entails. In their conceptualisation of the ROL, Trebilcock and Daniels⁷⁰ distinguish between the "thin" and the "thick" conceptions of the ROL and advocate a "thinner" conception. The "thick" conception of law relates the ROL to freedom and democracy⁷¹, while the "thin" conception of law refers to formal rules intended to regulate rational beings.⁷² The "thin" conception is intended to relate directly to development needs. ROL is, in their words, a conception that "coheres with the goals of development".⁷³ In this sense, therefore the ROL that is conducive to development must at least guarantee certain development-related freedoms, such as freedom of trade, freedom of expression, access to the courts, and access to health, reduction of poverty, etc. By extension, ROL must not only guarantee these development-related freedoms, but it must also ensure sustainability in the exercise of those

68 Toope 2003 *McGill Law Journal* 363.

69 For most countries, legal institutional reform has had to pave the way for rule of law. See the example of China: Peerenboom *China's Long March Toward Rule of Law* 6-7.

70 Trebilcock and Daniels *Rule of Law Reform and Development* 16-29.

71 Trebilcock and Daniels *Rule of Law Reform and Development* 16.

72 Trebilcock and Daniels *Rule of Law Reform and Development* 20.

73 Trebilcock and Daniels *Rule of Law Reform and Development* 24.

rights. Where such sustainability is foreseeable, the ROL will be said to prevail. In this way, the "illusion" of justice is warranted.⁷⁴

"Justice," as an aspect of the ROL, implies a fundamental assurance to the investors that law protects them in their acquisition of both intangible and tangible property . Moreover, ROL assures investors that they are protected in their acquisition of assets, in their liability towards other traders, in the realisation of profits and in many other threats to amassing profits. Haggard, McIntire and Tiede⁷⁵ outline the logic of it all as follows:

The core logic is that security of property rights and integrity of contract underpin, respectively, investment and trade, which in turn fuel economic growth and development. However, property rights and contracts rest on institutions, which themselves rest on coalition of interests.

Laws and regulations that protect investors and help them to resolve issues related to their businesses quickly can be crucial for business creation and survival because they encourage investment, facilitate smooth business operations and help viable businesses recover if they become insolvent.⁷⁶ ROL is thus cited as one of the criteria of measuring investor protection.⁷⁷ Protection of investors promotes economic activity and entrepreneurship, as investors "make risky but high value-added investments."⁷⁸ Strengthening business regulation may have a significant impact on the overall economic performance of firms and economies.⁷⁹ This is a rather formalistic, albeit whiskered way of looking at ROL, for it excludes the possibility that the same guarantees can be granted by an informal system of law.

It seems that the goals of the ROL may still be achieved even in circumstances where the concept is not purely the Western concept; what is important is that a system should be able to provide security of property and rights.⁸⁰ For a legal system to give rise to these two main goals, it must at least be consistent and predictable. Therefore, the protection mechanisms do not have to be liberal or private. Take the

74 Haggard *et al* 2008 *Annu Rev Polit Sci* 205.

75 2008 *Ann Rev Polit Sci* 205.

76 *Doing Business Regulations* 36; see also John *et al* 2008 *The Journal of Finance* 1679-1728.

77 *Doing Business Regulations* 37.

78 *Doing Business Regulations* 37; see also Hobbes "Leviathan" 414-415.

79 Djankov *et al* 2006 *Economics Letters* 395-401.

80 Lindsey *Law Reform in Developing and Transitional States* 67-68; Hachez and Wouters *Promoting the Rule of Law* 6-10.

land tenure system of Lesotho⁸¹ for example; security of property may still be provided even though the government owns land on behalf of the people.

Historically, especially for African countries that were colonised, the introduction of new legal systems precluded an expansion in the phenomenon of trade, either internally or externally.⁸² Law began to define the rights of persons against the state and against each other. However, the pace of economic development did not correspond to the legal reform processes that continued after independence.⁸³ Neither did economic progress stall for countries that have been notorious for the absence of respect for human rights. China, for example is outstanding in its economic performance but it cannot be used as an example of the absence of a relationship between law reform and development. There may be an absence of ROL in the sense understood better by Western standards, but quite ironically, there is equally less regulation in interpersonal relationships as envisaged by the World Bank reform policy.⁸⁴ What is more, advocates of the human rights hypothesis tend to overemphasise human rights as the measure of ROL.

Those who are against the human rights hypothesis argue that there is no evidence that human rights protection is necessarily a major consideration for foreign investors in deciding where to invest.⁸⁵ Clarke cautions that it would be wrong to assume that there cannot be a mechanism for enforcement of rights simply because the mechanism is not in the form of courts.⁸⁶

Enforcement is as much an issue outside litigation as it is in litigation. One is therefore cautioned against a Eurocentric bias that because the institutions are not formal or Western; they are non-existent.⁸⁷ Clarke's argument and that of other anti-

81 S 4 of the Land Act provides that "land in Lesotho is vested in the Basotho Nation and is held in trust by the King."

82 Note the difference in approach between the Spanish, British and French empires in colonial Africa, per Grier 1999 *Public Choice* 318-320.

83 Grier 1999 *Public Choice* 325-327.

84 See generally Ping and Tan "Chinese and American Interpersonal Relationships"; Turner *et al Rule of Law in China* 168.

85 Chukwumerije 2009 *Emory International Law Review* 422; see also Tanase 2001 *Adapting Legal Cultures* 187-198, who says that law was not a precondition for the modernisation of Japan.

86 Clarke 2003 *Am J Comp L.* 91.

87 Clarke 2003 *Am J Comp L.* 91; also see Golub "Beyond Rule of Law Orthodoxy" 16; Siddiqi "Customary Justice" 121, 122, who is of the view that there is convincing evidence that legal institutions matter for economic development.

human rights advocates⁸⁸ is that rule of law is but one of the considerations of investors when deciding to invest.⁸⁹ What seems to be important is the availability and use of enforcement mechanisms, which depend on many factors, including willingness of parties, political will on the part of executive institutions and the availability of resources. It depends on a synergy of efforts between different societal and governmental organs. All these institutions are tools of development that must develop to the standard that warrants efficiency.

ROL is a product of development efforts.⁹⁰ The goal to be achieved is development in all its aspects including ROL. Law reform or ROL should not be the prerequisite of development, but should be the target of development efforts. Hence, context does matter. The ROL, as understood in China, might be the most appropriate conceptualisation for Africa, because of similarities in the business cultures of these places.⁹¹ East Asian (including Chinese) economies are,

characterised by relationships both between business people *inter se* and between business people and the state, with many of these relationships being conjured outside the framework of formal legal process.⁹²

Admittedly, the cliché that is often associated with African culture, namely that in Africa there exists a polychromic culture,⁹³ "time is limitless", may not apply to China. However, the Eurocentric monochromic culture of "time is money" equally does not apply to Africa, especially to the informal sector of African economies.⁹⁴ Nonetheless, between the two cultures, namely Western and Chinese cultures, perhaps more could be borrowed from China, especially because of its disinclination towards formality. ADR is founded on a departure from formal norms. Hence, it offers

88 Clarke 2003 *Am J Comp L* 91.

89 Clarke 2003 *Am J Comp L* 91.

90 Stephenson 2005 www.worldbank.org.

91 Sheehy 2005 *Nw J Int'l L & Bus* 238.

92 Chukwumerije 2009 *Emory International Law Review* 424-425; Jayasuriya "Analysis of Legal Institutions" 6-7.

93 Gold 2005 *J Disp Resol* 298; in "polichronic culture" the system of time allows several things to be done at once. It is often associated with traditional societies, such as Africa and Latin America. See Cohen *Negotiating across Cultures* 34, who notes that, "Traditional societies have all the time in the world. The arbitrary divisions of the clock face have little saliency in cultures grounded in the cycle of the seasons, the invariant pattern of rural life, community life, and the calendar of religious festivities".

94 Gold 2005 *J Disp Resol* 298.

a good platform for reviewing the doctrinal value of the ROL in intra-African trade, which is typically informal in nature.⁹⁵ Cultural context, therefore, cannot be ignored.

The cultural context of African trade is everything. By definition, culture,

Consists of specific learned norms based on attitudes, values, and beliefs, all of which exist in every society...culture cannot easily be isolated from such factors as economic and political conditions and institutions.⁹⁶

Culture therefore determines how business is organised and run by different communities across boundaries. Culture also determines local rules by which traders in a particular locality conduct their business. This is the essence of customary or indigenous law. This characterisation of intermingling of culture and law is typical of the African informal sector.⁹⁷ The question is whether it provides a system of law that warrants "rule of law."

Culture can have an effect on law as in the development of customary law, for instance. Culture also determines the pace or the path of economic development. In this way, pursuing cultural development can be as much an objective of development as pursuing legal reform. All these development efforts can lead to development in the larger context. Where the system of law in place takes into account the indigenous cultures, development can progress sustainably and for the benefit of the people for whom it is meant.⁹⁸

2.2.3 ADR and the ROL

Poverty (absolute poverty) reduction and the enforcement of contractual rights are both important goals of economic development,⁹⁹ that is, protected exercise of those rights, particularly in the context of trade contributes to economic growth. Failure to protect those rights or inadequate protection of those rights gives rise to disputes,¹⁰⁰

95 According to the OECD report, the informal sector represents 43% in Africa, Lesser and Moisé-Leeman *Informal Cross-Border Trade* 1.

96 Daniels and Radenbaugh *International Business* 64.

97 Sousa 2006 *Law & Society Review* 55.

98 Moodley 1994 *CILSA* XXVII 44; Menkel-Meadow 2003 *J of Disp Res* 319.

99 Bourguignon 2004 *Poverty, Inequality and Growth* 69.

100 Doing Business *Making Difference* 71-72.

notwithstanding that disputes actually result in the very exercise of those rights.¹⁰¹ Methods of resolving those disputes range from the traditional litigation, whether adversarial or inquisitorial, on the one hand, and arbitration, mediation and negotiation on the other hand. The latter category has been referred to as "Alternative" or "Applied" Dispute Resolution (ADR).¹⁰²

The most fitting description of ADR is to be found in Mackie *et al* as follows:

The most common classification is to describe ADR as a structured dispute resolution process with third-party intervention, which does not impose a legally binding outcome on the parties. Mediation is the archetypal ADR process falling within this classification.¹⁰³

This "definition" excludes arbitration because arbitration is rather adjudicative in nature.¹⁰⁴

As an alternative to litigation, ADR goes back a long time.¹⁰⁵ In the 17th century, New England colonists developed their own dispute resolution mechanisms, including informal mediation and arbitration as a result of strong ethnic, religious or commercial interests.¹⁰⁶ Lawyers and courts mostly frustrated them. Gold¹⁰⁷ categorically excludes the possibility that these communitarian dispute resolution methods could apply across boundaries, but attributes such transnational applicability exclusively to litigation.¹⁰⁸ However, mediation, in its raw indigenous albeit diverse form, has a very long history in other parts of the world too, including China, Africa, Japan and the Americas.¹⁰⁹ In Africa, ADR in the form of mediation has been used for centuries, using elders, councillors, headmen and tribal chiefs as mediators.¹¹⁰ It was thus based on the restoration of peace and social harmony.¹¹¹

101 Bigsten *et al* 2000 *The Journal of Development Studies* 14, 24.

102 Dieng "ADR in Sub-Saharan African Countries" 614.

103 Mackie *et al* *The ADR Practice Guide* 8-9.

104 Stipanowich 2004 *Journal of Empirical Legal Studies* 1.3; Fulton *Commercial Alternative Dispute Resolution* 74, refers to arbitration as "litigation without wings"; see Faris 2008 *De Jure* 518 for other reasons why arbitration is different from other ADR methods.

105 Barrett and Barrett *History of Alternative Dispute Resolution* 1.

106 Gold 2005 *J Disp Resol* 289. 302; The history of ADR could also be traced to Arnstein's "A Ladder of Citizens Participation" see Arnstein 1969 *Journal of the American Institute of Planners* 216-224; see also Wondolleck *et al* 1996 *Sociological Perspectives* 249-262.

107 Gold 2005 *J Disp Resol* 304.

108 Gold 2005 *J Disp Resol* 304.

109 Gold 2005 *J Disp Resol* 309.

110 Young 1989 *Cic Just* Q 58.

111 Grande 1999 *JAL* 66.

Through colonisation "centralisation of power meant centralisation not only of the production of legal rules but also, for the same reason, of dispute resolution."¹¹² The new product of ADR can be traced to Professor Sanders' speech of 1976 in which he discarded the notion of delivery of justice as "one size fits all".¹¹³ ADR was thus re-introduced in the 20th century through law reform, sparked by, amongst others a realization that,

Law is more than lawyers - to be of value in society it must provide guiding principles that allow for regularity and rationality in the way in which disputes are settled and the way in which relationships are governed.¹¹⁴

ADR does not necessarily detract from formal law despite the purport that it adopts indigenous elements of law. It is not different from pre-trial conferences that were part of court procedures, especially in civil matters. The only difference is that actual parties participate in the process, whereas in court-sanctioned pre-trial conferences parties are represented by their lawyers.

As a product of reform, ADR is aimed at improving dispute resolution and hence access to justice.¹¹⁵ However, its inability to ensure enforcement leaves much to be desired especially concerning its most eminent feature, namely mediation. While mediation is voluntary, the mediation outcome is not judicial. Compliance with it relies very heavily on the willingness of the affected parties, except where it is court-annexed, in which case it benefits from the enforcement mechanisms that go with litigation.¹¹⁶ The question is whether ADR can facilitate the achievement of ROL as a goal of development.

Where the applicable enforcement routes are premised on ADR, (which is not court annexed), enforcement is dependant mainly on the parties themselves and the community involved. ADR reinforces the ROL only to the extent of providing access. In other words, it reinforces ROL only where it is an extension of formal institutions of

112 Grande 1999 *JAL* 66.

113 Menkel-Meadow 2000 *Ohio St J Disp Resol* 1; Henseler 2003-2004 *Penn St L Rev* 174-181.

114 As quoted in Toope 2003 *McGill Law Journal* 365; see also UK, ODA, Government and Institutions Department, *Law, Good Government and Development* 1,12; Greco 2009 *Pepp Disp Resol LJ* 649, describes ADR as "... something more akin to a soft drink company whose vending machines now carry bottled water alongside their familiar carbonated beverages. It is a new product in the same corporate machine."

115 Mowart 1992 *CILSA XXV* 44.

116 Rabinovich-Einy and Tsur 2010 *Vermont Law Review* 539.

administering an entrenched legal system, such as where it is court-annexed.¹¹⁷ However, in its pure form, ADR is not only about formal institutional and systematic reform, it is also about the empowerment of the communities to administer justice. ADR thus marks a departure from a formalistic view of the ROL. In a rather parallel way, it reinforces ROL. In this way, ADR emphasises certain aspects of the ROL more than they are emphasised by litigation. In fact, it could be said that the question of whether ADR is consistent with ROL is semantic.¹¹⁸

2.2.4 ROL, reform and development

There seems to be little doubt as to the contribution of law to development. For instance, De Soto¹¹⁹ claims that, "Development is possible only if efficient legal institutions are available to all citizens." The availability of legal institutions alone is not enough. Such institutions must administer well-developed substantive and procedural principles of law. In embarking on these world reforms, the expectation of the World Bank was that while on the one hand excessive state control would cease, on the other hand a revitalised legal system would facilitate the operation of the market and thus bring about economic growth.¹²⁰

Most scholars acknowledge that it would be wrong to view institutional development or legal reform from the perspective of "one size fits all."¹²¹ However, for some,¹²² the "one size fits all" syndrome can be avoided by the provision of training for the recipient societies in the recipient systems.¹²³ This does not in any way retract from the fact that the approach would be top-down instead of bottom-up. There must be an attempt to "indigenise" the reform. Reform must meet the economic needs of a specific country or the specific needs of certain groups in society.

117 Sternlight 2006 *DePaul Law Review* 571; see also Trubek *The Law and Economic Development* 74.

118 Sternlight 2006 *DePaul Law Review* 569.

119 De Soto *The Other Path* 186; see also Doing Business *Understanding Regulation* 1-10.

120 Faundez "Rule of Law" 184.

121 Cooter "The Rule of State Law" 212; Bruno and Pleskovic (eds) *Development Economics*; De Soto *The Other Path* 186.

122 Pistor 2002 *Am J Comp L* 101.

123 In this context Cappelletti 1993 *Modern Law Review* 288, asks "...which are the best kinds of persons to staff such institutions?"

According to the Longman Dictionary,¹²⁴ "reform" means "to improve a system, law, organisation, etc. by making a lot of changes to it so that it operates in a fairer or more effective way." Reforms presuppose the existence of institutions that need to be improved. In this context, reform presupposes the existence of a law or legal system that is less effective. In practical terms, a determination of the efficacy of a system has to be made before reforms can take place. This will make reforms that are both relevant and enhancing; that is to say, reform should not seek to change an existing system merely because it presumes a superior position over the system. It must be necessitated by identifiable deficiencies in that system.

Since the beginning of colonisation in Africa, reform has gone through different phases, albeit under differing nomenclature. Colonisation itself had "civilisation" as a tool by which legal systems of African countries were replaced by Western legal systems. In some countries, this resulted in the dualistic organisation of legal systems.¹²⁵ At independence, little attempt (if any) was made to resuscitate the sidelined indigenous systems.

In Africa, reform began in earnest after independence in the 1980s' engagement with the World Bank.¹²⁶ Until the 1980s, the role of the state¹²⁷ was seen as important in facilitating development.¹²⁸ From the late 1990s the World Bank, as the leading donor¹²⁹ for reform, began to realise that "one size does not fit all",¹³⁰ but did not follow this recognition by finding "good fits".¹³¹

For Africa, the only time it has had an opportunity to develop its own strategies of development, economic, social or even political was before colonisation. Colonisation ushered in phase upon phase of legal, political, social and economic development or reform and in most cases, without giving each imported strategy

124 Summers *Dictionary of Contemporary English* 1378.

125 Not all countries allowed legal dualism, for example the Ivory Coast and Ethiopia did not allow it. See Oppong 2007 *American Journal of Comparative Law* 677.

126 Faundez "Rule of Law" 180.

127 For history of the role of the state see Trubek and Kennedy *The Law and Economic Development* 2006.

128 Trebilcock and Daniels *Rule of Law Reform and Development* 6.

129 Other participants included CIDA, which convened a national round table on legal and judicial reform in 1996, see Toope 2003 *McGill Law Journal* 359.

130 Faundez "Rule of Law" 188.

131 Faundez "Rule of Law" 192.

sufficient time to be tested. Through all these phases, the role of the state assumed different positions. The role of the state also determined the focus of reform.

Initially reform was aimed at facilitating liberalisation, but further expanded to include governance or institutional reform.¹³² Based on the belief that institutions matter, reform targeted institutions in general.¹³³ Reform has thus served the narrow political and commercial interests without being tied to development.¹³⁴ The shift of the bank from focusing mainly on economic reform to including legal reform enabled the bank to contextualise reform in the larger concept of development.¹³⁵

ADR is the latest of the attempts at law reform aimed at facilitating economic growth in developing countries including in Africa. Most of these reforms focus more on promoting the interests of major players in international trade than on the trade needs of countries and regions. This bias is prevalent in the reforms entailing ADR as well. The result is to transplant reforms that are irrelevant and ineffective. The efficacy of the reforms can be established through empirical studies of the effect of specific legal reforms on economic development.¹³⁶ There is no evidence that law reform leads to an increase in economic development.¹³⁷ Neither is there evidence that law reform does not necessarily translate into economic development.¹³⁸ The suggested reforms mostly deal with forms rather than substances of reform. As a result, advocates of reform concede that there is no guarantee that certain reforms will actually result in growth.¹³⁹ Nonetheless, the reform process has proceeded unhindered with the backup of donors.

It appears that the current reform project is what other people would call neo-imperialism or neo-colonialism, in that it perpetuates the ideas of colonialism.

132 Faundez "Rule of Law" 181.

133 De Soto *The Other Path* 86; De Long and Shleifer *Princes and Merchants*; Besley 1995 *Journal of Political Economy* 903-937; Easterly and Levine 1997 *The Quarterly Journal of Economics* 1203-1250; Easterly and Levine 2003 *Journal of Monetary Economics* 3-39; Knack and Keefer 1995 *Economics & Politics* 207-227; Acemoglu et al 2001 *American Economic Review* 1369-1401; Rodrik et al 2004 *Journal of Economic Growth* 131-165.

134 Whittaker "The Policy Setting: Crisis and Consensus" 8-9.

135 Faundez "Rule of Law" 181.

136 Such studies are wanting, particularly in Africa. See Cross 2001 *Tex L Rev* 1737; Toope 2003 *McGill Law Journal* 360.

137 Doing Business *Understanding Regulation* 35.

138 Trebilcock and Daniels *Rule of Law Reform and Development* 9-10, who argues that those who argue that law reform does not necessarily translate into economic growth rely on out-dated data of a "course grained nature."

139 Rodrik et al 2004 *Journal of Economic Growth* 157-158.

Inasmuch as the attempt is to reform the legal systems, the focus seems to be mainly on the colonial systems in disregard of the local systems. Reform remains an extension of the reforms in the West. It appears that this fundamental determination has been overlooked since the very beginning of the reform project in Africa.

Africa had little choice regarding what type of reform it needs. The recent reform projects of Japan,¹⁴⁰ which are characterised as altruistic rather than the corporatised American-based reforms, have not yet touched Africa, especially sub-Saharan Africa.¹⁴¹ The altruistic reform could conform better to *ubuntu*-based reform. It must be added that even the Japanese or other Asian countries' sponsored reforms are conditioned on development assistance as is characteristic of most donors.¹⁴²

The beneficiaries of these reforms are in fact judges, other judicial staff and lawyers. The benefits have not reached the final end users, such as entrepreneurs, and poor citizens trying to access justice or to resolve their disputes.¹⁴³ The approach of reform has always been a top-down approach, focusing on the so-called stakeholders, while overlooking the actual functionaries. Chodosh *et al*¹⁴⁴ provide a blue print for the implementation of ADR in Egypt. They state that legal reform should be "bottom-up" instead of "top-down" or transplanted. For any reform to be successful, it must be based on profound knowledge of the economic and social situation of the country involved and it must be done by the country itself in response to its own needs.¹⁴⁵

Donors drive the post-World War II reforms. The drivers of donor-driven legal reform are disaster relief, pre- and post-conflict peacekeeping, post-conflict reconstruction, institutional reform, and democratisation and ratification of global trade agreements.¹⁴⁶ The World Bank has been at the forefront of donor-driven reform. The involvement of the World Bank is questioned on many grounds, including that

140 Taylor "Rule-of-Law Assistance Discourse and Practice" 164-165.

141 Taylor "Rule-of-Law Assistance Discourse and Practice" 165.

142 Taylor "Rule-of-Law Assistance Discourse and Practice" 165.

143 Hammergren "With Friends Like These" 210-211.

144 Chodosh 1995 *Mich J Int'l L* 869 says: "Alternatively, some countries recognise the value of drawing on foreign models, but pursue their adoptions without sufficient attention to the distinctive functional and systemic features of the local legal culture."

145 Shihata *The World Bank Legal Papers* 276. Also see Ofosu-Amaah 2002 *Law and Business Review of the Americas* 551.

146 Taylor "Rule-of-Law Assistance Discourse and Practice" 175.

reform is a very political exercise.¹⁴⁷ Generally, the donor-driven reforms do not deal with homegrown predetermined goals of development. They are biased towards a Western view of the developmental needs of Africa.

Donor-driven reform tends to focus attention on the needs (business needs) of the business community. In defining the goals of reform, the perspective usually adopted is that of the "business community". The business community is defined from the perspective of Western standards and demands.¹⁴⁸ The business community has unbalanced power dimensions that almost invariably affect small businesses negatively. In other words, the reform that has been experienced in Africa so far overlooks the needs of small business. Small business constitutes a large portion of African business enterprises. Even the small portion of big business that exists is made up of multinational corporations.

Presently the issue being debated is that of the appropriateness or relevance of legal reform, i.e. the appropriate models. It seems to be a settled issue, that there is a relationship between law and development, and that reform is necessary to make sure that law does result in increased growth. The argument is not that there is no need for reform, but rather what kind of reform it is and who should implement it.¹⁴⁹

Most writers seem to suggest that there can only be ROL where the state takes up the responsibility through institutional reforms. This presupposes a top-down approach to reform. Hence, ADR was introduced by way of court-annexed mediation in most African countries. It would be difficult to argue that this kind of mediation furthers party control or more equitable dispute resolution as is reputed of mediation, because as connected as it is, it tends to be used merely as a stage in the process of litigation.¹⁵⁰ By contrast, private ordering would be difficult to monitor.

Private ordering can exist where there has not been reform.¹⁵¹ Clay makes the point that for ten years trade in California went on without intervention by state institutions in resolving contractual disputes. The new ADR is, however, looked at differently

147 Nader 2006 *Anthropology News* 6-6; Ngugi 2006 *Cardozo J Int'l & Comp L* 313; Tshuma 2000 *Social & Legal Studies* 115-142.

148 Toope 2003 *McGill Law Journal* 366.

149 Davis and Trebilcock 2008 *American Journal of Comparative Law* 63.

150 Parrot 2007 *Fordham Law Review* 2703.

151 Clay 1997 *Journal of Law, Economics, and Organization* 202-231.

because of the suggestion that it manifests some of the legal practices prevalent in Africa. Nonetheless, the suggestion that by its nature ADR can easily be transplanted to Africa has been met with much scepticism.¹⁵² Most importantly, the premise that people will react in the same manner to reform is flawed.¹⁵³ The bottom line is that Africa has a unique albeit diverse culture of its own.¹⁵⁴ For instance, African owners of small firms prefer negotiation amongst themselves to court settlements.¹⁵⁵

ADR exists in most parts of Africa as a mechanism outside the formal court procedures. However, its high usage does not necessarily imply that the ADR systems are the best. It could well be that "they are the only ones available."¹⁵⁶ "Appropriate" reform should thus reorganise, revitalise, revamp or coordinate those methods already in existence, instead of incorporating methods that were developed elsewhere. According to Benson,

Indeed, a privatised system of customary law based on reciprocity is not only possible, but has strong historical precedents. The fact is that through much of history custom has been much more important in determining rules of conduct than written constitutions, legislation or precedent.¹⁵⁷

Benson¹⁵⁸ adopts a rather unique approach. He appears to be asking where Africa would be in terms of economic development without colonisation. While this is hypothetical, it does provide objective, albeit abstract credibility to the exploration of customary law as an alternative to the imported "litigation-oriented common law". What he says has acquired universal truth:

Actually, many of the laws in modern societies that are widely respected and adhered to (that is, violated relatively infrequently) are laws that developed from the "ground" because legislation is often codification of customary law.¹⁵⁹

According to him, it is possible to have some form of uniformity throughout the world where private ordering in the form of customary law is allowed. His reasoning derives from the very tenets of mediation that it results in a satisfactory end to the dispute,

152 Grande 1999 *JAL* 63.

153 Carfield 2011 *U Colo L Rev* 754.

154 Daniels and Radenbaugh *International Business* 64.

155 Bigsten *et al* 2000 *The Journal of Development Studies* 12.

156 Nyamu-Musembi 2003 *Governance Division*, DFID 6.

157 Benson 1990 *The Journal of Liberation Studies* 26.

158 Benson 1990 *The Journal of Liberation Studies* 27.

159 Benson 1990 *The Journal of Liberation Studies* 27.

acceptable decision, and verifiable decision not only by the parties involved, but also by the groups that may be affected by the decision.¹⁶⁰ These are all elements of sustained relationships that are desirable in trade, and they are characteristic of African mediation as "dialogue-driven and relationship-focused" rather than "settlement-driven and problem-focused"¹⁶¹

Exporting law to Africa by way of law reform seems to be based on one lifelong assumption that the African legal systems in place are dysfunctional. The effect has been to ignore the good qualities to be found in the African systems indigenised or indigenous, while at the same time failing to make relevant and compatible changes.¹⁶² Whereas institutions can be equated with legal rules rather than organisations,¹⁶³ Dam¹⁶⁴ cautions that there is no single institutional route to economic development. Caution should also be taken not to use the institutions in developed countries as reference points, but to look at those in developing countries for purposes of comparison.¹⁶⁵

Reforms also tend to focus more on national rather than international reform. The reason seems to be that, at the regional international level, institutional development is still lagging behind. Reforms can only be channelled through institutions. The question remains, especially in the context of intra-African trade as to how these national reforms transcend boundaries and affect trade positively. Although borders between African countries are artificial, there are so many cultural commonalities, not to mention trade relationships, around the borders. Such interactions, albeit informal warrant a need for a conforming regime of dispute resolution.

Another dilemma for developing countries is that in order for them to implement legal reforms, they must get funding¹⁶⁶ because as developing countries they may not be in a position to afford the reforms contemplated by the Western traders and donors.

160 Benson 1990 *The Journal of Liberation Studies* 27.

161 Umbreit 1997 *Mediation Quarterly* 208; see Nabudere 2005 <https://repositories.lib.utexas.edu> 5-6.

162 Those who criticise on the basis that the World Bank ignored the specific circumstances of the countries in which the reforms are implemented include, Alford *The More Law* 15-16; Faundez "Legal Reform in Developing and Transition Countries" 1; Faundez *The Rule of Law Enterprise*; Dezalay and Garth (eds) *Global Prescriptions* 307, 317.

163 Dam *The Law-Growth Nexus* 2; also see North *Institutions* 27.

164 Dam *The Law-Growth Nexus* 3.

165 Davis and Trebilcock 2008 *American Journal of Comparative Law* 30.

166 Davis and Trebilcock 2008 *American Journal of Comparative Law* 33.

There are therefore four dimensions to the issue of reform in Africa: The first one is whether Africa needs reforms? The second one relates to the availability of reform routes and whether Africa has a choice. The third dimension relates to what informs Africa's ability to choose: is it level of development or is this purely a question of business promotion without necessary guarantees of the "trickle-down" effect? Fourthly, once adopted, what are the challenges of implementation? The question of adaptability is separate from the question of implementability. The latter question is an issue of sustainability. All these questions have financial implications. This is more reason why developing countries should look at law reform that works for them (i.e. intra-African).

Because of their vulnerability, developing countries tend to accept everything in the form of development aid or trade agreements.¹⁶⁷ This in turn then becomes the problem of "over treatment". While the diagnosis itself may have ignored the causes of the problem, the institutions are overwhelmed with various "aid" reforms, which they are either unwilling or incapable of declining because they are blinded by their desire to "develop".¹⁶⁸ Chukwumerije continues to observe that,

... while the rule of law may be helpful in building the basic framework to support a market economy, legal reforms alone are inadequate to address the problem of economic growth in developing countries.¹⁶⁹

ROL is just one of the factors to be looked at. The question is whether, in a continent whose economic growth has stagnated for so long, especially in the context of intra-country trade, law reform can play a role in boosting growth. The answer is yes. However, care must be taken not to reform for the sake of reform or for the sake of meeting donor requirements, but to reform with a purpose to enhance trade, namely intra-regional trade.

Reform cannot take place overnight,¹⁷⁰ especially where there is a need for radical or revolutionary changes. Where there is a need for a complete overhaul of the legal system, the reform process should be allowed to take root and be owned by the people it affects. In Tanzania, reform could be said to have succeeded, and the

167 Gillman 2009 *Georgetown Journal of International Law* 264, says legal transplants are facilitated by trade agreements.

168 Chukwumerije 2009 *Emory International Law Review* 385.

169 Chukwumerije 2009 *Emory International Law Review* 388.

170 Carothers *Promoting the Rule of Law Abroad* 8-10.

success is attributed to long years of trial and error.¹⁷¹ Faundez¹⁷² expresses doubt as to the sustainability of these projects. What ensures sustainability of these reform projects is the incorporation of local conditions.¹⁷³ An example is always made of the Russian rushed reform to facilitate privatisation, the so-called Big Bang policy.¹⁷⁴

On the relation of trade and economic growth, Harrison¹⁷⁵ has the following to say, "new growth theories, however, do not predict that trade will unambiguously raise economic growth." Harrison does not deny that increased trade leads to increased economic growth but questions the very causes of increase in trade. It is difficult to establish a direct relationship between increases in trade and law, particularly ADR. Increases in trade may mean a number of things, including increases in imports or exports, exports in raw materials as opposed to exports in finished goods and export of services rather than goods. Despite the many theories of economic development through trade, it is for each country to define growth for itself. In other words, to fit the national economy of each country into Rostow's stages of economic development¹⁷⁶ requires a thorough economic needs assessment of each country before even aggregating to the region. Not all countries need to industrialise before or by way of growing economically. Not all countries need to export more than they import before they can grow. Other factors that contribute to trade growth include country size, and foreign capital inflation. It is easy, however, to argue that if looked at from the perspective of increased exports, trade may contribute to growth in GDP. Therefore, what one is looking at is the link or contribution of ADR to economic growth.

The most important ingredient of a sustainable trade relationship is trust. Milgrom, North and Weingast¹⁷⁷ ask as follows, "How can people promote the trust necessary for efficient exchange when individuals have short run temptations to cheat?" Law should aim at providing a fair playing ground for traders.¹⁷⁸ Fairness of trade will, in

171 Pedersen "Tanzania's Land Law Reform" 8.

172 Faundez "Rule of Law" 186.

173 Faundez "Rule of Law" 187.

174 Karla and Stiglitz 2004 *The American Economic Review* 753-754.

175 1996 *Journal of Development Economics* 420.

176 Rostow *The Stages of Economic Development* 4-12.

177 1990 *Economics and Politics* 1.

178 Campher *Oxfam's Coffee Campaign* 149. This is emphasised in various ways on the following web sites: Fair Trade 2016 <http://www.fairtrade.net/> 1-8; Rooke 2013

turn, through prevention of disputes ensure the preservation of relationships. Trade relationships can also be sustainable where the resolution of disputes protects interests over rights. ADR is known to ensure the preservation of relationships through defining disputes in terms of interests rather than rights.¹⁷⁹

The African enterprise is seen as one of the most important aspects of economic development. Development should itself imply growth in indigenous enterprises. Restrictions on land purchase and use of land as collateral is often cited as an example of impediments to the growth of small enterprises in Africa.¹⁸⁰ There is, therefore a need for an African business renaissance, which will allow for the shedding of all the impediments to growth in trade and will lead to increased commoditisation. Mbigi¹⁸¹ says,

African genius lies in people case or Ubuntu. This should be the foundation of our own cultural business renaissance.

The question that remains is whether this *ubuntu* philosophy is actually compatible with commoditisation or increase in the small enterprise. *uBuntu* would seem to be at variance with trading mainly for maximisation of profits. Put differently, profit maximisation is not the sole motive for doing business but is rather a development goal to be achieved through business. Therefore, to achieve the goal, business entities must continue their business relationships despite disputes. This hinges on the way "development" is defined. Our view of development must change from that of looking at development in terms of industrialisation to looking at development in terms of sustainable development in order to appreciate the role of customary law in dispute resolution. In other words, we must divorce ourselves from looking at development purely from the "modernisation theory" point of view. Adopting the modernisation view of development for African economies seems to constitute a serious oversight on the part of Western reformers. Grande¹⁸² says this oversight by the Western reformers was inevitable, regard being had to the nature of the modern law system, which they were challenging.

<http://www.divinechocolate.com>; Oxfarm <https://www.oxfam.org.au/explore/trade/fairtrade-coffee-campaign>; see also Perry-Kessaris *Law in the Pursuit of Development* 1-7.

179 Fisher, Ury and Patton *Getting to Yes* 23-24.

180 Geiger and Armstrong *The Development of African Private Enterprise* 99.

181 *In Search of the African Business Renaissance* 5.

182 Grande 1999 *JAL* 69.

It is critical to take a different look at trade as a major contributor to economic development. Trade should not depend exclusively on the market operations in order for it to lead to economic development. If emphasis be on sustainable use of resources, then the demand and supply of trade should feature less. There is a need to exercise control. Law must restrict trade to needs only and not wants. That is the essence of sustainable development. For the developing countries of Africa, this needs to be emphasised more because of the dire needs of the majority of citizens.

2.3 Conclusions: ADR as platform for developing relevant methods of dispute resolution

There is a relationship between law and economic development. The causal nature of the relationship is not very clear. Legal reform is supposed to relate law and the rule of law to economic development. However, the reform must relate to the nature of trade and economics in Africa. In order for law or dispute resolution mechanisms to be relevant, they must be contextualised. Contextualisation of law into economic development needs requires a thorough needs assessment, which is based on the correct epistemology. Thus far, ADR has failed to yield the expected outcomes because it was based on incorrect epistemology. Moreover, the economic development ills that it was intended to remedy were wrongly diagnosed, i.e. they were established from the wrong epistemological basis. The argument is not that there is no need for reform. Fundamentally, the very need for reform must be based on empirical findings about each country's needs *vis-a-vis* the needs of the region. In other words national reforms should always reflect or correspond to regional legal/economic agendas. A revelation that African trade is dominated by the informal sector implies that any innovation in the aspect of dispute resolution must relate directly to the informal sector. The ADR movement provides the necessary platform for relating the Western-developed methods to the context in Africa, for enhancing economic development.

In the next chapter the changes in the African legal landscape (through ADR) since independence are analysed. The analysis seeks to evaluate the impact that the ADR has had on economic development in terms of intra-African trade. The focus is not

only on changes in legal systems, but also on changes in the implementation of the changed legal systems against shifts in economic development paradigms.

CHAPTER 3

Analysis of the recent innovations in the African commercial dispute resolution landscape

3.1 Introduction

Africa has had its share of legal reforms aimed at facilitating economic growth. Generally, the reforms were aimed at improving institutional efficiency and investment attraction.¹ Most reforms had to do with trade liberalisation and global economic integration.² On the commercial landscape, reforms dealt with legislative (including institutional) reforms.³ In some countries, these included the establishment of the commercial court and the introduction of court-annexed mediation,⁴ while in other countries, it included changes in the banking systems and fiscal policies.⁵ Some of these changes result from a very important aspect of law making, namely legislation.⁶ The pressure for reform has always been more from outside the African countries than from within.⁷

The reforms in Africa were generally sourced from different Western countries with different legal systems.⁸ The recent reforms, particularly those relating to Alternative Dispute Resolution (ADR) are sourced from the USA.⁹ However, the reform process has not yet covered the entire African continent, and has generally failed.¹⁰

1 Kayizzi-Mugerwa *Reforming Africa's Institutions* 1.

2 Sach *et al* 1995 *Economic Reform* www.jstor.org/stable/2534573.

3 De Soto *The Other Path* 86; Besley 1995 *Journal of Political Economy* 903-937; Easterly and Levine 1997 *The Quarterly Journal of Economics* 1203-1250; Easterly and Levine 2003 *Journal of Monetary Economics* 3-39; Knack and Keefer 1995 *Economics & Politics* 207-227; Acemoglu *et al* 2001 *American Economic Review* 1369-1401; Rodrik *et al* 2004 *Journal of Economic Growth* 131-165. Faundez "Rule of Law" 8-9; De Long and Shleifer *Princes and Merchants* 1993.

4 In Uganda for example, establishment of the commercial court is regarded as a most successful reform project. See Ellis *et al* *Gender and Economic Growth in Uganda* 66.

5 Devarajan *et al* (eds) "Aid and Reform in Africa" 1.

6 Pound 1908 *Harvard Law Review* 384; see also Cairns 2007 *Tul Eur & Civ L F* 24.

7 Watson *Legal Transplants* 95; see also Watson 1995 *The American Journal of Comparative Law* 469-476; The history of the concept is given succinctly by Cairns 2013 *Ga J Int'l & Comp L* 687.

8 Nader and Grande 2002 *Law & Social Enquiry* 573-594; Care 2006 *Oxford U Commw LJ* 2006 27.

9 LeRoy and Feuille 2002 *UCLA L. Rev.* 143; Cappelletti 1993 *The Modern Law Review* 282-296.

10 Taylor "Africa's Place in International Relations" 81-82. However, a number of mediation and or arbitration programmes in different regions of the African continent are an indication that ADR is beginning to take hold. Examples of those programmes include the following: The

Moreover, the reforms have limited successes in increasing access, especially in the informal sector.

It was concluded in the previous chapter that, a revelation that African trade is dominated by the informal sector implies that any innovation in the aspect of dispute resolution must relate directly to the informal sector. Improved access would mean extending legal services to those people who cannot access any other ways of resolving their disputes and redressing their grievances.¹¹ This will enhance their participation in intra-African trade and/or economy and ultimately lead to economic growth. The legal context of such reform is the newly introduced ADR.

The purpose of this chapter is to analyse ADR as the "newest import"¹² into Africa's legal system in order to determine its impact in increasing intra-African trade. This will be achieved by first providing the general historical background to the ADR and more specifically the background to ADR in Africa.¹³ Secondly, the pros and cons of ADR in Africa *vis-a-vis* trade and development will be investigated.¹⁴ Lastly, a conclusion is drawn on whether African countries have adopted the appropriate models of ADR. Essentially, the argument is for the transplantation that considers the local circumstances. Watson posits that "transplanting" is the best source of development of the law.¹⁵ In his justification of the transplant theory, Paquin argues that a transplanted system is better than the homegrown or formalised indigenous system.¹⁶

Ghana Arbitration Center <http://www.ghanaarbitration.org>; Regional Centre for International Commercial Arbitration – Lagos, <http://www.rcicalagos.org>; The Cairo Regional Centre for International Commercial Arbitration, <http://www.crcica.org>; Africa ADR, <http://www.africaadr.com>; The Arbitration Foundation of Southern Africa (AFSA) UNKNOWN <http://www.arbitration.co.za/pages/default.aspx>; Dispute Resolution Centre Kenya, <http://www.disputeresolutionkenya.org>; Africa Centre for Dispute Settlement, <http://www.usb.ac.za/disputesettlement>; African Centre for the Constructive Resolution of Disputes (ACCORD) <http://www.accord.org.za>.

11 Buscaglia and Stephan 2005 *International Review of Law and Economics* 90.

12 See Greco 2009 *Pepp Disp Resol LJ* 649.

13 Section 3.1.1.

14 Section 3.2.

15 Watson *Legal Transplants* 95; see also Watson 1995 *The American Journal of Comparative Law* 469-476; Watson's theory is based on an historical study of how Roman law influenced the development of the law in England and continental Europe. The history of the concept is given succinctly by Cairns 2013 *Ga J Int'l & Comp L'* 687; Ewald puts the theory into logical perspective in his work in the 1995 *American Journal of Comparative Law* 489-510.

16 Paquin 2008 *Transna'l L & Contemp Probs* 331-839.

In this chapter the transplant theory is used to test the general hypothesis that law development is always influenced from outside. No attempt is made here to distinguish between transfer, transplantation, importation and reception,¹⁷ nor is there an attempt to criticise the transplant theory itself. The "Transplant-ism" theory is often compared with what is called the "indigenous resources theory,"¹⁸ which emphasises utility of indigenous resources in the development of the law. Teubner¹⁹ refers to legal transplants as "legal irritants," because as an outside product,

it works as a fundamental irritation, which triggers a whole series of new and unexpected events. It irritates, of course, the minds and emotions of tradition-bound lawyers; but in a deeper sense, - and this is the core of my thesis - it irritates law's 'binding arrangements'

Since all these words signify development of the law by reference to outside sources, the transplant theory is taken at its face value to provide the basis for analysing the development of law through reform. The question remains whether the trends in ADR transplantation so far and the models adopted will ensure firstly, an increase in intra-African trade that shall translate to development within countries of Africa.²⁰ On this question, Watson suggests the following test to decide whether the regime of law in existence is satisfactory:

First, how responsive is the law to the serious needs and desires of the community? The more easily a source of law allows law to change when society undergoes change, the better the source of law. Secondly, how comprehensible is the law to the persons affected by it? The more comprehensible the law, the more satisfactory the source of law. Thirdly, how comprehensive is the law? The more certainly the existing law can provide an answer to the legal problems that arise the more satisfactory is the source of law. Typically a tension exists between the ease of comprehension of law and its comprehensiveness.²¹

The second question, which is answered by the formulation given by Watson above, is the extent to which conventional ADR answers pertinent questions of poverty and

17 Wise 1990 3; see also Ajani 1995 *The American Journal of Comparative Law* 93-117.

18 Huang 2007 *Modern China* 164. .

19 Teubner 1998 *The Modern Law Review* 12.

20 According to Brainch, "ADR will Promote a culture of non-confrontational dispute management and resolution, Facilitate the settlement of cross-border disputes, Improve productivity by releasing cash, otherwise spent in litigation, for investment in the community or commercial sector; Promote an efficient and effective legal system attractive to foreign investors. A unified, continental ADR voice will build investor confidence in Africa." Brainch "Justice Sector Reform in sub-Saharan Africa" 12.

21 Watson 1978 *The International and Comparative Law Quarterly* 552.

underdevelopment in Africa. How does it affect the most vulnerable and yet most populous members of African communities? The formulation by Watson would seem to be better accommodated by customary law, but perhaps not to the full extent. It is important in this context to appreciate the background history of ADR in Africa.

3.2 Background history

The history of ADR goes back a very long way, as far as biblical times.²² However, as a formalised or conventional method of dispute resolution it is often traced back to Sanders.²³ In his speech of 1976, Professor Sanders discarded the notion of delivery of justice as "one size fits all". He said the goal should be "to let the forum fit the fuss".

The importation of ADR into Africa was part of what one may call a legal development process. This process entails formal establishment and record of legal rules that affect people and their interactions preceded by limited needs assessment studies,²⁴ but with strong donor support. In the meeting of donors held in Paris on 5 June 1990, a programme was designed to,

improve local skills and institutions for policy analysis and economic management in sub-Saharan Africa.²⁵

In this context, legal development is intertwined with development in all its aspects in a given country.

If African legal development was to be divided into stages, then there would be three stages of legal development in Africa, namely pre-colonial, colonial and post-

22 The greatest of all mediators in the *Old Testament* is Moses. He served as a mediator when he communicated his Sinaitic covenant with Israel (Exodus 19: 9;20: 19; 24:1-2; 34: 27-28; Deuteronomy 5:5; Leviticus 26:46); Gold 2005 *J Disp Resol* 289, says mediation has existed for thousands of years in China, Japan, America and other parts of the world. Indeed, the Cape Town Chamber of Commerce was established in 1804 to resolve maritime disputes through the use of ADR: Cape Chamber of Commerce and Industry UNKNOWN <http://capetownchamber.com>.

23 Henseler 2003-2004 *Penn St L Rev* 165. Whereas it was seen by those who subscribe to the views of Professor Sanders as a new model in touch with the "grassroots" Nader says advocates of ADR had the following in common: "a distaste for uncertainty, for appeals to higher authorities, for adversarial confrontation, for courts, for justice by win-lose methods and a taste for secrecy" 1999 *ASIL Proceedings* 310.

24 Gramatikov and Verdonschot "Legal Needs of Vulnerable People" 1-4.

25 World Bank Group Archives siteresources.worldbank.org/EXTARCHIVES/ 201.

colonial. The existing legal systems of Africa are the result of reforms that came through colonisation in all its forms.²⁶ Institutions are the most important aspect of a legal system.²⁷ Legal institutions develop and implement law. ADR constitutes a post-colonial attempt to improve the legal systems of African countries amid diverse legal systems inherited from different colonial powers.

There are three families of law in Africa resulting from colonialism, namely, the Continental European civil law legal system, the Common law system and the Mixed law legal system.²⁸ This colonial legacy has also resulted in plurality of law in Africa, created or entrenched mostly by statutes. In Lesotho, for instance, the so-called native courts were created by the 1884 Proclamation 2B²⁹ and in Nigeria a similar institution was created by the Native Courts Proclamation 1900, as amended in 1991.³⁰ This resulted in dichotomous legal systems, commonly known as legal dualisms.³¹ Not all countries allowed legal dualism.³² This dualism, which was the creature of colonialism, has resulted in undeveloped customary or indigenous African law. According to the court in the case of *Gumede v President of the Republic of South Africa*:³³

However, during colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it.

Courts are the implementing institutions that drive legal systems. ADR reform should at best enable courts to develop customary law. Generally, many court systems of African countries are not yet developed,³⁴ to the extent of affording poorer populations access to justice.³⁵ Reform should have focused on discovery of customary law and developing institutions that implement it by focusing on the

26 The introduction of the court system into the African legal systems was seen by colonisers as part of the civilising mission. See Nader 1999 *ASIL Proceedings* 310.

27 Burki and Perry "Beyond the Washington Consensus" 15-24.

28 Bamodu 1994 *JAL* 125-143.

29 *The General Law Proclamation*.

30 See Osagie *Economic Development* 57-58.

31 Poulter *Legal Dualism in Lesotho iii*.

32 For example, the Ivory Coast and Ethiopia did not allow it, for they feared it would lead to divisions based on traditional communities and customs: Oppong 2007 *American Journal of Comparative Law* 685.

33 2009 (3) BCLR 243 (CC).

34 Sampesa 1992 *International and Comparative Law Quarterly* 409.

35 This is confirmed by Logan C 2017 <http://afrobarometer.org>

repositories of customary law or those who have the closest contact with the litigants.

The process of reform by introducing ADR started in earnest in Africa at the turn of the 21st century.³⁶ The ADR projects in Ghana and Ethiopia were implemented between 2003 and 2008 with funding from the U.S. Department of State.³⁷ Ghana now has a comprehensive Act of parliament dealing with arbitration, mediation and customary arbitration of disputes.³⁸ The Act was enacted to,

provide for the settlement of disputes by arbitration, mediation and customary arbitration, to establish an Alternative Dispute Resolution Centre and to provide for related matters.³⁹

Section 82 of the Act recognises mediation agreements as binding and enforceable as court judgments.⁴⁰

Other reforms include the Nigeria project that was implemented from 2008-2009 and was funded by the World Bank.⁴¹ Tanzania, Zambia, Mozambique and Malawi have also incorporated various forms of ADR into their Commercial Courts.⁴² ADR was introduced in Rwanda through the 2003 Constitution, which is implemented by the Mediation Committee law,⁴³ thus providing an environment conducive to the operation of mediators, who seem to substitute or complement the Courts.⁴⁴ The West African country of Benin and the Central African country of the Republic of Congo have introduced specialised tribunals, known as "*tribunaux de conciliation*", which hear all disputes related to civil law.⁴⁵ In South Africa there is an outcry for the adoption of court-annexed mediation and the process has already started at the Magistrate court level through the promulgation of Short Process Court and Mediation in Certain Civil Cases Act (the "SPCA") 1991.⁴⁶

36 Brainch "Justice Sector Reform in Sub-Saharan Africa" 8.

37 Brainch "Justice Sector Reform in Sub-Saharan Africa" 8.

38 *Alternative Dispute Resolution Act* 2010.

39 Preamble.

40 Uwazie "Alternative Dispute Resolution in Africa" 4; Dieng "ADR in sub-Saharan African Countries" 616; Adjabeng 2007 <http://www.mediate.com/articles/adjabengs3.cfm>.

41 Brainch "Justice Sector Reform in Sub-Saharan Africa" 8.

42 Brainch "Justice Sector Reform in Sub-Saharan Africa" 2.

43 Organic Law N°02/2015/OL.OF16/07/2015.

44 Yance 2014 *Pepp Disp Resol LJ* 12.

45 Kohlagen 2005 *State Law* 9.

46 Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991 (the "SPCA") came into effect on 17 July 1992; see also Paleker 2003 *ADR Bulletin* 4.

Different terminology has been used in different countries to refer to court-annexed mediation, to wit, "court-directed", "court-referred", and "court-approved."⁴⁷ Court-annexed mediation refers to a situation where the mediation process is part of the court process in that the court is empowered to order it or parties may of their own choice request referral to it. It is almost automatic for every case to be referred to mediation once filed with the court. However, parties reserve their right to opt out of the process and proceed with litigation. Where the mediation fails, parties proceed with litigation. Where it succeeds, the result is made an order of court and enforced as such.⁴⁸ Court-annexed mediation is also distinguished from private mediation and judicial mediation.⁴⁹

The process of introducing ADR into parts of Africa is also influenced by developments at the international level. United Nations (UN) bodies have endorsed the use of mediation (and arbitration) to resolve commercial disputes. For instance, the United Nations Commission on International Trade Law (UNCITRAL) has enacted model laws on arbitration and mediation. The International Chamber of Commerce (ICC) in collaboration with UNCITRAL has established the International Commercial Terms (INCOTERMS), which are finding increased use in international trade.⁵⁰

The 1958 New York Convention⁵¹ deals with enforcement of foreign arbitral awards by member states. Thus, it recognises settlement of disputes outside litigation. Work is underway to replicate the convention in relation to settlements of international commercial disputes through mediation.⁵² The 1965 Washington Convention⁵³ also provides a structure within which to practice mediation and other ADR methods. Almost all African countries are members of the 1965 Washington Convention , which provides for the conciliation of foreign investors that qualify as nationals of

47 See Mackie et al *The ADR Practice Guide*: 6; Merchant and Rauf 2007 *Smart Lessons* 1.

48 See Mwenda *Paradigms of Alternative Dispute Resolution* and Ingleby 1993 *The Modern Law Review* 441-451.

49 Steffek <https://e-justice.europa.eu/1-2>.

50 Since the 1960s incoterms were already enjoying wide use and standard terms of international contracts. See Schmitthoff 1968 *The International and Comparative Law Quarterly* 558-559.

51 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

52 http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html

53 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement Of Investment Disputes, Washington 1965

other states and members' states.⁵⁴ Thus, with the aim of creating uniformity between countries, international bodies and agreements are increasingly influencing reform on the domestic level. Without uniformity, it would be difficult to judge the effect of reform in international relations.

3.3 The pros and cons of ADR in Africa

It is difficult to answer the question of the contribution of ADR to intra-African trade growth in general terms for several reasons. ADR processes are ill conceived. They provide the right medication for a wrong disease. The process of transplanting ADR into Africa was haphazard and clustered. Furthermore, the substance of the imported models was not common to all the African countries in which ADR has been introduced. Yet there is an apparent potential of ADR growth in Africa.

3.3.1 No ills to solve

In order to conclude that the ADR was a necessary change in the legal systems of Africa, two mutually inclusive factors have to be considered. On the one hand, the colonial legal systems; both civil law and common law inherited systems were to some extent ineffective.⁵⁵ On the other hand, ADR may be seen as an additional way of resolving disputes.

One of the ways by which the importance of one over another of the outlined factors could be determined is by looking at the market operations of the African economies. Bigstein argues that little is known about how African markets operate in practice.⁵⁶ He makes a point that a high frequency of non-compliance should not be interpreted to indicate imperfect or ineffective legal institutions:

54 Dieng "ADR in Sub-Saharan African Countries" 617.

55 Joireman 2001 *J of Modern African Studies* 571-596.

56 Bigstein *et al* 2000 *The Journal of Development Studies* 2.

Good legal institutions incite firms to take more chances, thereby encouraging trade and leading to more cases of breach and more recourse to courts and lawyers.⁵⁷

It has already been said that the court systems of Africa are not fully developed. The words "not fully developed" mean that they are still growing and they have not yet matured into full capacity. It is difficult therefore to criticise them on their effectiveness when it is acknowledged that they are not yet mature. The reforms, therefore, came even before we could be able to say that they are there, fully established but dysfunctional in the sense portrayed by McMillan and Woodruff.⁵⁸

One of the indicators of a failed public system of courts is the growth of private ordering. McMillan and Woodruff⁵⁹ have studied the developing or transition economies of Eastern Europe and have concluded that some form of spontaneous private ordering developed where gossip and associations are used to resolve disputes between traders.⁶⁰ Porat agrees that where public order fails, private ordering will develop.⁶¹ He submits further that public order is never perfect.⁶² Parties to contracts will therefore always look for alternatives. Such alternatives include customary or indigenous law, which is developed from within the communities involved. No empirical evidence is needed to establish dysfunctionality⁶³ of public institutions, especially where there are glaring manifestations of such failure as in dealing with corruption, for instance.

ADR reform failed to link up with one of the most prevalent challenges in the delivery of justice, namely corruption.⁶⁴ According to the Transparency International's Global Corruption Barometer, most African countries rank at the bottom of the Corruption Perception Index.⁶⁵ According to the 2014 Corruption Perception Index, African countries are at the bottom, which means they are in the category of the most corrupt countries of the world. Litigants in Africa are forced to accede to bribing

57 Bigstein *et al* 2000 *The Journal of Development Studies* 2; see Buscaglia and Stephan 2005 *International Review of Law and Economics* 91 for a seemingly contrary view. The view by Buscaglia is an ideal that is not backed up by empirical evidence.

58 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

59 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

60 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

61 Porat 2000 *Michigan Law Review* 2461.

62 Porat 2000 *Michigan Law Review* 2461; see also Djankov *et al* 2003 *The Quarterly Journal of Economics* 454.

63 Porat 2000 *Michigan Law Review* 2461.

64 Wei 2000 *Review of Economics and Statistics* 1-11.

65 Transparency International 2014 <https://www.transparency.org/cpi>.

police officers, court officers and/or judges in order to access justice. According to Adjabeng, ADR has the potential to reduce judicial corruption because of the following:

Current ADR regulations allow for parties with cases pending in court to opt for ADR before or at any point of the hearing. Parties have the opportunity to remove themselves temporarily from the court's direct adjudication and administrative processes leading to a significant reduction in judicial corruption in one form or the other. In such Court-connected ADR processes, there are no judges to bribe, no losses of case files by the court registries and definitely no courts staff to bribe because resolution lies conclusively with the parties and their selected neutral Mediator or Arbitrator.⁶⁶

Free Trade Agreements (FTAs) would seem to work against the harmonisation of laws in that they are normally between a few countries and major economies of the world. While it can be said that, on the one hand, that is the very reason why reform always seeks to put the system on a par with international or global trends, on the other hand, that may not augur well for intra-African trade. In fact, FTAs have been criticised for hampering harmonisation. The damage extends to the harmonisation of laws and legal systems as well. For example, the FTA between Lesotho and the EU was objected to by Mozambique on the basis that the move would risk trade between SADC members.⁶⁷ Furthermore, Africa often signs contradictory agreements. For example, while Ghana has obligations to hand over suspects of terrorism in terms of the Rome statute, it has signed a bilateral agreement with the USA not to hand over US personnel to the ICC.⁶⁸

3.3.2 *The "A" in the ADR and the misconception revisited*

The idea that the ADR was supposed to provide alternatives to litigation was wrong to start with, because then people started looking at it in the context of alternatives to litigation. It being "alternative" suggests that the intention is for it to substitute litigation. However, the tendency to formalise ADR (through incorporating it into the existing civil procedure rules), for instance, makes it as formal, and thus subsumed

66 Adjabeng 2010 www.effectius.com.

67 An earlier FTA between South Africa and the EU in 1999 had been hotly debated for risking the viability of SACU (Lewis "After the Negotiations" 2); and actually leading to a fall in trade volumes of the Southern African Region: Lewis "After the Negotiations" 12.

68 AfriMAP OSIWA and IDG 2007
http://www.afrimap.org/english/images/report/AfriMAP_Ghana%2520JusticeDD.pdf 3.

into the very system that it is supposed to replace.⁶⁹ ADR does not necessarily have to replace litigation; it has to complement it.⁷⁰ The rule-making process must find a place for adjudication in the whole process of delivery of justice.⁷¹

Viewed in this way, that is, as a complement to litigation, it is more acceptable, especially where the litigation systems are entrenched if the 'A' in the acronym ADR stands for "appropriate"⁷² and not "alternative", especially in the African countries where ADR reforms may not be bringing anything different from indigenous methods. Fiadjoe actually suggests that ADR should be looked at not as an alternative to litigation, but as one technique that may be appropriate in the resolution of conflict generally, for historically it remains the most acceptable to most societies: "indeed, in international law, it is litigation which is the latecomer."⁷³

Proponents of ADR emphasise speed as one of the most important attributes of ADR.⁷⁴ It is not in all the cases that such speed is required. In order for a dispute in commercial matters to be resolved there may be a need for production, discovery and introduction of (documentary) evidence. Indeed, it is the said evidence that may help the court to go to the root of the problem. Dealing with the cause of the problem as such may help achieve the very goal of mediation, namely preservation of relationships. In the words of Katz, "speed can destroy opportunities for developing evidence, especially when ADR is used to cut short discovery."⁷⁵

In Africa, ADR was introduced mainly in the form of court-annexed mediation.⁷⁶ It was, therefore, made mandatory for the court to order mediation. This may add to delays in that the case will come back to the court where no settlement was reached. In any case, settlement may not necessarily be a sign of a successful ADR.⁷⁷ On the other hand, it does not help overcome disputes of interest between the clients and

69 Kartz 1993 *J Disp Resol* 54.

70 Lerm 2012 *De Rebus- SA Attorneys Journal* 22-24; Ipp 1998 www.sabar.co.za.

71 Resnik *The Domain of Courts* 1989 *U Pa Rev* 2230.

72 Kohlagen 2005 *State Law* 9; Mowart 1989 *SALJ* 349.

73 Fiadjoe *Alternative Dispute Resolution* 6.

74 Longan 1994 *Neb L Rev* 715-716. There is general consensus amongst most writers on ADR that it is time efficient. The range of literature since the famous work of Fisher and Ury *Getting to Yes*, focuses on the advantage of ADR as time saving (eg Feehily *Commercial Mediation in South Africa*).

75 Kartz 1993 *J Disp Resol* 5.

76 Crampton 2005 *Hamline J Pub L & Pol'y* 234. Other authors use "court-connected" instead of court-annexed. See Nolan-Haley 2014 *Harvard Negotiation Law Review* 18.

77 Sherman 1992-1993 *SMU Law Review* 2085-2087.

the lawyers who want delays for purposes of making money. In which latter case it is important that under court-annexed mediation the clients appear in person and without assistance of the lawyers when they mediate, in order to mitigate chances of the lawyers using the opportunity to cause further delays. Their appearing in person does not remove the feeling that they are before a court.

Ultimately, the delays may result in the very costs that the exercise sought to avoid. Ingleby⁷⁸ argues that where mediation is institutionalised "the arguments in favour of compulsory mediation are based on unwarranted extrapolations from data about voluntary mediation." Indeed, compulsory mediation may increase the costs and add to the formality of dispute processing.⁷⁹

Reformers have also ignored one fundamental attribute of ADR: except for arbitration, all ADR methods rely on the ability of the parties to come up with a solution. The solution has to come from the parties. Whereas that may augur well for the enforcement of the outcome where there is one, it may prolong the dispute further where the parties are not able to come up with a solution, thus increasing the very costs that were being avoided.⁸⁰

One key element of mediation is that it is voluntary. Court-annexed mediation cannot be said to be voluntary. Indeed, there is an element of voluntariness in court-annexed as opposed to court mandated, but even that is only to a limited extent.⁸¹ For instance, in most jurisdictions where court-annexed mediation is exercised, officers of the court act as mediators. Parrot concludes that by introducing the element of compulsion in mediation through court-annexed mediation renders mediation unconstitutional, in that it limits access to justice.⁸²

3.3.3 *The manner in which ADR was introduced in Africa*

ADR was transplanted into an existing system of law, which system was itself an imported system that had not taken root in most African countries. However, it would

78 Ingleby 1993 *Modern Law Review* 443.

79 Ingleby 1993 *Modern Law Review* 443.

80 Messick "Alternative Dispute Resolution" 3-4; see also Prosner 1986 *U Chi L Rev* 388-391.

81 Clarke 1991 *J Chinese L* 247.

82 Parrot 2007 *Fordham Law Review* 75.

seem that ADR was more likely to work in a common law rather than in a civil law system.⁸³

It might be that inasmuch as it was "transplanted", not much care was taken to make sure that it was adaptive to the conditions of Africa, including more specifically the traditional cultural circumstances; rather it was transplanted into the Western system of law. Moreover, the pre-existing laws are themselves in need of reform. Most commercial laws are out-dated and clustered, for example, Swaziland arbitration law, which was based on English law has not been changed since 1966 and the English law on which it was based was overhauled in 1979.⁸⁴

ADR was introduced in different periods across the continent.⁸⁵ As a result, it is not easy to measure the successes of ADR at the continental level. The assessment can only be done inside individual countries. Ghana and South Africa have a longer history of contemporary ADR, and mediation enjoys an equally older pedigree.⁸⁶ As far as contemporary ADR is concerned, the SPCA and High Court Rule 37⁸⁷ usher in a new regime. The SPCA is, however, criticised for being a "ramshackle" and a failed attempt at incorporating ADR into the court system of South Africa.⁸⁸ The critique notwithstanding, the SPCA did usher in at least considerations of ADR in the South African legal system.

ADR was introduced in a haphazard and clustered manner in terms of when it was introduced, regions and countries within which it was introduced . For instance, in Senegal different statutes provide for varied alternative dispute resolution methods: the Criminal Code Procedure makes provision for mediation in cases involving first-

83 Joireman 2001 *J of Modern African Studies* 576.

84 Sampasa 1992 *International and Comparative Law Quarterly* 391.

85 Brainch "Justice Sector Reform in sub-Saharan Africa" 8; see also Uwazie "Alternative Dispute Resolution in Africa" 4; Dieng "ADR in sub-Saharan African Countries" 616; Adjabeng 2007 <http://www.mediate.com/articles/adjabengs3.cfm>.

86 Reference to mediation appears in a number of legislative tools, including the following: *Magistrate Court Act*, which provides a consent form to pre-litigation mediation. Incidentally, a similar procedure allowing for court-annexed mediation is now being piloted under the *SPCA*. Other legislative instruments featuring mediation are the *National Land Transport Transition* (s.20); *National Ports Act* (s.4); *Estate Agencies Affairs Act*; *National Land Transport Act* (s.7); *Human Rights Commission Act* (s.19); see Benjamin "Assessing South Africa's CCMA" 2-4; According to Rycroft 2014 *South African Law Journal* 778, ADR features in more than 40 pieces of legislation in South Africa.

87 *Uniform Rules of Court* (South Africa).

88 Paleker 2003 *ADR Bulletin* 1.

time minor delinquents.⁸⁹ The Civil Code,⁹⁰ on the other hand, provides for conciliation by village chiefs and area councils regarding family and donation matters.⁹¹ In South Africa too, different statutes make provision for varied methods of ADR.⁹²

Uganda is outstanding in its legislative effort to incorporate ADR in its legal system: its 1995 Constitution provides for the promotion of reconciliation in all matters handled by the judiciary. As a result, of the constitutional provision, Uganda enacted the *2000 Arbitration and Conciliation Act* 7 of 2000 that described new judicial powers of referring cases to mediation.⁹³ In Mozambique, there is the *Arbitration, Conciliation and Mediation Act* 11/99 that was passed in 1999 to legitimise non-court ADR, compliant with World Trade Organisation (WTO) standards, and a Centre for Arbitration, Conciliation and Mediation was established.⁹⁴

Amendment of court rules has also been the easiest route taken by most countries. Ghana, for instance, promulgated the *Amended Commercial Court Rules* 2004, compelling parties to a pre-trial conference to apply ADR outside the court system, and before litigation and terms of settlement are entered as a judgement of the court.⁹⁵ Nigeria is said to be the first African country to introduce the Multi-Door Courthouse (MDC), which opened in Lagos in 2002.⁹⁶ The MDC offers three doors to the resolution of disputes, namely Arbitration, Early Neutral Evaluation and Mediation.⁹⁷

In other countries, such as Ghana,⁹⁸ Malawi,⁹⁹ Lesotho¹⁰⁰ and Zambia,¹⁰¹ it was introduced through the rules and "annexed" to the court system. In Lesotho, rules

89 Criminal Code Procedure (Law 99-88) Article 752 paragraph 2 thereof; Dieng "ADR in Sub-Saharan African Countries" 615.

90 Civil and Commercial Obligations Code 1968.

91 Article 21 thereof; see also Dieng "ADR in Sub-Saharan African Countries" 615.

92 ADR is referenced in a number of legislative tools, including the following: *Companies Act 71 of 2008 (sections 156 (a), 157,158,166(1) and 169 (1) b; Electronic Communications and Transactions Act 25 of 2002, s 69).*

93 Brainch "Justice Sector Reform in Sub-Saharan Africa" 9.

94 Brainch "Justice Sector Reform in Sub-Saharan Africa" 9.

95 Brainch "Justice Sector Reform in Sub-Saharan Africa" 9.

96 Kehinde UNKNOWN www.ainablankson.com.

97 Brainch "Justice Sector Reform in Sub-Saharan Africa" 7 and 10.

98 Brainch "Justice Sector Reform in Sub-Saharan Africa" 7 and 8.

99 Brainch "Justice Sector Reform in Sub-Saharan Africa" 8.

were promulgated to allow for mediation¹⁰² and the courts seem to embrace the importance of mediation. The then Court of Appeal Judge, Mr Justice Ramodibedi remarked as follows:

Litigation so far has served the interests of neither party but only of the lawyers. It would be in the interests of all concerned that emotions be controlled and wise heads put together to find a solution. We have already suggested mediation. We are not aware of reasons, which may have delayed or permanently derailed that process. If wisdom does not prevail and no solution other than by continued litigation is sought, so be it. It is, however, fair to predict that the relationship between the parties will be further soured, only the lawyers will reap rewards for their services at the expense of their clients, and the clients may receive no true benefit whatsoever in the long run.¹⁰³

Court-annexed mediation is questioned on a number of bases.¹⁰⁴ However, the most critical aspect of court-annexed mediation is about its purport to guarantee access. One of the principles of accessibility is that parties must volunteer to resolve their dispute through ADR or mediation. Making the exercise of mediation court-annexed introduces the element of compulsion and eliminates the element of voluntariness.¹⁰⁵ Furthermore, it would be

hard to argue that compulsory court-annexed mediation furthers the ADR movement's values of party control over process or more equitable dispute resolution, since parties often end up back in court after the court-annexed process runs its course.¹⁰⁶

Karz concludes that in the absence of evidence that compulsion produces greater efficiency or greater justice, voluntariness should be restored to the court-annexed mediation for mediation to produce the expected results.¹⁰⁷ The experience in labour ADR could be of great value to most African countries.

100 High Court (Mediation) Rules (2011) introduce court-annexed mediation and define it as "the mediation proceedings conducted by mediators designated by court in accordance with the provisions of these rules."

101 Mwenda *Paradigms of Alternative Dispute Resolution* 136.

102 For example, in Lesotho court-annexed mediation is introduced by the High Court Mediation Rules, (in Malawi it is the Courts (Mandatory Mediation) Rules).

103 Quoted by Ramodibedi J in the case of *Selikane v Lesotho Telecommunications Corporation* CIV/APN/448/98 www.lesothoiii.org; *Van Zyl ADJP in the case of Ex parte: PJLG ; In re: PJLG [2013] 4 All SA; Owoseni v Faloye 2005] 14 NWLR (Pt 946)719, 740 (Nigeria); Aribisala v Ogunyemi CA/IL/34/99 (Nigeria).*

104 See generally Heeden 2005 *The Justice System Journal* 273-291.

105 Parrott 2007 *Frdham Law Review* 2694.

106 Parrott 2007 *Fordham Law Review* 2703.

107 Kartz 1993 *J. Disp. Resol.* 54.

Another connotation to accessibility of justice is the costs associated with accessing justice. It is known that litigation is reputed for being very costly. In fact one of the bases of introducing ADR was and still is premised on the cost effectiveness of the exercise. Where ADR is court-annexed, the parties must go via the litigation system before accessing it. That has implications on costs because when the mediation fails, resort will be had to the litigation system.

In general, ADR was introduced in most countries mainly through the labour laws.¹⁰⁸ In South Africa, the CCMA has a long history that begins in 1995.¹⁰⁹ In Lesotho, a similar institution is referred to as the Directorate of Dispute Prevention and Resolution (DDPR). In this labour relations sector, ADR has been praised for all the virtues of ADR.¹¹⁰ However, clustered and scattered over time, albeit in different variants, ADR is beginning to form part of most African countries' legal systems. In the department of labour relations, ADR seems to have worked. However, in introducing the ADR into the general court system, African countries disregarded their experiences with labour matters and sought to introduce mediation as if it were a new thing altogether, especially where the process was introduced with the aid of foreign sponsors. This is complicated further by the slow pace of harmonisation of law in the region.

There is a total absence of uniformity in the manner of adopting ADR and in the content of ADR. This absence of uniformity resonates through the region and does not augur well for harmonisation of law in the African region.

There are attempts at the regional level to introduce ADR, albeit on a limited scale. The Common Market for Eastern and Southern Africa (COMESA) has restructured its Treaty to accommodate Conflict Resolution, and the emphasis is on peace building in the context of investment and development.¹¹¹ There is a need to intensify the efforts at the regional level in the context of harmonisation. Globalisation implies that whatever seems to work at the national level should work at the supranational level.

108 Dieng "ADR in Sub-Saharan African Countries" 615.

109 The Commission for Conciliation, Mediation and Arbitration (CCMA) was established by the 1995 *Labour Relations Act*.

110 Rycroft 2014 *South African Law Journal* 778.

111 Brainch "Justice Sector Reform in Sub-Saharan Africa" 9-10.

African countries are individual members of many international groups. Despite this, the transplantation of ADR did not take cognisance of international trends. In 2002, UNCITRAL drafted a *Model Law on International Commercial Conciliation* (Model Law on Conciliation) to serve as specimen for national laws. None of the African countries, for instance, has drafted legislation based on the Model Law nor have they incorporated it into their domestic legislation.¹¹²

An inability to take account of or to copy international trends may affect enforceability of arbitration decisions, even if national law backs them up, if such law does not make provision for international enforcement. Enforcement can be made a lot easier by adopting international instruments or by tailor making the law on the specimen provided by the international organisations in a uniform manner through Africa.

It is difficult to generalise the successes and failures of ADR in Africa. It is even more difficult to assess the impact of the reform on intra-Africa trade when such reforms have been implemented in only a few countries. Moreover, introduction of ADR should go hand in glove, particularly with economic harmonisation if it is to have an effect on regional trade.¹¹³ Reform has been haphazard and clustered, and it risks the universal impact of reform on intra-African trade. Where the model is the same, results are different. Different models have yielded similar results. The efficacy of the innovations also depends on the legal system of each country. ADR or mediation does not provide a system of its own. Indeed "[e]ach country needs to make a choice about the direction of its legal reform."¹¹⁴

112 Stromberg 2006 *Loyola of Los Angeles Law Review* 1399.

113 On this, Church and Church 2008 *Fundamina* 14.2, have the following to say: "Although there are those who might hold that conceptually harmonisation is a mere myth, it is widely recognised that harmonisation may be part of a process to achieve this goal in the context of comparative law in which unification of law serves as a goal complementary to that of law reform. In other words, rather than merely suppressing one legal system in favour of another, which causes problems, the better approach would be to regard unification itself as a process that involved progressive harmonisation as a first step and eventual integration of institutions and treatment. In this process harmonisation would serve to remove discord and reconcile contradictory elements between the rules and effects of two legal systems, which would nonetheless continue in force."

114 World Bank and Legal Technical Assistance *Initial Lessons* 10.

3.3.4 ADR continues the legacy of colonialism

The exportation of the ADR reforms to Africa or to developing countries in general is a purely economic phenomenon, calculated to create and maintain an environment conducive to foreign investors to trade, in the same manner that colonisation did.¹¹⁵ The General Agreements on Tariffs and Trade (GATT) the World Trade Organisation (WTO), the World Bank, International Development Association, International Finance Corporation have been cited as American-styled tools of perpetuating neo-colonialism, manifesting itself through such reforms, as include ADR.¹¹⁶ In this context, Sassen observes that the transnational corporations (TNCs) are "strategic organisers of the world economy."¹¹⁷ These organisations have in part influenced the post-colonial stage of the development of law. In other words, these organisations drive the transplantation process.

The process of transplanting laws into African countries is described by such terms as coca-colonisation,¹¹⁸ which is generally used synonymously with neo-colonialism,¹¹⁹ Americanisation,¹²⁰ Westernisation,¹²¹ Transplantation,¹²² spurred emulation,¹²³ and legal diffusion¹²⁴ to signify that the new legal development originates from outside the country. The legal development process seems to result from the sympathy from donors for the dire situation of the developing economies.¹²⁵ Coca-colonisation seems to be the most appropriate, if not fashionable term to describe the transplantation of ADR into Africa. It has been defined as follows:

115 Care 2006 *Oxford U Commw LJ* 27: "Legal systems of former colonies are often burdened with a legacy of transplanted laws, developed for use in a foreign country"; Sassen "Economic Globalisation" 235, says globalisation displaces government functions to enable the global economic actors to operate easily across borders. See also McMichael "The New Colonialism."

116 Nader 1999 *ASIL* 306-308. See also Nkrumah *Neo-Colonialism* 242.

117 Sassen "Economic Globalisation" 64.

118 Coca-colonisation simply means globalisation of American culture. See Greco 2010 *Pepp Disp Resol LJ* 649-650.

119 Greco 2010 *Pepp Disp Resol LJ* 650.

120 Greco 2010 *Pepp Disp Resol LJ* 656; see also Saegusa and Dierkes 2005 *J Japan L* 105.

121 Black 2001 *ADR Bulletin* 31.

122 Greco 2010 *Pepp Disp Resol LJ* 652.

123 Tobias 2012 *West European Politics* 55-173.

124 More specifically diffusion in this case means the process by which legal concepts keep their meaning and form in foreign jurisdictions. Levi-Faur 2005 *International Organization* 456 and 459.

125 Goodale 2002 *Law and Social Enquiry* 597, says ADR is another form of sympathetic law i.e. "Legal practices that are understood by concerned individuals and institutions in the United States and Western Europe to serve humanitarian, social reformist, and counter-hegemonic functions when introduced to, and used by, groups at the margins of cultural, economic, and legal power"; see also Nader 1999 *ASIL* 304-311.

... a word used to describe what seemed to be the inexorable extinguishment of local, indigenous cultures of a global one dominated by the West, and particularly the United States.¹²⁶

As a theory, *coca-colonisation* is said to entail the following:

Foreign capital is used for the exploitation rather than for the development of less developed parts of the world... neo-colonialism increases rather than decreases the gap between the rich and the poor.¹²⁷

Coca-colonisation is thus seen as a process of reform that introduces such legal changes as ADR into the African countries by "transplanting them".

During the first transplantation exercise in colonialism, the purpose of reforming the African laws was to prepare an environment conducive to the European traders.¹²⁸ The objective of the colonisers was to "ensure that trade was regulated under laws acceptable to themselves and that, in terms of administration, their rules were applied."¹²⁹ It is not surprising therefore, that transplants are facilitated by trade agreements.¹³⁰ It seems that the same objectives drive today's reforms. The focus is still on the formal sectors of economies, whilst neglecting the poor informal sectors. In that way, it cannot be concluded that ADR responds directly to the people who actually need it.

In the same vein, ADR is criticised for continuing the legacy of the adversarial system by perpetuating the division between the poor and the rich. The introduction of the ADR leads to further isolation of the poor members of the society from accessing the law. In other words, it preserves the adversarial system for the rich and the powerful, thus denying the poor masses complete access to justice,¹³¹ especially in the manner in which it has been implemented in Africa through the court-annexed mediation,

126 Greco 2010 *Pepp Disp Resol LJ* 649.

127 Nkrumah *Neo-Colonialism 1965*; It is in this context that Greco ponders that ADR is, "... something more akin to a soft drink company whose vending machines now carry bottled water alongside their familiar carbonated beverages. It is a new product in the same corporate machine." Greco 2009 *Pepp Disp Resol LJ* 650.

128 Joireman 2001 *J. of Modern African Studies* 571.

129 Dieng "ADR in Sub-Saharan African Countries" 613.

130 Gillman 2009 *Georgetown Journal of International Law* 263.

131 According to Scharf *et al* 2002 <http://www.gsdr.org/docs/open/SSAJ99.pdf> 4: "access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives."

Contemporary ADR processes depend on the formal legal system not only for their supply of disputes, but also as an enforcement mechanism in the background, ensuring compliance with the mediated agreement or the arbitration award.¹³²

This dependence has implications on costs. Settlement that results from such court-annexed mediation may not be a sign of a successful ADR.¹³³ In any case, settlement may not be the desired goal by litigants, especially where the mediation is court annexed or relies on cases supplied by the litigation system.¹³⁴ Forcing such litigants to mediate through court-annexed mediation could be seen as denying the litigants "their day in court".¹³⁵ It is actually in this aspect of mediation where most resistance occurred when the ADR was introduced in Africa.¹³⁶ The tradition of "rights" is embedded or is at least long in Africa. People do not therefore want to relinquish those rights very easily. They are thus wary of a system that seems to deprive them of their rights. In the end, it is not yet concluded that ADR is cost effective.

The adversarial system is criticised not only for being costly, but also for providing "win-lose" solutions to disputes. ADR on the other hand is lauded for providing "win-win" solutions. This may not work where there are glaring power differentials, such as exist in African family settings.¹³⁷ It has been established in the USA that in cases of grossly unequal bargaining power, "adversarial methods are the most judicious means of dispute management."¹³⁸ For example, Africa is known for its patriarchal arrangement of society. In a male-dominated society, disputes between man and wife are often manifests of continuing power struggles within the household. In some cases, the dispute may be caused by frequent violence of man against woman. In such a situation, power differentials are glaring. An attempt to provide a win-win solution may be futile for the wife.¹³⁹ Scutt concludes that,

132 Orns-Rabinovich-Einy and Tsur 2010 *Vermont Law Review* 539.

133 Sherman 1993 *SMN Law Review* 2083.

134 Ingleby 1993 *Modern Law Review* 442.

135 Eisele 1991 *Judicature* 35.

136 Nolan-Haley 2014 "Procedural Justice" 30-32.

137 Nzegwu *Family Matters* 26-27.

138 Nader 1999 *ASIL* 309.

139 Scutt 1988 *Women's Studies Int. Forum* 513.

In a world where power differentials and inequality are real, with real detriments, counselling, mediation, and conciliation serve the interests of the powerful to the detriment of the powerless.¹⁴⁰

As Nader observes, "changes in the preferences for dispute-handling forums do reflect on the distribution of international power."¹⁴¹ The Ghana case, bears testimony to the fact that in African situations, where there are powerful chieftains against individuals, litigation is preferred over ADR.¹⁴² So far, the courts have endorsed the importance of ADR or mediation.¹⁴³ The mediation instruments have different provisions in respect of the question of cost and this may make it difficult for the courts to encourage mediation through costs orders, for instance.¹⁴⁴ However, this does not change the perception that court-annexed mediation still caters for the privileged few who can afford litigation in the first place.

3.3.5 Top-down instead of bottom-up approach

Henseler¹⁴⁵ holds that community justice advocates argue "people need to build grassroots justice institutions that apply community-based norms to disputes, and rely on community members to resolve disputes". In other words, he suggests a bottom-up rather than a top-down approach (as is typical of the adoption of ADR in Africa). This is what Druzin refers to as "bottom-up law", which stands in contrast with "top-down law."¹⁴⁶

It can be argued that most of the transplanted laws have been developed outside Africa in the form of common law or in the form of statutes. In both instances of the development of the law, the localities where they were developed have had the

140 Scutt 1988 *Women's Studies Int. Forum* 516.

141 Nader *The Life of the Law* 150.

142 Crook *et al* "The Law, Legal Institutions and the Protection of Land Rights" 1.

143 *Selikane v Lesotho Telecommunications Corporation*; Van Zyl ADJP in the case of *Ex parte: PJLG* [2013] 4 All SA 41 (ECG) (RSA); *Owoseni v Faloye* [2005] 14 NWLR (Pt 946) 719, 740 (Nigeria); *Aribisala v Ogunyemi* CA/IL/34/99 (Nigeria).

144 The Judicature (Commercial Court Division) (Mediation Rules) 2007 provides under Rule 18 sub-rule 1 that "A party that fails to attend the mediation session without good cause is liable to pay to the mediator the adjournment costs specified in the First Schedule to these Rules, which shall be embodied in the order of the court." On the contrary, the Supreme Court (Mediation) Rules 2013 (Seychelles) do not have similar provisions, nor do they attempt to deal with this issue anyhow.

145 2003-2004 *Penn State Law Review* 170.

146 Druzin 2003 *Journal of Public Law* 375.

opportunity to debate the laws and thus own them.¹⁴⁷ For the countries in Africa where the laws are being transplanted, there is no such opportunity. The question of owning the laws thus remains. These laws are developed out of context. The same can be said of the ADR. In the West, ADR underwent a very lengthy metamorphosis; the same did not happen when it was imported into Africa. In the USA the process may at best be said to have begun back in the late 1800s, until it was given the present impetus by Sanders. In all those years it was being tossed back and forth by all the stakeholders. Homegrown systems bode well for uniformity and harmonisation of laws under the auspices of globalisation. According to Care,

Rather, it is concluded, the diversity of local systems should be seen as a strength, which counter-balances the demand for uniformity inherent in the process of globalisation.¹⁴⁸

Speaking for transplants, Greco says creating laws from scratch requires the kind of expertise that is rare in Africa.¹⁴⁹ It seems the only possible remedy is to look outside for experts in making good laws.¹⁵⁰ However, customary law does not need to be created from scratch, it is there to be discovered, or codified and developed further.¹⁵¹ In this context, following the Chicago School of Thought,¹⁵² Druzin suggests the following criteria for influencing the development of customary norms:

(1) Information campaigns to trigger widespread beliefs in the norm's legitimacy; (2) increasing the esteem (or the guilt) felt in following a norm by altering social perceptions; (3) mandating or banning a particular behaviour; and (4) taxing or subsidising behaviours.¹⁵³

The criteria offered above are not alien to the use of borrowed law in the form of transplants to stimulate the development of functional and relevant customary law. The point is that conventional ADR can work fully and well for the promotion of intra-African trade if it is adopted in such a manner as to stimulate further development of African customary law. In this regard, Carfield proposes a 'participatory' approach to

147 Care 2006 *Oxford U Commw LJ* 27.

148 Care 2006 *Oxford U Commw LJ* 29.

149 Greco 2010 *Pepp Disp Resol LJ* 5.

150 Greco 2010 *Pepp Disp Resol LJ* 5.

151 It must be added that that culture plays an important role in the ability of people to accept and own innovations. Home-grown innovations can easily be accepted. See Greco 2010 *Pepp Disp Resol LJ* 7; Trubek and Galanter 1974 *Wis L Rev* 1062.

152 Yeung *Securing Compliance* 19.

153 Druzin 2003 *Journal of Public Law* 377.

law and development.¹⁵⁴ Most importantly, for such ADR to acquire the robustness and self-enforcement usually associated with customary¹⁵⁵ law, it should ideally develop from the bottom up.

3.3.6 *Not fully aligned with case management reforms*

ADR reforms always go together with case management¹⁵⁶ reforms. It features in case-load management, which emphasises judge-driven case management. In the USA, the the need for the involvement of the judge in driving cases was based on factors such as¹⁵⁷ costs, absence of privacy except in the case of minors, delays, non-predictability of the outcome, inflexibility of the trial process, potential to destroy relationships, limited control of parties over the process, absence of control of parties over the outcome, and absence of choice of the judge. These were heeded in latter reforms dealing with both case management and the contribution of ADR in reducing case backlogs. Peckman RF adopts the following quote:

Necessarily, pre-trial procedure envisages the invocation of initiative on the part of a judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation.¹⁵⁸

However, that does not happen throughout Africa. In some African states that has been the case, yet in others the reforms have gone without accompanying case-management reforms.¹⁵⁹ In the latter scenario, parties are always prone to referrals to ADR only for delaying the cases at the cost of the poor parties. Nevertheless, where there are strict rules regarding compliance, referral to ADR may not necessarily result in unwanted delays

154 Carfield 2011 *U Colo L Rev* 739.

155 Parisi 2000 *Encyclopaedia of Law and Economics* 611.

156 Case management has its own critics. See for example Alschuler 1986 *Harvard Law Review*.

157 Fiadjoe *Alternative Dispute Resolution* 31-32; see also Fiadjoe 2001 *Caribbean Law Bulletin* 8.

158 1984-1985 *Rutgers L Rev* 255-256.

159 Messick "Alternative Dispute Resolution" 3-4.

3.3.7 *Harmonisation of reform in ADR*

One explanation for Africa's stagnant growth is poor infrastructural networks. Key in the argument is the word "network." By analogy, it is equally important that African legal systems are on a par with the world systems, especially with the economic superpowers that invest in Africa, notwithstanding that African countries have no choice but to accept legal reform as a precondition for aid. Nevertheless, because harmonisation of laws presupposes the identification of common elements in the laws of each country, reform should at best be common in all the countries, especially where it is sponsored by one common entity. Unfortunately, different approaches were adopted in reforming the legal systems of Africa. In any case, it is almost impossible to adopt common methods of dispute resolution in countries that are so diverse in culture, unless attention is paid to the commonalities in the diversity.

At the level of the African Union (AU), a uniform law should be developed that deals with intra-African trade disputes, confidentiality of the process of mediation, enforcement of mediation outcomes, and prescription during mediation, just like in Europe.¹⁶⁰ Moreover, the codification of commercial law by OHADA is a step in the right direction. In addition, the idea of stimulating development of the law from the ground must be pioneered at the same level.

3.3.8 *Some success stories to replicate*

Where ADR has been successful, it is mainly because of an increased effort at contextualising it. The success stories of Ghana and Ethiopia are about the so-called court-annexed mediation.¹⁶¹ Court-annexed mediation does not necessarily extend access to the poor; rather it reinforces access to those who have already chosen the courts (litigation) for the resolution of their disputes. Without statistics as to the beneficial use of ADR as an alternative, it is difficult to conclude that the introduction of ADR has brought increases in the access to justice. The main benefit seems to be a reduction of backlog in cases.

160 See Kohlagen *ADR* 5; this is elaborated more in chapter 6 below.

161 Uwazie "Alternative Dispute Resolution in Africa" 3-4.

Most jurisdictions have defunct pre-trial procedures that allowed for the settlement of disputes out of court. The introduction of ADR might after some time, fall into the same defunct state. What is exemplary in the situation in Ghana is the fact that the law recognises settlements arrived at out of court, that is to say, settlements that do not result from an initial litigation attempt, but those that result from an initial process of private ADR and ends there.¹⁶² Nevertheless, the real test for the success of ADR in Africa should not be how well it serves the business community (especially multinationals), rather, it should be the extent to which locals, and (especially the poor) are able to access and enjoy justice. Most of the success stories (especially in commercial dispute resolution) are in the formal as opposed to the informal sector of the economy.

3.4 Conclusions

It appears that it might be too early to make a useful assessment of ADR in Africa because it is still in its infancy.¹⁶³ However, the analysis was based on a view that it is not necessary to wait until ADR actually takes root. By that time, it might be too late to address problems that were apparent right from the onset. The motives behind the reform by way of ADR leave much to be desired. As in the case of the ADR movement of the 1980s, this provokes the pertinent question whether ADR provides panacea or anathema to Africa's economic ills.¹⁶⁴

While it is true that throughout history the development of the law has always been influenced from outside and mostly through colonialism, an attempt should always be made to adapt such law to the local circumstances by stimulating local growth. This will go a long way towards ensuring acceptability that is necessary for enforcement and sustainability. The historical background of the Law Merchant justifies the exploration of customary law as having the potential to improve the westernised ADR mechanisms.¹⁶⁵

162 Uwazie "Alternative Dispute Resolution in Africa" 1-6.

163 Chamber Trade Sweden <http://chambertradesweden.se>.

164 Edwards 1986 *Harvard Law Review* 668-684.

165 Benson 1990 *The Journal of Libertarian Studies* 660.

Most law and development initiatives have failed because of a disregard of local circumstances. This calls for an in-depth study of the diverse cultural circumstances of Africa and their inclusion in the reform process. It has been accepted over the years that culture plays an important role in the ability of people to accept and own innovations. The possibility of a homegrown legal system may be farfetched. The possibility of a purely indigenous ADR is elusive. What remains is finding a good fusion between the imported and the indigenous ADR methods; a fusion that will work inside not only one African country but also one that can work across African countries with the possibility of being exported to other countries. That calls for an in-depth study of indigenous laws of Africa, which is carried out in the next chapter.

CHAPTER 4

Tapping into the indigenous knowledge: continuity and change in indigenous methods of dispute resolution

4.1 Introduction

This business has nothing to do with writing, and you keep trying to put it down and in the process, you ruin it for us.¹

In the previous chapter, it was established that law and law reform are necessary for economic development. It was also concluded that for legal reform to work it must relate to the circumstances of each country. Emphasis was placed on the importance of incorporating African customary law into the transplanted law, or to contextualise the imported law into African customary law.

Different terminology has been used to refer to African customary law. Some authors refer to customary law as early law,² ancient law,³ primitive law,⁴ customary law,⁵ traditional law,⁶ African law.⁷ In a situation of growing globalisation manifested by regionalisation and harmonisation of laws, ICL would be more appropriate when referring to customary law that has its origins in Africa of pre-colonial time. In this way, a rather historical, albeit confusing argument about the coincidence of colonists and black South Africans in the 1600s in Southern Africa is avoided.⁸ Notwithstanding that, ICL had already been influenced through conquests and other factors by transplants long before the arrival of the Westerners.⁹ However, inasmuch as colonists brought Western law with them, Black (South) Africans had or brought indigenous non-Western laws with them. ICL is thus distinguished from the modern official and dominant system that is made up of laws, techniques, institutions and

1 An elder of the Dagomba Kingdom, a Lion of Dagbon, in northern Ghana is said to have told the scholar Staniland, see Fitzpatrick 1984 *JAL* 20; see also Staniland *The Lions of Dagbon* 175; Unger *Law in Modern Society* 50; Einstein is often quoted as having said, "Everybody is a Genius. But if you judge a fish by its ability to climb a tree, it will live its whole life believing that it is stupid", see for example Kelly *The Rhythm of Life* 80.

2 Elias *African Customary Law* 81.

3 Maine *Ancient law* 1.

4 Redfield 1964 *U Cin L. Rev* 1.

5 Fitzpatrick 1984 *JAL* 20-27.

6 Fitzpatrick 1984 *JAL* 20-27.

7 Juma 2001 *Thomas L Rev* 459; Driberg 1934 *Journal of Comparative Legislation and International Law* 230 -235.

8 See for example Rautenbach 2008 *EJCL* 2.

9 Merry 1988 *Law and Society Review* 870.

roles, which are, with few exceptions, modifications of British or other Western models.¹⁰

ICL constitutes some form of private ordering, which might provide an alternative to the ills of public ordering.¹¹ McMillan and Woodruff¹² are of the view that under dysfunctional public order, private ordering may thrive. The picture painted by Clay¹³ would suggest that it is possible to conduct trade without law in the sense of public ordering. However, the structure that regulated the Californian trade, the "coalition" as he presents it, is most likely to have given rise to *lex mercatoria*. The similarity between the "coalition" and *lex mercatoria* is formidable, as they were both systems of contract enforcement that depended on reputation.¹⁴ Milgrom¹⁵ seems to agree, while at the same time acknowledging that formal systems of law are equally necessary reinforcements. In countries, such as African countries, where dualism and diversity¹⁶ of systems exist, there is a need to study the relevance and importance of ICL, particularly to intra-African trade.¹⁷ This is a question of comparative law that can only be answered by looking at it from the perspective of legal pluralism.¹⁸

Legal pluralism is viewed as the descriptive theory of law.¹⁹ Griffiths defines legal pluralism as "... that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs."²⁰ It therefore provides an appropriate approach to studying Africa customary law; firstly, it recognises that diversity does exist, and allows one to look at the question of diversity with a view to identifying how each legal order can help resolve a multifaceted social problem.

Legal pluralism is not unique to Africa. It exists in every system. Colonialism is but one of its causes.²¹ Even in modern legal systems, such as the British system, the

10 Galanter 1972 *Comparative Studies in Society and History* 53-70.

11 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

12 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

13 Clay 1997 *Journal of Law, Economics and Organisation* 203-231.

14 Mokyr *The Oxford Encyclopaedia* 532-533; See page 120-121 below for a conceptualisation of the so-called reputation mechanism;

15 Milgrom and Douglass *Economics & Politics* 1-23.

16 Bamodu 1994 *JAL* 128.

17 Bamodu 1994 *JAL* 128.

18 Van Hoecke and Warrington 1998 *The International and Comparative Law Quarterly* 495-536.

19 Griffiths 1986 *Journal of Legal Pluralism* 2; see Glenn "Sustainable Diversity in Law" 95-111.

20 Griffiths 1986 *Journal of Legal Pluralism and Unofficial law* 2.

21 Ngaraj "Human Rights, Legal Pluralism and Conflict" 19.

absence of a written constitution represents (constitutional) pluralism.²² However, this kind of diversity or plurality cannot be compared to African legal pluralism, which has multiple layers.²³ Hence, legal pluralism in Africa requires a thorough study especially on how it may affect intra-African trade. In the final analysis, the complementarity of the different elements of legal pluralism is more important than looking at the different strata as parallels. The correct symbiosis will derive from appreciating the usefulness of private ordering as against public ordering.

It is important to define IMADR , especially in Africa. Firstly, these methods have been given inadequate attention, particularly in relation to their relevance to economic development. Secondly, the new movement in ADR requires that we salvage the little that is left of the knowledge of African dispute resolution and improvise on the transplanted systems.

In this chapter, the nature of indigenous dispute resolution in Africa is explored. The idea is to argue that the common elements found in each country make up what could be the "common" law of Africa,²⁴ notwithstanding that there are some similarities between indigenous law and modern Western law. In this dissertation, the argument is that a large percentage of African economies is based in the informal and therefore less complex sector. Intra-African trade can, therefore, be best facilitated by the incorporation of ICL in the existing systems at the national, as well as regional levels of Africa.

A study of ICL is manifest of a "rebellion" against modern dispute resolution systems in the form of litigation and other new methods. It is an echo of William Shakespeare in King Henry VI in which Dick, the butcher, offered the following advice to Jack Cade, the rebel: "The first thing we do, let's kill all the lawyers...." Lawyers and judges, quite contrary to IMADR, especially in Africa, drive litigation.

22 Bhamra *The Challenges of Justice* 150.

23 Bamodu 1994 *JAL* 128, identifies three layers of African diversity of customary law, which are, one, the internal diversity within each African country; two, the diversity among different African countries; three, diversity between African states and other (non-African) states.

24 Van Niekerk refers to this as the *Ius Communes*, that could possibly be built from Roman law and African indigenous law: Van Niekerk 1998 *African Legal Theory and Contemporary Problems* 172-173.

Firstly, the status of the pre-colonial African law and trade,²⁵ will be addressed, thus defining what is meant by indigenous law. Argument will be made that the advent of colonialism in Africa not only interfered with and diluted the indigenous law and methods of dispute resolution, but it equally introduced certain elements into, or redefined indigenous law.²⁶ This exercise cannot be done without reference to the "exchange systems"²⁷ peculiar to Africa, for it is the persistence of this peculiarity that requires a revision of the process of reform.

Secondly, it will be ascertained whether indigenous law is law.²⁸ Without necessarily exploring a particular theory of law, different views on customary law are analysed in order to conclude that indigenous law is indeed law.

Thirdly, the elements of what is referred to as the ICL of Africa will be looked at in order to identify what is common on the entire African continent, including the general characteristics that make customary law not too distinct from common law.²⁹ A conclusion will be drawn on whether what is left of the ICL of Africa could be useful in redefining the common law or a legal family of Africa.³⁰

4.2 African pre-colonial law

Prior to colonialism, Africans had regulated trade relationships through IMADR.³¹ Colonialism affected those relationships and the indigenous methods of alternative dispute resolution (IMADR).³² The question is whether it is possible to revive IMADR in its pure, (maybe original) form, without necessarily succumbing to the so-called

25 Section 4.2.

26 Van Niekerk 1998 *CILSA* 166; Starr and Collier 1987 *Current Anthropology* 3.

27 An exchange system in this context refers to a situation "whereby goods and services are transferred by mechanisms, such as reciprocity and redistribution." Per Riddell 1992 *The Journal of Modern African Studies* 60.

28 Section 4.3.

29 Section 4.4.

30 Bamodu 1994 *JAL* 126; Zweigert and Kotz believe that this is possible, Zweigert and Kotz 1987 *Introduction to Comparative Law* 63.

31 From the 1870s to the 1960s when most countries of Africa gained their independence. See Olufemi *Modernity in Africa* 34.

32 Care 2006 *Oxford U Commw LJ* 27-60. Indigenous methods of alternative dispute resolution (IMADR) is the writer's conceptualisation, intended to distinguish indigenous approaches to dispute resolution, from the mainstream, imported litigation, at the same time conceding that litigation is now so entrenched that it forms the mainstream form of dispute resolution despite resilience of customary law in general.

traditionalisation.³³ The general approach to defining ICL has been to define it as "law" or "not law." There are those authors who have, however, emphasised that ICL is more about methods than about law. However, what exactly is ICL or IMADR?

4.2.1 ICL or IMADR

Unger defines customary law (and international law) in the following terms:

Any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgement by those groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied.³⁴

Custom is composed of practices, traditions, and cultures of any given society, which have been developed from time immemorial.³⁵ In other words, the main source of any law is definitely custom, as customary law arises from the usage and practices of the past.³⁶

It has been said that in order for custom to be regarded as law it must satisfy the following requirements:³⁷ firstly, it must be certain; secondly, it must be observable and applicable, without exception, to the whole society regulated by it. In other words, it must be uniformly observed over a long period of time.³⁸ Thirdly, it must be reasonable. It must be construed within prevailing circumstances in any given society. Lastly, it must be enforceable through due process of law. It must be noted here that these requirements as pronounced in the case of *Van Breda* echo a Western perspective of what customary law is.³⁹

Customary law therefore, can be defined as a body of rules (or as norms according to sociologists), customs or traditions, observable by all the people in any given

33 According to Sissons 1998 *Oceania* 37, "traditionalisation" means "... a process or set of processes through which aspects or contemporary culture come to be regarded as valued survivals from earlier time."

34 Unger *Law in Modern Society* 49; see also, Harper "Customary Justice" 17-18.

35 *Alexkor Ltd v Richtersveld Community* (CCT19/03) [2003] ZACC 18.

36 Moore 1986 *CUP Archive* 39.

37 *Van Breda v. Jacobs* 1921 AD 330; See also Palmer and Poulter *The Legal System of Lesotho* 109,153; Bennett *The Application of Customary Law* 51-103.

38 Palmer and Poulter *The Legal System of Lesotho* 153.

39 The definition was actually adopted from Hailsham *Harlsbury Laws of England* paragraph 401 showing the position of the law in England. This definition was greatly elaborated on in the case of *New Windsor Corpn v Mellor* [1975] ALL ER 44.

society, the infraction of which carries civil or criminal liabilities.⁴⁰ According to Ngcobo J, customary law can be classified into three forms, namely the form of customary law practiced in the community; that found in the statutes, the case law or textbooks, and academic law used for teaching purposes.⁴¹ Inasmuch as these define sources of customary law, they invoke the question of legitimacy. Are all sources valid sources that all give legitimacy to customary law?

In addition to the definition provided by the *Black's Law Dictionary*,⁴² according to Tobin and Taylor, customary law is

"dynamic and constantly evolving and often incorporates legal concepts and measures drawn from other legal systems."⁴³

Customary law can be most useful in resolving disputes related to land and water allocation.⁴⁴

Colonialists tended to regard the Kings as the repositories of customary law.⁴⁵ For instance, in Lesotho the codification of customary law is entitled "Laws of Lerotholi,"⁴⁶ Lerotholi being the King who was in power and actually directed the recording of what was considered the customary law of the Basuto.⁴⁷ The chiefs and the Kings were generally regarded as authorities on customary law. Ramose comments that, "the Zulu King is the memory and symbol of Zulu law in general and customary law in particular."⁴⁸ This in itself creates doubt as to the credibility of the recorded customary law amid principles of research and history writing.⁴⁹

African history, including recordings of ICL, has been written largely by missionaries, thus resulting in what Ellias refers to as the missionary perspective of customary law,

40 Palmer and Poulter *The Legal System of Lesotho* 109,153.

41 *Bhe v Magistrate Khayalitsha* CCT/ 49/03 citing De Koker 1998 *Journal of Judicial Science* 112-113; see also *Mabena v Letsoalo* 1998 (2) SA 1068 (T); Ashton *The Basuto* 249 mentions four sources, namely tradition, statutes, chief's orders and the courts.

42 Page 2 above.

43 Tobin and Taylor "Across the Great Divide" 7.

44 Cuskelly *Customs and Constitutions* 1.

45 Fenrich *et al The Future of African Customary Law* 155; Regarding chiefs as the sole custodians of customary law has in fact created cynicism amongst some authors because chiefs were regarded as instruments of the colonial powers. See Onyango *African Customary Law* 148.

46 Poulter 1972 *African Affairs* 152.

47 Poulter 1972 *African Affairs* 152; A similar exercise in Tanzania resulted in the Local Customary Law Declaration of 1961.

48 Ramose "African Customary Law" 352.

49 Afolayan "African Historiography" 626.

and that African customary law is bad and should be abolished *holus bolus*.⁵⁰ Additionally, one of the most eminent lawyers of the United Kingdom said that thought in tribal African society is not governed by logic but by "fetish" although he was criticised heavily for not even citing an authority for that.⁵¹ Ironically, some authors refer to ICL as a recent development. There are, of course other earlier laws, which Ashton⁵² regards as the customary laws of Lesotho, such as the 'Proclamation by Moshesh' of 1855, Ordinance against the Introduction and Sale of Spirituous Liquors in the Territory of the Basutos of 1854, and the 1859 'Law of Trade'. It can be argued that Westerners already occupying the nearby Free State Republic⁵³ influenced these statutes in both content and form.

Using Senegal as an example, Snyder⁵⁴ argues that customary law is a recent development. Snyder challenges the notion that customary law predates colonialism.⁵⁵ This argument is of little consequence to the question of whether ICL is law. Clearly, in recording customary law colonists had to rely on Africans. Therefore, ICL existed in its pure, undistorted form prior to colonisation. The influence of colonisation through codification and other means should not mean that it created ICL.⁵⁶ In actuality, in some cases colonialism, through capitalism, affected only the substance rather than the form of indigenous law.⁵⁷

There is evidence that Britain as the coloniser protected customary and property rights. For example, it was held in *The Case of Tanistry*,⁵⁸ that the Crown did not take actual possession of the land due to conquest and that pre-existing property rights continued. In the case of *In re Southern Rhodesia*,⁵⁹ it was held that in the absence of express confiscation, it could safely be assumed that the conqueror had respected the pre-existing customary law. Thus, the continuity doctrine seemed to

50 Elias *African Customary Law* 2.

51 *The Observer* July 8, 1951.

52 Ashton *The Basuto* 250.

53 Ashton *The Basuto* 250.

54 Snyder 1981 *Journal of Legal Pluralism and Unofficial Law* 49-90.

55 This notion is shared by, amongst others, Ellias *African Customary Law* 25-28: Ellias emphasise that continuity is the most definitive element of customary law; see Chanock "Agricultural Change and Continuity in Malawi" 396-410.

56 Twining actually argues that codification changed the content of ICL, Twining *The Place of Customary Law* 33.

57 Snyder 1981 *Journal of Legal Pluralism and Unofficial Law* 49-90. This view is criticised by Fitzpatrick 1984 *JAL* 22.

58 516.

59 [1919] A.C. 211, 233.

prevail⁶⁰ over recognition principle and as a result, the decision of *In re Southern Rhodesia* was followed in other subsequent cases.⁶¹ In addition, such express confiscation was to follow upon what Lord Denning said, namely that,

In inquiring . . . what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. . . ⁶²

In recognition of the fact that law development has been influenced from outside through legal transplantation, then it must be accepted that changes in customary law, as influenced from outside, were inevitable.⁶³ Even in the European legal history, the influence of Roman law through legal transplantation is undisputed.⁶⁴ Comparing African customary law with other legal systems would perhaps help emphasise that imperialist nations have always influenced the organisation of colonised societies, mainly through the instrument of law.

Although occupying an inferior position in the hierarchy of laws, the codification of customary law created a situation where it applied side by side with common or civil law, thus resulting in the so-called legal dualism.⁶⁵ ICL makes little or no differentiation between civil law and criminal law.⁶⁶ Its true nature is yet to be discovered.

60 Secher 2004 *The UNSWLJ* 712-713.

61 *Mabo v Queensland No. 2* [1992] HCA 23; (1992) 175 CLR 1 F.C. 92/014; *Tijani v Secretary Southern Nigeria* [1921] 2 A.C. 399.

62 Lord Denning affirmed the same rule in *Oyekan v. Adele* [1957] 2 All E.R. 785,788; see also *Mabo v Queensland 59*, *Tijani v. Secretary Southern Nigeria*.

63 Menski *Comparative Law in a Global Context* 50.

64 Watson *Legal Transplants* 95; Menski 2006 *Comparative Law* 50; Menski 2006 *Comparative Law* 50; see also Watson 1995 *The American Journal of Comparative Law* 469-476; Ewald 1995 *The American Journal of Comparative Law*; Cairns 2013 *Ga J Int'l & Comp L* 687.

65 Kane *et al* "Reassessing customary Law Systems" 6; see also Koyana 2013 *Speculum Juris* 86.

66 Driberg 1934 *Journal of Comparative Legislation and International Law* 231.

4.2.2 The nature of African ICL

Customary law derives from customs and culture.⁶⁷ The nature of customary law of Africa can best be explored by looking at how the African customs have recurred over time and how they have had a doctrinal effect on the people connected with them. Most doctrines are expressed in proverbial form.⁶⁸

Mahao⁶⁹ describes the ICL in Lesotho and elsewhere as 'participatory' and hallmarked by freedom of expression. Freedom of expression⁷⁰ was underpinned by two of the most important constitutional doctrines, namely, "*mooa-kgotla ha a tsekisoe*," meaning "erring while on a public platform cannot be a punishable offence."⁷¹ This doctrine allowed those present, or passing through, at the council or public *pitso*⁷² to openly express their thoughts without fear. Mahao says it is a doctrine of "immunity" from criminal prosecution equal only to the Western principle of Parliamentary privilege. The other related principle is expressed as thus, "*moro-kgotla ha o okoloe mafura*," which means that at the council a spade is called a spade.⁷³ This doctrine allowed one to say that which under normal circumstances may be offensive, i.e. in form or content and thus render the speaker liable criminally and/or civilly.⁷⁴ Furthermore, it implies that participation by more people will help resolve the dispute.⁷⁵

67 Mattias 2004 *Ariz J Int'l & Comp L* 63-64.

68 Mandora and Wasosa 2013 *International Journal of Asian Social Sciences* 874; Hamutyineyi *Shona Proverbial Lore and Wisdom* xix. For analogies in Nigeria see Messenger 1959 *Southwestern Journal of Anthropology* 64-67; Kwesi 1986 *Journal of American Folklore* 280-303.

69 Mahao 2010 *XLIII CILSA* 323.

70 It is acknowledged that other authors do not think that the human rights concept existed in pre-colonial Africa. Maine "From Status to Contract" argues that "in pre-colonial Africa, rules of social conduct could not be differentiated into law and custom, hence the rules were oppressive"; see Elechi "African Indigenous Justice System" 7.

71 In Shona (mainly Zimbabwean language) it is put as follows: *Dare harina benzi* (a court knows no fool), see Mandora and Wasosa 2013 *International Journal of Asian Social Sciences* 876.

72 This is a public gathering (convocation) called by the King to discuss important matters of the community including adjudicating over disputes.

73 This could also mean that the Court takes matters that come before it seriously. It is expressed as follows in the Shona tradition: *dzimbahwe harina dandar* (a chief's court is not for entertainment. See Mandora and Wasosa 2013 *International Journal of Asian Social Sciences* 872.

74 Mahao 2010 *XLIII CILSA* 323.

75 This is rendered more succinctly by the following Shona proverb: *Sezvo vakuru vakati: mhosva aitongwi nekurwa padare pashe padurunhuru miromo mizhinji inoswatudza nyaya* ("As the elders said: a conflict cannot be resolved through fighting a chief's court is a

The above doctrines have found expression in the constitutions⁷⁶ of many countries as human rights, proving to some extent that the concept of human rights are an example of natural law and have existed in varied forms in pre-colonial Africa.⁷⁷ Membership of the extended family or community afforded individuals rights and duties. According to M'Baye and Ndiaye, individuals enjoyed such rights as freedom of expression, freedom of religion, freedom of movement, freedom of association, the right to work, and the right to education, but within the framework of the group.⁷⁸ Nonetheless, where one failed to adhere to the norms of the community, he/she would lose the entitlements because freedom of expression was considered a communal right.⁷⁹ Elechi asserts that no one would be punished for holding different or opposing views on any issue, and "no attempt is made to suppress any voice."⁸⁰

Ellenberger describes the proceedings of ICL as follows:

Nothing was more congenial to these people than a complicated civil action or a well-defended criminal case. It was a tournament of wits, in which everyone took part, the object being the stultification of a witness, or the conviction out of his own mouth of an accused person. All sorts of questions were allowed, and the idea of cautioning the accused against committing himself never occurred to any one, and would have been dismissed as ridiculous if it had ... When the case had been fully heard, the counsellors, or indeed any one present, gave their opinion upon it, the lowest in rank first, and so on up to the chief, who spoke last, and whose decision was final.⁸¹

In the end, every member of the community heard the case. The members would then examine the witnesses in chief and through cross-examination. It was possible in the same proceedings for a member or members of the community to play the devil's advocate at the same time. In the end, however, the purpose would always be towards reconciliation and restitution of the injured party.⁸² The chiefs or the kings were just there as mediators. Once the case was presented to the public, the King or

softening place different viewpoints help to resolve conflict") in Mandova and Wasosa 2013 *International Journal of Asian Social Science* 873.

76 Article 16 of the Constitution of the Republic of South Africa; article 32 of the Constitution of Angola; Article 14 of the Constitution of Lesotho; Article 33 of the Constitution of Kenya; Article 39 of the Constitution of Nigeria; See also Elechi "African Indigenous Justice System" 12.

77 Elechi "African Indigenous Justice System" 7.

78 as cited in Motala 1989 *Hastings International and Comparative Law Review* 381; Motala 1989 *Hastings International and Comparative Law Review* 373 – 410.

79 Marasinghe "Traditional Conceptions of Human Rights in Africa" 32.

80 Elechi 1996 *International Journal of Comparative and Applied Criminal Justice*.

81 Ellenberger *History of the Basuto* 266.

82 Mahao 2010 *XLIII CILSA* 323-324.

the Chief would not meddle. The speakers enjoyed the greatest freedom in expressing their views.⁸³ In the final analysis, neither lost completely nor won completely. In some cases, the compensation would go not to the complainant but to the family, or clan or chief as the case may be, usually taking the form of an offering to the court itself.⁸⁴

It was not the duty of the chief to act as police officer to his community.⁸⁵ This was the responsibility of the entire community. The chief sat on a trial as a judge. If the suit was private, he sat more as an arbitrator than as a judge.⁸⁶

Access to justice was also underscored by such rather unflattering doctrines as "*Morena ke khetsi ea masepa*,"⁸⁷ meaning the King had an obligation to give a hearing to anyone including those that are gross, trivial or apparently immoral.⁸⁸ Casalis reports that, "it is understood that on these occasions the chiefs must hear the most cutting remarks without a frown."⁸⁹

What was central to the judicial process was the act of listening by those whose task it was to resolve the dispute. Each side was allowed to present its case without interference. After that, both parties and their witnesses would be cross-examined by the triers of fact in ascending order of hierarchy and the last one to speak would also give a final decision. The focus of cross-examination was not on history and motive but on the external facts of the matter.⁹⁰ That way it was very easy to arrive at a solution since a consensus on facts emanated directly from the agreed facts.⁹¹ There are other features of African ICL that make it unique, which will be discussed in the next section.

83 Casalis *The Basutos* 234.

84 Ashton *The Basuto* 256.

85 Casalis *The Basutos* 224.

86 Driberg 1934 *Journal of Comparative Legislation and International Law* 242.

87 Literally means a chief is a bag into which faeces should be deposited. In this way the chief did not have coercive powers of law per se. His role was thus analogous to what Benson (*The Enterprise of Law* 16) says happened in the Guinea, that is, that, there the chief or leader played the role of the "First among equals" or *primus inter pares*.

88 Ellemberger *History of the Basuto* 266 says that the chief was "accessible to the meanest."

89 Casalis *The Basutos* 234.

90 Casalis *The Basutos* 215–216.

91 Casalis *The Basutos* 215–216.

4.2.3 A description: peculiar features or principles

Certain attributes or principles of African ICL law have been highlighted as unique. They include the following:

4.2.3.1 *uBuntu*⁹²

Customary law deals with rules that are concerned with reconciling the parties, or developing moral ideals cherished by the larger community.⁹³ The description of solidarity as given by Unger in the context of solidarity versus formality would equally fit this general characteristic of the collective nature of customary law. Speaking of solidarity he says:

one is never permitted to take advantage of his legal rights so as to pursue his own ends without regard to the effects he may have on others. And this ideal holds that the overriding collective interest is the interest in maintaining a system of social relations in which men are bound to act, if not compassionately, at least as if they had compassion for each other. Thus, one is never entitled to sacrifice an individual some social interest simply because legality has left him at another's mercy.⁹⁴

Thus, *ubuntu* helps define rights and obligations by always reflecting on the community values. It provides caveats to seemingly individualistic obligations. It is perhaps, based on *ubuntu* that a girl or boy in customary law remains a minor even if he/she is over 21 years of age for as long as he/she is not married.⁹⁵ Answerability in any form of transaction that may affect him/her is burdened on someone who plays the role of guardianship and provider over the person.

uBuntu "is a fundamental value; an inherent belief system, which underscores indigenous cultures and indigenous legal orders in Africa."⁹⁶ There is a plethora of

92 Authorities abound on the judicial use of *ubuntu*. See South African authorities analysed in Himonga, Taylor and Pope 2013 *PER* 67. Rautenbach "Exploring the Contribution of *uBuntu*" 1 does not doubt the value of this concept to constitutionalism in South Africa. The *Makwanyane* case is seen as the judicial birth of *ubuntu*.

93 Unger 1977 *Law in Modern Society* 208.

94 Unger 1977 *Law in Modern Society* 209.

95 *Boloko v Lehlaka* 1974-75 *LLR* 80.

96 Van Niekerk 1998 *CILSA* 167; *Le Roux v Dey* 2011 (3) SA 274 (CC).

literature on the concept of *ubuntu*.⁹⁷ It has been accepted by most writers that simply put, *ubuntu* refers to the idea that every form of transaction, whether social, economic and even environmental should be treated with deserving compassion and reverence.⁹⁸

uBuntu is said to be incapable of a singular meaning.⁹⁹ Its ambiguity derives from the fact that it seems to entail all principles of ICL. Rautenbach observes that it is a "value-laden concept with many meanings" including compassion, conformity to basic norms and collectivity.¹⁰⁰ It seems that *ubuntu* defines the very essence of life. It may well be an ideology in its own right equal to the Asian Confucianism. Bennett equates it to the Indian *dharma*.¹⁰¹ The Chinese mediation *literati*, (meaning mediators), is based on similar principles of *ubuntu* and cooperation, which itself owes its pedigree to the often-quoted adage by Confucius, that: "although I listen to the cases as other judges do, I must make my best efforts to instruct people to live without litigation."¹⁰² It may well be used not necessarily as a principle of law but the basis upon which every principle of law is defined, to give law its humane face. It seems to be embedded in the belief that inasmuch as human rights were born with people, people were born with *ubuntu*. Louw¹⁰³ concludes that,

It would be ethnocentric and, indeed, silly, to suggest that the Ubuntu ethic of caring and sharing is uniquely African. After all, the values, which Ubuntu seeks to promote, can also be traced in various Eurasian philosophies.

It is the commonest principle of coexistence, and therefore a natural tendency of every human being. A law without *ubuntu* is artificial and man-made and does not perpetuate peaceful coexistence. The same applies to law-regulating business transactions. In a business setting, Nussbaum¹⁰⁴ provides the following enlightening example of a business transaction underscored by *ubuntu*:

Joe Mogodi, a successful businessman in Pietersburg, South Africa, showed his Ubuntu by buying up 100 sewing machines at an auction, which he then made

97 See for instance Sloth-Nielsen and Gallinetti 2011 *PER* 63-90; Boniface 2013 *PER* 378-401; Chivaura "Hunhu/Ubuntu"; *S v Makwanyane*; *Dikoko v Mokhatla*; Mahao 2010 *XLIII CILSA* 317-336; Kaphangawani "African Conceptions of a Person" 332-342.

98 See particularly Mahao 2010 *XLIII CILSA*.

99 Klug *Constituting Democracy* 164.

100 Rautenbach "Exploring the Contribution of *uBuntu*" 2; see also Bennett 2011 *PER* 53.

101 Bennett 2011 *PER* 46-47.

102 Chern *The Commercial Mediator's Handbook* 17.

103 Louw "Ubuntu" *conclusions*.

104 Nussbaum "African culture and Ubuntu" 2003 *Perspectives* 3.

available to men and women in the community who were interested in starting tailoring businesses but did not have the necessary capital. He honored their dignity by making a simple verbal agreement that they would pay him for the machines once there were sufficient profits to begin interest-free payments. This is typical of Ubuntu consciousness and still occurs widely both in rural South Africa and among African communities in the urban areas.¹⁰⁵

Going forward, the very basis of the contractual undertaking between Mogodi and the community contractants should inform the manner in which a dispute will be resolved where it arises. For the same reason, the members of the community are burdened by the *ubuntu* shown by *Mogodi* to be loyal. Such loyalty may not only manifest in making good their promise, but also in perpetuating the custom base of *Mogodi* in all his businesses.

Trade may be a private affair but it does affect other members of the community, especially the business community. Inasmuch as the principle of saying 'I am sorry' in common law defamation is meant to resolve disputes and restore peace in communities, the same can be extended to business disputes to restore peace and preserve relationships in business communities. Treating the transaction with compassion may require a party to a dispute to use rational judgment to avoid the suffering of the other party. Where for instance, after breach of contract the judgment creditor would be taken out of business by the execution of the judgment, the judgment debtor could in the exercise of *ubuntu* retract from the execution of the judgment, because this would result in deprivation of the debtor.

If one applies *ubuntu* to a contractual dispute, for instance, one will go beyond mere allocation of blame and intent, and deal with the apportionment of blame. One will also consider how allocation of losses would affect each party. Where 'I am sorry' would leave each party desirous of continuing the relationship, and then the matter should end there. This compares with what Unger refers to as formality and solidarity.¹⁰⁶

105 See Louw for a further illustration and comparison with a "stokvel," Louw "Ubuntu" 3. Louw defines a stokvel as "a wide range of community-based financial arrangements according to which resources are pooled and then again disbursed to members as either (interest-free) loans or payouts" 9.

106 Unger 1977 *Law in Modern Society* 208.

The idea of reforming the commercial dispute resolution aspect of law by infusing in it *ubuntu*, is justified by the general view that South African law should be indigenised or Africanised.¹⁰⁷ This goes for the entire continent.

4.2.3.2 Status and substitution

The principles of status and substitution are universal in African ICL.¹⁰⁸ Status means that one cannot enter into a transaction with another one of a different status. For example, an unmarried man cannot sue a married man. He would have to be represented by a member of a family who is himself married.¹⁰⁹ In the case of *Boloko v Lehlaka*¹¹⁰ a stepmother had made an undertaking to pay compensation in the form of six cattle for the abduction and seduction committed by her stepson of over 40 years of age. The contract was held to be valid in both civil and customary laws. Even though the stepson was over 40 years of age, he could not conclude the contract under customary law because he was not married. In the same breath, it is common in all the customary laws of Africa that a member of the family can always recover a debt on behalf of a member of family who is liable to do so.¹¹¹

4.2.3.3 Prescription

The above case in 2.3.2 demonstrates one other important attribute of African ICL in the context of contracts. In Africa, a debt does not prescribe. Driberg exposes this principle in the following manner: "A debt or a foul is never extinguished till the equilibrium has been restored, even if several generations elapse."¹¹² This is at stark variance with the Western principle of prescription or statute of limitations.

Prescription rules often set time limits for instituting an action against a defaulting party. Most countries of the world have rules on prescription whether sourced from statutory or judge-made laws. Whenever the principle is applied in court, there are

107 Rautenbach "Exploring the Contribution of *uBuntu*" 21.

108 Driberg 1934 *Journal of Comparative Legislation and International Law* 232.

109 Driberg 1934 *Journal of Comparative Legislation and International Law* 232.

110 1974-75 *LLR* 1.

111 Driberg 1934 *Journal of Comparative Legislation and International Law* 232.

112 Driberg 1934 *Journal of Comparative Legislation and International Law* 238.

two likely outcomes, namely the court will be applying the prescription rule to throw a case out of court on the basis that it was out of time, or the courts might condone the delay based on a rule called "in the interests of justice." This latter rule speaks to the facts that caused the delay and the reasonableness of the delay. There are as many cases, which are thrown out of court for prescription, as there are those condoned and allowed to proceed. Where there is no condonation the results are absurd.

In this context, the issue of prescription becomes important in two ways: what is its bearing on customary law, and how does mediation itself affect prescription. The former question is the most pertinent as it brings to bear different cultural perceptions on prescription. The previous chapters shed some light on the general customary law approach to prescription in Africa. In most African countries the rule is captured by such sayings as *molato ha o bole*. The spirit is always to restore and preserve relationships.

4.2.3.4 Divinities

In Africa, the concept of law is intertwined with custom, taboos, ordeals, mediumship, divination¹¹³ and the expectations of sharing, play, good company and harmony.¹¹⁴ It is thus difficult to separate morals from legal principles. The two are united by one purpose of protecting and enhancing the "power of life in the universe."¹¹⁵ In the same manner, dispute resolution is related to the religious system.¹¹⁶

To speak of law and reconciliation in Africa is to speak of morality and ritual at the same time.¹¹⁷

Disputes are looked at in this context, that is the context of reconciling the individuals with the community and ultimately with the common good. If one commits an immoral offence, he has his ancestors to punish him. Punishment is not only remitted by those who sit on the dispute but by the entire community in pursuance of what the

113 Lingonge *The Church as the Family of God* 65; see also Ekenke and Ekeopara 2010 *American Journal of Social and Management Sciences* 209-218.

114 Lingonge *The Church as the Family of God* 66.

115 Lingonge *The Church as the Family of God* 66.

116 Van Hoecke and Warrington 1998 *The International and Comparative Law Quarterly* 511.

117 Lingonge *The Church as the Family of God* 65; Driberg 1934 *Journal of Comparative Legislation and International Law* 69-71.

wishes of the ancestors may be. In the end, what is sought to be protected is not only the individual, but also the family, the clan and the entire community.¹¹⁸ Hence, one of the ways of determining the truth was through oath swearing. Oath swearing involved the invitation of divine intervention in the determination of a dispute. Oath swearing was universal in Africa.¹¹⁹

4.2.3.5 Collectivity

Collectiveness is the most crucial of the characteristics of the indigenous dispute resolution process. Grande describes the African tradition of dispute resolution as generally a collective and community-based enterprise.¹²⁰ Van Niekerk cautions against regarding the idea of the collective good as an absolute characteristic of African indigenous law for there are other indigenous mechanisms of protecting individuals in indigenous African law.¹²¹ For example, a story is told of a boy who died of measles. His family sued the man who had entered the village seven years earlier without cleansing or lustration. The culprit admitted guilt and paid cattle in compensation. The moral of the story is, if not cleansed, there will be repercussions for everyone.¹²² Ellenberger offers an insight into the significance of civic obligations in this context in the following terms:

Every Mosuto was responsible for his neighbour. He was liable to be punished for any crime of his neighbour, if he neglected to report it to the chief. A father was responsible for all the members of his family until they married. A village was collectively responsible for each one of its inhabitants.¹²³

This collective element resonated in the punishments as well. In Lesotho, where a villager refused to work for the Chief, the entire village or community from which he came, would suffer the same punishment. If he were fined a head of cattle, for example, every member of the village would have to pay or contribute to the fine.¹²⁴

118 Stealing of planted yam seedling was considered a capital offence in Nigeria, because the act was comparable to exterminating a household: Ehiabhi "Rethinking Alternative Dispute Resolution" Unpublished 4.

119 This was supplanted by evidence during colonialism, Ehiabhi "Rethinking Alternative Dispute Resolution" Unpublished 8.

120 Grande 1999 *JAL* 65; see also Van Niekerk 1998 *CILSA* 165.

121 Van Niekerk 1998 *CILSA* 165.

122 Driberg 1934 *Journal of Comparative Legislation and International Law* 238.

123 Ellenberger *History of the Basuto* 268.

124 Mabile 1906 *Journal of the Royal African Society* 362.

What caused obedience in the community, however, was more than just fear of the punishment or sanctions, but fear of the implications of those sanctions on other members of the community.

4.2.3.6 Sanctions

African indigenous law is generally regarded as being without sanctions. Driberg explains away the absence of sanctions in African law on the basis that there is no need because the law is positive and not negative. Driberg says law in South Africa is not obeyed because it is the act of the sovereign or enforced by *ad hoc* sanctions, but it is respected because of the sanctions involved in the "belief and practice of the community."¹²⁵

For the Southern Africans cattle were the most valued for cementing social relations.¹²⁶ There were no regular traders and markets.¹²⁷ In fact in most cases cattle were a medium of exchange in their own right, used for determining the price for *lobola* and paying fines. Even in the modern customary law where payment of *lobola* can be done in money terms, the money price is given a nominal value represented by cattle. In questioning the introduction of trade by the colonists, and perhaps parallel to the Law of Trade introduced by Moshoeshe in 1859,¹²⁸ one of the chiefs of Basutoland, chief Moorosi, said that beer was not for sale but for celebrating or socialising.¹²⁹

Customary law was recognised not because it was backed by the power of some strong individual or institution but because of "reciprocity."¹³⁰ This is demonstrated by how ICL was applied in the prevention and resolution of particularly trade-related disputes.

125 Driberg 1934 *Journal of Comparative Legislation and International Law* 238.

126 Burman *Chieftdom Politics and Alien Law* 10.

127 Du Plessis 2011 *PER* 4.

128 Ashton *The Basuto* 250.

129 Burman *Chieftdom Politics and Alien Law* 115-116.

130 Benson *The Enterprise of Law* 12.

4.2.4 Pre-colonial or colonial exchange systems

The indigenous methods of alternative dispute resolution operated in the context where resources were allocated largely through the gift exchange system.¹³¹ For them to be relevant they must be blended with other forms of ADR that conform to the present exchange system, typically driven by markets. It is safe to say that the traditional exchange system still operates in rural Africa.¹³² If Africa is characteristically rural, it would be ideal therefore to apply this blend of Indigenous ADR because there is no denying the influence of Western culture even in the extremely rural settings.¹³³ Dunnet¹³⁴ categorises African entrepreneurs into the "Traditional" and "Westernised" entrepreneurs and he says many traders fit in the middle between these two groups. Westernised entrepreneurs are orientated in market economies whereas traditional entrepreneurs may be more comfortable in gift systems.

There is a clash between market systems of resource allocation and gift exchange systems when market systems penetrate traditionally gift exchange systems.¹³⁵ On the one hand, market systems are based on precision and adherence to contractual terms, whereas gift systems rely on good faith or reciprocity in the context of contractual undertaking.¹³⁶ Good faith and reciprocity are necessary for the maintenance of business and social relationships. These two doctrines are also not alien to Western-influenced modern legal systems,¹³⁷ but they are given less attention than they require. In Africa they have existed, together with other doctrines for a long time before colonialism.¹³⁸

Slavery and the exchange of goods between Africans and Europeans took place long before colonialism.¹³⁹ The first contact with the Europeans was through trade in

131 Fafchamps 2001 *Journal of African Economies* 110; Meillasoux *The Development of Indigenous Trade and Markets* 82.

132 Erikson 2010 *IJPEE* 201.

133 Van den Berghe *South Africa: A Study in Conflict* 39.

134 Dumett 1983 *Comparative Studies in Society and History* 663.

135 Fafchamps *Market Institutions in Sub-Saharan Africa* 6-12.

136 Fafchamps *Market Institutions in Sub-Saharan Africa* 6-12.

137 They are expressed in such words as altruism, which goes along with building of trust to improve market operations, see Kennett 1980 *American Journal of Economics and Sociology* 344, 346.

138 Fafchamps *Market Institutions in Sub-Saharan Africa* 6-12.

139 1884 marked the epitome of African colonisation as a result of the Berlin conference. By 1900 European countries had claimed 90% of the African territory.

ivory and slaves and that goes back as far back as the 15th century.¹⁴⁰ Both the indigenous chiefs and the European merchants dominated it. One of the punishments for failing to pay a debt was to enslave the debtor.¹⁴¹ This allowed the growth of the slave trade to spiral in that chiefs exchanged punished slaves or those captured in wars by trading them for sugar and other goods. Cowries were amongst the items brought to the African coast by traders to exchange for slaves, thus used as money.¹⁴² The *Diakhankhe* of Senegal and Gambia have traded very successfully both internally and internationally in the years 1600 and 1850.¹⁴³

In the Sudan, contracts for sale were usually made in the presence of one or more witnesses. The purpose was to secure the property even for future generations. In some communities, such as Senegal, children would therefore be called as witnesses for this purpose.¹⁴⁴ In upper Senegal, brokers chosen by parties concluded important contracts.¹⁴⁵ Contracts were concluded in different ways depending on what was being sold. For instance, where the object of sale was a horse, slave, or cattle the buyer paid a small fee in addition to the purchase price to the seller.¹⁴⁶ To negotiate a purchase took as long as it took to decline an offer of sale.¹⁴⁷ This exhibition of patience and good faith could easily be dismissed as procrastination, which was inconsistent with modern economic demands. However, it demonstrates that a simple sales transaction was an opportunity to create relationships.

This rather informal manner of approaching social and economic relationships is universal throughout Africa. It is wrong to suppose that an urbanised African is less of an African than a rural-based African.¹⁴⁸

140 Thiongo *Petals of Blood* 67, has asked: "Where went all the Kenyan people who used to trade with China, India, Arabia long before Vasco da Gama came to the scene"; see also Brooks *Yankee Traders* 10-11.

141 Grant *The African American Slave Trade* 13-15.

142 Grant *The American Slave Trade* 22; cloth currency was also used as a medium of Exchange: Curtin "Pre-Colonial Trading Networks and Traders" 235; see also Wilks "Asante Policy Towards the Hausa Trade" 132.

143 Curtin "Pre-Colonial Trading Networks and Traders" 235.

144 Sundström *The Exchange Economy of Pre-colonial Tropical Africa* 20.

145 Sundström *The Exchange Economy of Pre-colonial Tropical Africa* 21.

146 Sundström *The Exchange Economy of Pre-colonial Tropical Africa* 21.

147 Sundström *The Exchange Economy of Pre-colonial Tropical Africa* 22.

148 Jewsiwicki and Mudimbe 1993 *History Theory* 3.

4.3 Is ICL law?

Deciding on the best definition will help determine if African law in its indigenous state qualifies to be regarded as law. In order to determine if indigenous law is law we must first define "indigenous." The indigenusness of African law will not only help distinguish it from Western or transplanted law, but will help to determine its development and adaptability over time.

4.3.1 The "indigenusness" of law

The word indigenous derives from the Latin word *indigen* meaning "native."¹⁴⁹ According to the Collins English Dictionary, indigenous means "originating in and characteristic of a particular region or country."¹⁵⁰ The United Nations instruments do not provide a definition of "indigenous." Instead, the UN system provides criteria for identifying indigenous people for purposes of political emancipation.¹⁵¹ A more relevant definition is that sourced from the Philippines. Section 3 of the Philippine Act¹⁵² provides a rather comprehensive, albeit specific definition of "indigenous." The emphasis is on continuous occupation of a certain territory, observing the same customs for time immemorial.¹⁵³

For law to be indigenous, it has to apply to indigenous people.¹⁵⁴ "Indigenous people" is defined by contrasting it with colonising or foreign communities. The most

149 Collins English Dictionary 2014 <http://www.thefreedictionary.com/indigenous>.

150 Collins English Dictionary 2014 <http://www.thefreedictionary.com/indigenous>.

151 ANON. UNKNOWN <https://www.un.org/development/desa/indigenuspeoples/about-us.html>.

152 *Philippine Indigenous Peoples Rights Act 1997*: "For purposes of this Act, the following terms shall mean: ... h) Indigenous Cultural Communities/Indigenous Peoples refer to a group of people or homogenous societies identified by self-ascription and ascription by other, who have continuously lived as an organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed customs, tradition and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonisation, non-indigenous religions and culture, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonisation, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.

153 See also Geyer 2010 *PER* 10.

154 WIPO "Customary Law" 2.

common elements of "indigenous" include:¹⁵⁵ pre-colonial, before the establishment of the present state boundaries, pre-conquest, own language, laws and religion, and distinctiveness, etc.¹⁵⁶ For former colonies, "indigenous" most importantly, also refers to traditional, and should be regarded from the perspective of the colonial or post-colonial system. In the context of Africa, therefore, indigenous law refers to customary law that originates in Africa. It entails rules that regulate spirituality, relationships and creates a bond amongst the members of the African communities, and between the people and the environment around them.

The success or failure of the indigenous legal systems is often judged on the basis of the modern law norms. Widner says, for instance, of the newly established dispute resolution councils of Uganda,

Restoring forums such as the resistance council courts in Uganda, the neighbourhood's courts in Somalia, and the *gacaca* in Rwanda establishes a foundation for the successful reconstruction of the rule of law.¹⁵⁷

The contamination caused by the Western perspective of law and the idea of subjecting customary law to adversarial or systemic engagement of lawyers and legal institutions cannot be ignored. Initially (or indeed generally), lawyers were not allowed to appear in customary law courts.¹⁵⁸ However, the setup in the courts, whenever there was a hearing was similar to the common law setup even before the introduction of representation in the courts, i.e. there would be a court president as a presiding officer and not the chief. There would also be a prosecutor where allegations were related to criminal law. The police would always be called in to assist in the execution of a prison term where this was imposed. The Subordinate

155 According to the UN Martinez Cobo Report, International Labour Organisation (ILO), the Indigenous and Tribal Peoples Convention 1989 article 1 (b), and the Working Paper on the Concept of "Indigenous People" of 1996.

156 Geyer 2010 *PER* 10; a number of international law instruments have embraced this definition without necessarily re-enacting it. For instance the UN Declaration on the Rights of Indigenous Peoples does not define "indigenous", but implicitly embraces the same understanding of what "indigenous" relates to, as shown above; WIPO instruments defining the term.

157 Widner 2001 *American Journal of International Law* 66.

158 Koyana 1997 *Consultus* 127; In Lesotho this was changed by the case of *Attorney General of Lesotho v 'Mopa* (2002) AHRLR 91 (LeCA 2002) 654 H to 655A-D.

Courts Act actually introduced the courts and their jurisdiction, which included trying certain crimes.¹⁵⁹

Chiefs played a much bigger role before colonialism than they did during colonialism. They acted as the ultimate implementors of ICL. They were the ultimate bond. They did this through chiefs' forums, which happened to be the only forums available. They maintained a hierarchy of authority that allowed parties access to justice depending on the magnitude of the dispute.¹⁶⁰ However, colonialism changed this.¹⁶¹ This hierarchy was defined more by colonial as well as post-colonial legislation, albeit at the same time curtailing the chiefs' powers.¹⁶² In Lesotho the hierarchy of authority of chiefs as inherited from colonialism, could be depicted by figure 1 below.

As creatures of statute, the statute limited their powers.¹⁶³ They existed side by side with the forma court system that maintained its own hierarchy based on state decisis and precedent. At the lowest level of the hierarchy are local courts. In Lesotho these local courts are not manned by chiefs but by what are called 'court presidents'. They are supposed to administer African law and they somehow constitute a paralle to the chiefs' forums although they have assumed a more formal approach to dealing with disputes. In this dual system of courts, the decisions of the Magistrate courts up to the highest court are supposed to be binding on the chiefs' court.¹⁶⁴ In practice whenever a chief makes a decision a dissatisfied party can always choose to go to the formal courts including the local courts depending on the magnitude of the case.

159 See for examples the Subordinate Courts Act 9 of 1988 of Lesotho, which provides for trial by subordinate courts, of certain crimes of lesser magnitude that those tried at the High Court. Most importantly, these courts were also given power of appeal and review over cases that come from "customary courts".

160 Moran et al. 2009 "Chieftainship and Local Governance in Lesotho" 17; according to Bogonko 1985 *Transafrican Journal of History* 6: during colonialism the role of chiefs changed to be that of a link between the colonial powers and the grassroots, and not to defy but to follow orders of the colonial government.

161 Hugh *Traditional Leadership in South Africa* 52.

162 Moran et al. 2009 "Chieftainship and Local Governance in Lesotho" 17.

163 Dlamini *The Role of Chiefs* 158.

164 Dlamini *The Role of Chiefs* 171.

Figure 1 Hierarchy of chiefs' authority



The colonial influence in ICL is still visible even in this period of post-colonial Africa,¹⁶⁵ even where ICL constitutes an important 'system' of law independent of the modern Western system of law. In a number of cases, colonialist institutions have systematically changed and or substituted ICL with Western principles. For example, in the case popularly known as the Regency¹⁶⁶ case, the court rejected an otherwise firmly held custom by the Basotho that inheritance to the position of chieftaincy is by birth and not by marriage. The South African Court had already made a similar decision in 1894, thus recreating a new rule of customary law.¹⁶⁷

4.3.2 *Is African ICL law?*

The debate on whether African ICL is law is vexatious. Different approaches have been used to determine if the ICL of Africa is actually law.¹⁶⁸ According to Snyder, the analysis of customary law can be divided into three schools of thought.¹⁶⁹ The first postulates that customary law is "folk law in the process of reception;"¹⁷⁰ the second school of thought is based on the notion that neo-traditional ideology developed in reaction to the lost indigenous power of men over women, e.g. family

165 Care 2006 *Oxford U Commw LJ* 27-60.

166 *Bereng Griffith v. 'Mantsebo Seeiso Griffiths* (1926-53) HCTLR 50.

167 *Siziba v Mseni* (1894) 15 NLR 237; see Koyana 2013 *SPECULUM JURIS* 16-17.

168 Ellias *The Nature of Customary Law* 8.

169 Snyder 1981 *Journal of Legal Pluralism and Unofficial Law* 50.

170 Fallers *Law without Precedent* 3.

law and criminal law;¹⁷¹ the third school of thought holds that stereotypes provide the basis for customary law.¹⁷² All three schools provide a critical platform from which to look at ICL. To provide a definition of law in the context of pre-colonial Africa requires a different conceptualisation from the peculiarly Western conceptualisation to an African conceptualisation.

Chiba places law in its social cultural context by constructing a tripartite model of law.¹⁷³ The three levels of Chiba's model of law are official, unofficial and legal postulates.¹⁷⁴ Van Niekerk identifies three most important "postulates" of African indigenous law, namely the superiority of super human forces to man, the harmony of the collectivity and the identity postulate. The identity postulate characterises indigenous African law as amenable to change although able to retain its identity as a system that is harmonious to the collectivity.

To Africans,

...law comprises all those rules of conduct, which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole. Private law deals with acts that disturb the equilibrium; public law with acts or situations, which negate those conditions, which make the maintenance of the equilibrium possible.¹⁷⁵

African legal philosophy puts emphasis on the maintenance of the social equilibrium as opposed to the Western system that extols individual rights.¹⁷⁶

Customary law has a much wider and generic application than what is envisaged by Austin¹⁷⁷ in saying law is "... a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." Customary law would generally refer to rules laid down or established by authority or custom for regulating the behaviour or conduct of members of a country or community subject to sanctions or legal consequences.¹⁷⁸ Unger identifies two elements of customary law: regularity in

171 See Channock 1978 *American Law Studies* 80.

172 See Colson "Land Rights" 197.

173 Chiba (ed.) *Asian Indigenous Law* 5-6.

174 Chiba (ed.) *Asian Indigenous Law* 5-6; see also Bhamra *Constitutionalism and Pluralism* 147-172 for a discussion of the three layers.

175 Driberg 1934 *Journal of Comparative Legislation and International Law* 231.

176 Adewaye 1986 *Journal of Legal Pluralism and Unofficial law* 57.

177 Austin 1885 *J Murray* 316 -317.

178 Ellias *African Customary Law* 54: "A better view seems to regard law as a common, indeed an indispensable attribute of all human societies..."

behaviour and the sentiment of obligation and entitlement.¹⁷⁹ Whereas the sentiment of obligation does exist in African ICL, it is not difficult to conclude that customary law influences regular behaviour.

Customary law changes all the time. The findings of the adjudicators may not necessarily rely on precedent, but consistency is based on doctrines, such as freedom of expression and others.¹⁸⁰ In the end, relationships will be preserved even at the risk of a known precedent. Take for example what happened in the case of Lesotho when King Moshoshoe of the Basotho, instead of punishing cannibals who had killed and eaten his grandfather, gave them fields and cattle for he appreciated that the vicissitudes of *Mfecane* (hunger and strife) were the reason for cannibalism.¹⁸¹ For customary law there is a point when deviation from the rule remakes the rule itself.¹⁸² Indigenous customs can, however, make up indigenous law.

ICL deals more with the procedure than the substance of the law. Therefore, it can be regarded as dealing with methods as opposed to substantive principles of law.¹⁸³ Elechi says, "the African justice system is process-oriented, rather than rule-based."¹⁸⁴ Driberg generally describes African law as a code of positive rules rather than of probabilities.¹⁸⁵ Law as a legal order or legal system is "committed to being general and autonomous as well as public and positive," some of which elements are lacking in customary law. Customary law may be part of the legal system or legal order but taking the Western perspective of law, it would not qualify to be regarded as a legal system in its own right.

Therefore, indigenous law constitutes all rules of conduct that regulate the behaviour of indigenous communities of a given location. The definition given by Mwenda, albeit rather technical seems to capture the essence of ICL,

179 Unger *Law in Modern Society* 49.

180 See pages 84 to 94 above.

181 Mabile 1904 *Journal of the Royal African Society* 367; in present Lesotho law they would be sentenced to death upon conviction: S 297 of the *1981 Criminal Procedure and Evidence Act* and article 5 of the Lesotho Constitution make provision for the death sentence in murder and other cases.

182 Unger *Law in Modern Society* 51.

183 Bamodu 1994 *JAL* 126.

184 Elechi "African Indigenous Justice System" 18; see also Gluckman *Politics, Law and Ritual* 183-185.

185 Driberg 1934 *Journal of Comparative Legislation and International Law* 233.

... the body of law that is 'home grown' in, or autochthonous to, Africa as distinguished from the body of extraneous law introduced in Africa, namely the Western-inspired law introduced in Africa as a result of colonialism.¹⁸⁶

Indigenous communities in the context of the African philosophy of *ubuntu*¹⁸⁷ are characterised by mutual communities, accepting communities, and inclusive, participatory communities.¹⁸⁸

Most of what constitutes customary law was recorded and thus codified by the colonists.¹⁸⁹ The opportunity of rediscovering the true nature or the full extent of African indigenous law may be forever gone with the demise of people who were the repositories of indigenous African law. However, ascertainment of ICL can still be done if one takes codification as but one of the methods of ascertainment of customary law. The other important forms of ascertainment include what has been referred to as "restatement."¹⁹⁰ According to Hinz, restatement refers to less formal recordings of customary law by relying on folklore.¹⁹¹

To codify customary law was an attempt to formalise it. To formalise it has had the effect of making it assume a new identity of formal rules analogous to other legal systems. The absence of formality does not disqualify customary law from being law, for law is never fully formal.¹⁹² However, the attempt at codification or the intervention by the colonists generally distorted the true nature of customary law. Take for instance the *pitso* as a forum of discussion and debate. At the beginning of the 20th century a council of chiefs was formed in Lesotho.¹⁹³ Mahao notes that this forum that had functioned as a place for robust debates, had now deteriorated into a "conveyor-belt" for the colonial decisions.¹⁹⁴ In fact it was systematically abolished and the council set up in its place. According to Poulter,¹⁹⁵

186 Mwenda *Paradigms of Alternative Dispute Resolution* 61.

187 This can be compared with the Japanese concept of *amae* and other similar concepts around the world: see Triandis *et al* 1984 *Journal of Personality and Social Psychology* 1363; Han and Choi 2008 *International Journal of Dialogical Science* 1-6.

188 Van Niekerk 1998 *CILSA* 169.

189 Brainch says customary law opinions were never meant to be treated as Codes. 2003 Brainch 2003 info.worldbank.org/etools/docs/library/108479/brainch_paper.pdf (28.04.16)

190 Hinz "The Ascertainment of Customary law" 89-90.

191 Hinz "The Ascertainment of Customary law" 134.

192 Unger *Law in Modern Society* 205.

193 Mahao 2007 *Speculum Juris* 212.

194 Mahao 2007 *Speculum Juris* 212.

195 Poulter 1972 *African Affairs* 149.

the traditional pitso (a representative general council of the people) was allowed to fall into disuse and insignificance by careful design, albeit with the concurrence of the chieftainship

4.3.3 Constitutional recognition

In most African countries, the question of whether customary law is law seems to be decided by the constitutions and the courts through the so-called repugnancy doctrine.¹⁹⁶ Many constitutions (undoubtedly creations of colonialism or neo-colonialism),¹⁹⁷ recognise customary law as law.¹⁹⁸ However, giving it constitutional recognition, subjects it to the repugnancy provisions of most constitutions and thus makes it vulnerable to Western influences.¹⁹⁹ As the court said in the case of *Shibi v Sithole*²⁰⁰ the validity of indigenous law must be determined by reference not to common law, but to the Constitution. Seeing customary law through the lens of common law led to its codification, in an attempt to formalise it. This in turn led to its marginalisation.²⁰¹ In the case of *Tongoane v National Minister of Agriculture and Land Affairs*²⁰² the Court held that the Communal Land Rights Act,²⁰³ which was meant to secure indigenous land rights was unconstitutional for failure to comply with the procedures provided in the Constitution for enacting legislation of its nature. Most importantly, the views of the occupants of the land and their customary law were

196 This doctrine has generally created mixed feelings among African writers, as it seems to have preserved and allowed development of customary law while at the same time subjecting it to Western law for verification. See Uweru 2008 *African Research Review* 286-295; Taiwo 2009 *Journal for Juridical Science* 89-115.

197 Harding 2004 *Oxford U Commw LJ* 143.

198 Article 156 of the Constitution of Lesotho does not make specific mention of Customary law like its predecessor (Proclamation 2B) does, but it preserves for the Kingdom all forms of law in operation before it. It is to be read with Article 154 which defines customary law as "customary law of Lesotho for the time being in force subject to any modification or other provision made in respect thereof by any Act of Parliament"; Chapter 12 of The Constitution of the Republic of South Africa 1996, (ss 211 and 212) affords official recognition to customary law as well as to the institution, status and role of traditional leadership, Article 2 (4) of the Constitution of Kenya has a repugnancy clause that mentions customary law.

199 CCT 50/03 [2004] ZACC paragraph 44 and 46.

200 *Shibi v Sithole* CCT 50/03 [2004] ZACC 18 (*saflii*) paragraph 43.

201 *Shibi v Sithole* paragraph 43; see also *Alexkor Ltd v Richtersveld Community* 18; *Bhe v Khayelitsha Magistrate* CCT 49/03 [2004] ZACC 17.

202 2010 6 SA 214 (CC).

203 11 of 2004.

ignored. The decision is, however, consistent with the a patently clear desire to indigenise law, as evidenced by Constitutional court pronouncements.²⁰⁴

As the definition of customary law suggests, it changes over time. According to Driberg, "There is nothing rigid or unchanging in them, though the changes may appear to proceed at a very slow rate."²⁰⁵ Constitutions have become the bedrock against which repugnancy of any law is tested. When traditional customary law was challenged in court regarding whether a female can inherit chieftainship in Lesotho, it was on the basis of the constitution.²⁰⁶ In Botswana, the Court did not hesitate to declare a customary law rule unconstitutional and therefore illegal.²⁰⁷ In the case of *Ramantele*, three sisters disputed their nephew's right to inherit the family home under customary inheritance laws that favoured male descendants. The High Court of Botswana ruled that these laws were unconstitutional, asserting for the first time the right of Botswana women to inherit property.²⁰⁸ However conclusive, final and certain this High Court decision may have been, the Court of Appeal further created uncertainty by returning the disputes to the family members where it all began.²⁰⁹ For customary law enthusiasts, this may well mean that the Court of Appeal was sending a message that customary law is capable of resolving the dispute as it were, and that the dispute should not have come through the modern law.

4.4 Comparison of ICL and modern law

Writers on African ICL have also alluded to a great deal of similarity between certain elements of law throughout Africa despite diversity. This provides a perspective from which to look at the question of legal reform and unification or harmonisation in Africa. The purpose for comparison is two-fold. On the one hand, where a principle of ICL seems to have featured, albeit under a different guise in another system foreign to Africa, this should bring into question the resuscitation of the principle

204 See generally Rautenbach "Exploring the Contribution of *uBuntu*" 21.

205 Driberg 1934 *Journal of Comparative Legislation and International Law* 242.

206 *Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea* [2013] LSHC 9.

207 *Mmusi v Ramantele* (MAHLB-000836-10) [2012] BWHC 1.

208 Jonas 2013 *African Human Rights Law Journal*.

209 *Ramantele v Mmusi* (CACGB-104-12) [2013] BWCA 1; see also Rautenbach 2016 *AHRLJ* 163.

where it has become obsolete, or the redefinition of the principle to acquire contextual meaning where it is still applicable. On the other hand, it will help us decide in the end if there is anything new to learn from the ICL or whether we are simply treading a walked path.

For some authors, ICL may not be regarded as a separate legal system, but rather a part of a pluralistic system.²¹⁰ Nevertheless, to the extent that it manifests some form of methodology it compares with other methodical ways of dispensing justice, be they of common law or civil law origin. In other words, ICL does share some similarity concerning these principles and doctrines of justice with other "systems". What makes it a system of law in its own right is its ability to administer and enforce justice thereby meeting the needs of the people to whom it applies.²¹¹ To that extent, there are certain commonalities between ICL and other forms of law.

4.4.1 *Frank pledge*

Analogies might be drawn between "collective responsibility" as an aspect of ICL and what was known as "frank pledge" in Medieval England. Frank pledge is what has metamorphosed into what we now know as bail, release and surety²¹² in the common law criminal law system, whereby a member of a society is allowed to stand in surety of someone who is arrested for committing a crime, for his release. The importance of frank pledge and of suretyship in the present criminal law system, is sharing of responsibility by other members of the community other than the accused. This is referred to as collective responsibility in ICL. A practice is known to have existed where a person could only be arrested if the chief of the village from which he came so permitted. If the chief refused to surrender the culprit, it would be under

210 Merry 1988 *Law and Society Review* 869-870.

211 Munalula 2014/2015 *SADC Law Journal* 94-95. In the most recent publication, Mosito also refers to it as a legal system, without committing to the requirements of a legal system per se, Mosito 2014/2015 *SADC Law Journal* 68-80.

212 Dewey and Kleimola 1984 *The Slavonic and East European Review* 180-191. Dewey and Kleimola make a very illuminating comparison between frank pledge and the Russian concept of collective responsibility, which is in turn reflective of the African conceptualisation of collective responsibility.

collective undertaking that the society would make sure that he attends his trial.²¹³ Sometimes the chief would be prompted by the arresting police themselves to undertake this.

4.4.2 Power dimensions

Power dimensions still play a critical role in indigenous methods. The *panchayats* of India, for instance, have not been able to completely shed the influence of power in making the judicial decisions.²¹⁴ In Africa, these power differentials sometimes manifest in subjugation of other groups in society, such as women and children.²¹⁵ One must hasten to add here that the perception of such subjugation is largely the Western concept of human rights. Those who have to apply indigenous law are often biased against women and others.

A second problem with community systems is that those deciding the cases are often biased against women, poor people, and other underprivileged groups²¹⁶

In some parts of Africa, customary law is interpreted to permit men to beat their wives and to disallow them from inheriting their husbands' property.²¹⁷ On the other hand representation by the head of the clan or family is a general occurrence in ICL,²¹⁸ and is intended to provide protection to the most vulnerable members of the clan or family as the case may be. In other words, it balances out the power differentials between men and women, where women are considered vulnerable. While a negotiated settlement would be an epitome of the use of ADR, it may be soiled by the unequal bargaining power involved. Such unequal bargaining power often results in unfair and inequitable results, unlikely if the court proceeding went ahead.

213 Interview of former Police Chief currently working as assessor at the High Court of Lesotho (3rd May 2016). He further said this practice was discontinued when it was realised that the chiefs were increasingly becoming criminals.

214 Galanter 1972 *Comparative Studies in Society and History*; Palanithurai *Dynamics of the New Panchayati Raj System in India* 166.

215 See generally, Anker *et al* (eds) *Women's Roles and Population Trends* 188.

216 Messick "Alternative Dispute Resolution"2.

217 Kane *et al* "Reassessing customary Law Systems" 15; Tripp 2004 *African Studies Quarterly* 1-19.

218 Driberg 1934 *Journal of Comparative Legislation and International Law* 233.

In criminal matters too, some settlements may give an impression that justice is for the rich. Take as an example a rapist who is ordered, based on restorative justice, to pay R100 000.00 to his victim in lieu of a jail sentence.²¹⁹ Alternatively, a relatively better-off person is given a fine that is "ridiculous" in relation to the crime committed.²²⁰ This somewhat justifies the main tenet of the African legal system, namely that the decision is reconciliatory and consensus-driven. In the rape case, the victim herself did not want the rapist to go to jail. In the latter case, compensation was paid, and in addition, a jail term was handed down, albeit suspended.²²¹

The influence of colonialism in entrenching the influence of power in resolving disputes is undeniable. History tells of tributes that had to be paid by Africans to the colonialist in some cases if not all for faults committed by the colonialists. In most cases payment of such tributes was forced.²²²

Failure to appreciate the structural differences between ADR in its traditional form and modern dispute resolution, especially the socio-economic context in which they operate, is the major cause of failures of the transplants in Africa. Rose²²³ points out that those modern mediators are formally trained and are expected to be neutral, formal and structured. By contrast, in African communities mediators are appointed informally through experience, are known to the disputants and operate collectively through councils of elders. Where ADR is implemented, therefore, there is a need to continuously train the mediators.²²⁴

219 *The Citizen* (Gauteng) 13th May 2015.

220 "The Star" newspaper reported a case of members of the AWB party in South Africa, who beat a black man to death for allowing his half-breed dog to mate with their pedigree dog. The two white men were both found not guilty of culpable homicide. They were later on ordered to pay over R34 000.00 in compensation to the family of the deceased. The significance of this case is not only the inequity of the fine imposed; in market terms it would also be a ridiculous amount of money. In customary law it would be acceptable for its nominal if not token value and could sufficiently serve the purpose.

221 See Kleyn and Viljoen *Beginner's Guide for Lawyers* 141.

222 Carton *Blood from Your Children* 33.

223 Rose 1996 *Africa Notes* 5-7.

224 Muigua Muigua-caselap.uonbi.ac.ke 67 (04.11.15).

4.4.3 Due care and reasonableness (standards)

The concept of the reasonable man is reflective of customary law. The concept entails that judgment must be based on what a member of the community from which the man comes would think.²²⁵ It is a fictitious member of the society based on the collective beliefs of that society. If it is thus community-based, it therefore speaks to customary law. Moreover, it manifests the collective nature of ICL.

A related standard to that of reasonableness is the so-called *good faith* in common law systems or what is known as *abuse of right* in civil law systems. "To act in good faith is to exercise one's formal entitlements in the spirit of solidarity."²²⁶ The following expression of good faith seems analogous to the Biblical saying that "you must do unto others as you would have them do to you"²²⁷ and to the adage of *ubuntu* that, "I am because you are."²²⁸ Thus, customary law is not too contrary to the principles of good faith, as found in common law systems. It is an equally good foundation for establishing, maintaining and enhancing relationships. Unger describes good faith as follows:

The good faith standard requires one to find in each case the mean between the principle that one party may disregard the interests of the other in the exercise of his own rights and the counter principle that he treats those interests exactly as if they were his own.²²⁹

For a person to act in good faith there must be trust. ICL was premised on trust. Trust between traders was important for the preservation of relationships. The continued relationship itself was regarded as a valuable asset that could not be risked unnecessarily.²³⁰ Lamenting the absence of trust in modern markets and how that affects trade, Kenneth calls for a revisiting of true altruism and is optimistic that altruism could lead to markets operating more efficiently than in its absence.²³¹

In South Africa, the court had an opportunity to equate good faith with *ubuntu* or to vindicate good faith through *ubuntu* in the case of *Everfresh Market Virginia Pty Ltd v*

225 The question of due care usually arises in negligence cases, e.g. *Bayer South Africa v Frost* 1991 (4) SA 559 and *Hamann v Moolman* 1968 (4) SA 348.

226 Unger *Law in Modern Society* 210.

227 Luke 6:31 expressed as follows in Matthew 7: 12 "In everything, therefore, treat people the same way you want them to treat you, for this is the Law and the Prophets."

228 Nussbaum 2003 *Reflections* 21-26.

229 Unger *Law in Modern Society* 210.

230 Stringham *Anarchy and the Law* 602.

231 Kenneth 1980 *American Journal of Economics and Sociology* 344, 346.

*Shoprite Checkers Pty Ltd.*²³² Although the argument was not well articulated to persuade the court, the court agreed that the Constitution does permit it to develop the common law, including with reference to customary law principles.

4.4.4 Restorative justice

Restorative justice "is a process where all the stakeholders in an injustice have an opportunity to discuss in an undominated dialogue what might be done to repair the harm, meet the needs of those affected and prevent recurrence of injustice."²³³ Restorative justice has always been part of indigenous African law, as is evident under *ubuntu*.²³⁴ During the *Mfecani* of *Lifaqane*²³⁵ vicissitudes, some people turned into cannibals. As described previously, in Lesotho the cannibals killed and ate the father of King Moshoeshoe.²³⁶ Upon their arrest, trial and conviction, the King ordered that instead of being killed, the cannibals should be given food, cleansed and given cattle and land to resume normal life.²³⁷ The result was that many other cannibals were converted back to civilisation.²³⁸ In the case of *State v Makwanyane and M Mchunu*²³⁹ Sachs observed that amongst the Cape Nguni the death sentence was only reserved for murder by witchcraft,²⁴⁰ because it threatens the very fabric of a legal system, i.e. no legal principles are capable of dealing with it.²⁴¹ Indeed King Moshoeshoe had already abolished it for all the crimes including witchcraft as was later endorsed by the colonialists.²⁴² There were only three levels of punishment then, namely community work, banishment or death. Imprisonment is generally perceived as a colonial import to most African countries.²⁴³

232 2012 (1) SA 256

233 Braithwaite *Meta Regulation of Justice* iv.

234 Mahao 2010 XLIII CILSA 330.

235 Also written *difaqane*, it refers to disturbances related to *mfecane* among the Sotho and Tswana tribes on the Highveld. *Mfecane* generally means "conflicts in the northern region of South Africa." See Paton *The Land and the People of South Africa* chapter vii.

236 Casalis *The Basutos* 285; Ellemberger *History of the Basuto* 227.

237 Casalis *The Basutos* 19-20; Ellemberger *History of the Basuto* 227-228.

238 Mahao 2010 XLIII CILSA 331.

239 CCT/N3/94.

240 Mahao 2010 XLIII CILSA 332.

241 Driberg 1934 *Journal of Comparative Legislation and International Law* 236.

242 Casalis *The Basutos* 220.

243 *Deidre Falling through the Cracks* 14.

4.4.5 Equity

Equity is "... the intuitive sense of justice."²⁴⁴ Many of the principles of customary law are part of what was known as equity law in England. Presently, most jurisdictions regard their labour or industrial courts as courts of equity.²⁴⁵ Willie defines equity as follows:

Equity is a collection of principles, based on natural law on conceptions of ideal justice;...national law was far from perfect; that to apply it strictly would in many cases lead to injustice...In Roman Law...a body of principles was developed by Praetors in order to counteract the harshness and subtlety of existing law.²⁴⁶

In South African and Lesotho Law, equity is not applied as law as was the case in England. As the definition above suggests, it is applied in its broad sense.²⁴⁷ In the context of customary law, *ubuntu* provides a similar principle to the principles of equity as adequately submitted by Bennett.²⁴⁸

4.5 Conclusions: Towards a common law of Africa

Judged then by Western standards of justice, many indigenous laws would be found to be unjust and should consequently be reformed or abolished. By the same token, if judged within the framework of indigenous rural postulates, Western law may be regarded as falling short of the standards of justice of indigenous jurisprudence.²⁴⁹

Applying the theory of legal pluralism and legal transplants, it is concluded that ICL is law. ICL does not have to conform to logic to be law. Compared to common law, Lord Porter retorted, in the case of *Best v Samuel Fox and Co. Ltd*²⁵⁰ that,

the common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection.

244 Unger *Law in Modern Society* 205.

245 *Lesotho Wholesalers v Metcash Trading* (CIV/APN/38/99) paragraphs 13, 14.

246 Gibson *Wille's Principles of South African Law* 15-16.

247 *Kent v Transvaalsche Bank* 1907 TS 765 and *Lesotho Wholesalers v Metcash Trading* (CIV/APN/38/99) for RSA and Lesotho respectively.

248 Bennett 2011 *PER* 30-53.

249 Van Niekerk *CILSA* 165; See Chiba (ed.) *Asian Indigenous Law* 2.

250 (1952) 2 TLR 246, 247.

Holmes further says, "The life of the law has not been logic: it has been experience."²⁵¹ Any differences between ICL and European (common) law are differences of degrees and not kind.²⁵²

The inevitable conclusion to make is that customary law should be seen as a creature of dialectical relations of opposition and support from colonial influence. There is no need to dig beyond the colonial period to find the "true" ICL. Records dating from colonialism provide an adequate memorial to customary law; recognition of customary law in the constitutions of most African countries is intended not necessarily for unrecorded forms of customary law, but as recorded principles or the so-called "living law" form of customary law.²⁵³

Is it possible to argue that judging by the common elements of indigenous law throughout Africa, which equally compare, to some extent with the Western common law, that we have a family of law unique to Africa? It appears that a useful criterion for determining the existence of an African legal family is first to consider the historical background and development of the legal system in question. This requires a fresh perspective born out of the historiography of Africa. Amongst the sources of African customary law are history books, which were written by missionaries with little or no training whatsoever in history writing. As said earlier on, these recordings are not without the colonists' biases.

Taken together it is found that the African customary law systems share common traits at least as far as other provisions besides substantive provisions are concerned.²⁵⁴

Moreover, ICL, like most systems, has not matured. It is in a state of evolution; it still lacks many answers to questions of legal principles.²⁵⁵ That would seem to make it less of law as it lacks certainty. It is, however, merely a legal situation in which "dominant legal systems recognise and support the local law of politically

251 Holmes *The Common Law* 1.

252 Elias *African Customary Law* 36.

253 The importance of living law has been recognised by the first and most important writers in Customary law. For example, Bartolus, a leading Italian Jurist on medieval Roman civil law, was of a view that since custom "existed on the interface between formal law and popular practice, it would be a mistake to rely on juristic writings and ignore what was actually going on." As quoted in Tobin *Why Living Law Matters* 16.

254 Bamodu 1994 *JAL* 126.

255 *Ramantele v Mmusi* (CACGB-104-12) [2013] BWCA 1 paragraph 25.

subordinate communities".²⁵⁶ Customary law, like common or statutory law, has neither been static nor without reform. Suggestions for reform in Nigeria, for instance, on the law of succession, have been based on experiences from South Africa and elsewhere.²⁵⁷

In Africa, there has been a coincidence of legal orders in the form of "common law," "civil law" and "customary law". If emphasis is put on the advantages of each, then we shall have two or three reinforcing orders that provide a powerful common legal system,²⁵⁸ notwithstanding that the convergence between common law systems and civil law systems seems inevitable regard being had to increasing parliamentary law making and/or codification of customary law. Finally, the conclusion is drawn that yes, ICL is rich in the most fundamental of the human co-existences, and relationships, *ubuntu* and collectiveness. Both these concepts are the ideals of the welfare state where capitalism has thrived. Recognising it now will help societies to set it up as a goal to achieve.

The justification for reform in Africa is not only that litigation is expensive and that it has not worked, but that it has also been inherited from the West. However, research for the alternatives should have gone beyond the pros and cons of litigation to question the very relevance of the adversarial system in the first place, particularly in the countries with a common law tradition. There is a need to research and debate African law further, not for purposes of discovering historical law, but for interpreting recorded African law to address present challenges.²⁵⁹

It has already been shown that law develops through outside influences. To argue for a complete overhaul of the colonial system borders on extremism, is like arguing that the descendants of colonialists must go back to their "home" countries, which would be preposterous. Our societies, indigenous and otherwise, have already been victims of modernisation in all its forms. While there is indeed negativity that has

256 Fallers *Law without Precedent* 3.

257 Diala 2014 *AHRLJ* 633-635.

258 In countries like Senegal there are actually three legal systems in one country.

259 Onyango *African Customary Law* 1-2.

come with reforms through colonisation, there is also a strong argument that there have also been advantages that have come with these reforms.²⁶⁰

Private ordering takes the form of bilateral relationships, trade associations, communal norms or market intermediaries.²⁶¹ In an increasingly globalising and regionalising world, such associations, including cooperatives, are not in short supply. Africa comprises entirely of developing countries with this general characterisation of dysfunctional economies.²⁶² It would not be difficult, therefore, to not only recognise the existence of private ordering, but also to harness it for the full integration of the informal sector into the formal sector and to utilise it in the formal sectors of the African economies as well.²⁶³ McMillan and Woodruff's view is that private ordering can be achieved spontaneously.²⁶⁴ That does not exclude the possibility of systematically creating an environment conducive to private ordering where ICL is blended with the transplanted ADR to resolve commercial disputes between traders in different Africa countries. In the next chapter the possibility of that blend, including ICL as the main ingredient, will be explored.

260 For an argument that this kind of argument should be abandoned see particularly Boaduo 2008 *Journal of Pan African Studies* 93.

261 McMillan and Woodruff 2000 *Michigan Law Review* 2421.

262 McMillan and Woodruff 2000 *Michigan Law Review* 2423.

263 Juma 2007 *Lesotho Law Journal* 1-40.

264 McMillan and Woodruff 2000 *Michigan Law Review* 2423.

CHAPTER 5

Relating IMADR to intra-African trade disputes: Introducing the IMADR through informal justice systems (IJS)

5.1 Introduction

Legal justice is not always actual justice.¹

In Chapter 3 it was established that most development assistance is channelled through what is called "the rule of law" approach to legal development, which has generally been top-down rather than bottom-up and has not focused on access by going to where people actually are. In Chapter 4 it was further submitted that transplantation of laws into Africa from colonialism to the present ADR reforms has not tainted the nature of ICL, and further that ICL could actually constitute the common law or the common law of Africa. Most of what is called ICL comprises procedural rather than substantive principles of law and their main characteristic is that they make no distinction between civil and criminal law. They seem not to be tuned to deal with civil commercial disputes, although there are historic instances of their application in commercial disputes.

In this chapter, the fundamental question is whether the IMADR as gleaned from ICL bear any relevance to the nature of the commercial disputes plaguing intra-African trade today. The question is whether the IMADR as gleaned from ICL can be used in commercial settings. That is to say, does the fact that ICL originates from Africa make it more relevant to commercial dispute resolution in Africa? Argument will be made that the nature of trade dictates what methods are relevant at any given point in time. Indigenous methods are characteristically flexible, and would therefore suit any circumstances.

An in-depth look is taken into the nature of commercial disputes arising out of intra-African trade. In other words, customary law, based on ADR at two levels, namely at the national level and the regional level, (i.e. within African states and between African states), is addressed. It is important in this regard to begin by highlighting the

1 Menkel-Meadow 2004 *Journal of Legal Education* 8.

level of and the trends in intra-African trade;² to be followed by a look at how the disputes arising therefrom have been solved.³ In other words, the failures of the non-ICL methods in resolving the commercial disputes that have visited intra-African trade will be highlighted in particular. Thereafter the chapter will narrow down on the failures of the alternatives put in place, i.e. regional and or national ADR.⁴ Lastly, suggestions regarding how the ICL-born alternatives could help will be put forward.⁵

In order to address the last point fully, a few elements gleaned out of ICL will be suggested to enhance the available and newly introduced alternatives, or where no alternatives have been put in place, a better mixture of those alternatives will be suggested (Western ADR plus IDRM). Reliance will therefore be on the transplant theory.⁶ In order to develop a mechanism that works for intra-African trade, common features will have to be found in the traditional indigenous methods, having identified those key elements that are common in the whole ICL. On the other hand, final submissions are based on the debate between advocates of regulation for the formal sector and those who are against increased regulation in the informal sector. Competing theories on how to deal with the informal sector include the option between criminalisation and legalisation.

In a broader sense, it will be important to consider, even if briefly, questions of whether there is a need for regulation to deal with aspects of economy that are market-oriented. Cave and Williamson⁷ make the distinction between the "normative" and "positive" theories of regulation. They posit that under positive theory the government intervenes in regulation merely for political or financial rather than economic reasons, whereas under the normative theory the motives for regulation can be divided into two types: economic and social reasons. Economic regulation is supposed to deal with market failures, whereas social reasons deal with protection of the public interest. This in turn depends on the importance of intra-African trade to African economies.

2 At page 114.

3 Section 5.1.

4 Section 5.3.

5 Section 5.4.

6 Cairns 2013 *Ga J Int'l & Comp L* 637; Ewald 1995 *The American Journal of Comparative Law* 489-510; Gillman 2009 *Georgetown Journal of International Law*; Greco 2009 *Pepp Disp Resol LJ* 649.

7 Cave and Williamson "The Regulation of British Broadcasting" 160.

5.1.1 Background: Current status and importance of intra-African trade

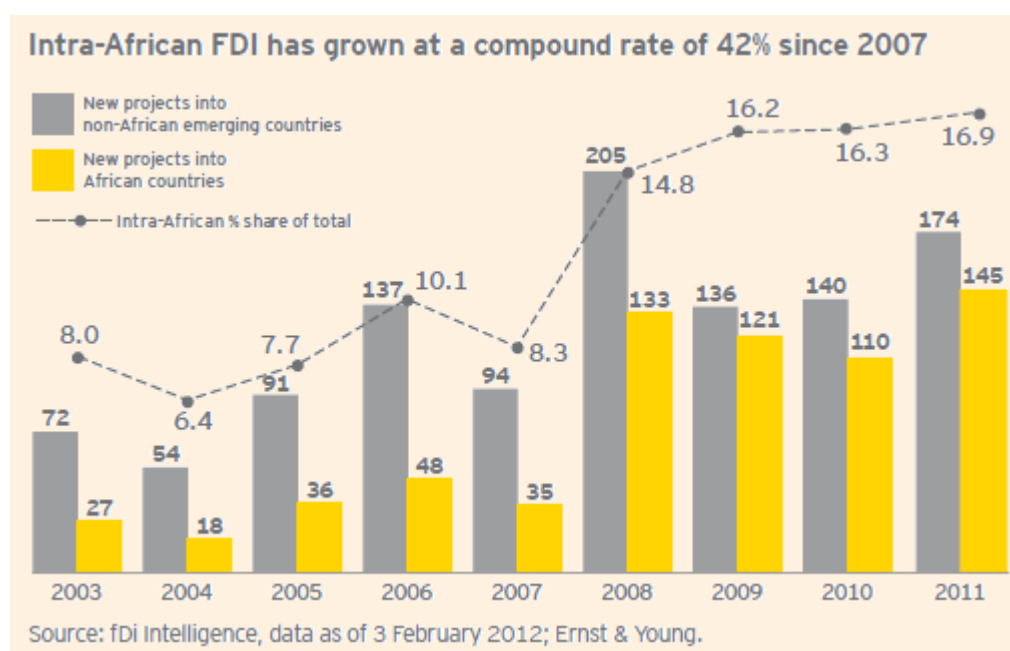
Intra-African trade and trade between Africa and the rest of the world pre-dates colonialism.⁸ The current status of intra-African trade is widely recorded.⁹ Intra-African trade also enjoys some degree of recognition. The degree of participation of African countries in intra-African trade varies over time and over geography.¹⁰ It is sometimes affected by political unrests that have plagued Africa over the years.¹¹ There is credibility in the suggestion that political unrest in neighbouring countries affects the economic growth of the other countries, the so-called "neighbours curse".¹² Statistics also show that intra-African trade has grown over the years because of an increase in regionalisation and harmonisation. For instance, COMESA is said to be the single largest trade destination for Kenyan goods.¹³ This is evidenced by the growth in intra-African Foreign Direct Investment (FDI), as shown in figure 2 below. The table show that intra-African FDI has grown steadily since 2007.

In some cases, optimistic reports have been made about the comparative value of the African market, to the effect that,

Trade experts see the bloc, which accounts for 69.5 per cent of the country's total exports to African countries as better growth pedal compared to European Union where preferential trade terms generated export worth Sh100.3 billion against total import bill of Sh171.9 billion.¹⁴

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- 8 Thiongo *Petals of Blood* 67; Brooks *Yankee Traders* 11-12.
9 Foroutan and Pritchett 1993 *Journal of African Economies* 74-105; Yeats *Some Empirical Evidence* (November 1998) 1-24.
10 Yeats *Some Empirical Evidence* (November 1998) 1-24.
11 Ades and Chua 1997 *Journal of Economic Growth* 279-304.
12 See generally Ades and Chua 1997 *Journal of Economic Growth* 279-304; Easterly and Levine 1998 *Journal of African Economies* 120-142.
13 Accounting for Sh112.9 billion or 32 per cent of last year's exports against imports of only Sh25 billion: see Omondi 2010 <http://www.businessdailyafrica.com/Corporate-News/-/539550/1066764/-/vba0ay/-/index.html>.
14 Omondi 2010 <http://www.businessdailyafrica.com/Corporate-News/-/539550/1066764/-/vba0ay/-/index.html>

Figure 2 Intra-African Trade FDI



Obviously, this recorded growth should come from the formal economies of trading countries. It does not account for unrecorded trade taking place particularly at the borders.¹⁵ Such trade contributes to the general growth of formal intra-African trade because of linkages that it has with formal trade.¹⁶ Formal or informal, growth in intra-African trade implies growth in potential commercial disputes. The nature of the trade itself generally dictates the mechanisms that can be used to resolve resultant disputes.¹⁷ Intra-African trade is predominantly informal in nature.

5.1.2 The informal nature of African trade

When traditional communities encounter markets, the gift exchange or reciprocity exchange should disappear.¹⁸ Through colonialism, market systems were re-introduced into Africa and they affected, in various ways, the gift exchange system.¹⁹

15 For this is virtually unrecorded trade as shown by Ackello-Ogututu and Echessah "Unrecorded Cross-Border Trade" 59; Macamo *Unrecorded Cross-Border Trade* 11.

16 Kranton 1996 *The American Economic Review* 830-851.

17 Kranton 1996 *The American Economic Review* 836-837.

18 Kranton 1996 *The American Economic Review* 833.

19 This was not without resistance. Saul discusses how certain African populations resisted, successfully the introduction of money into their age-old commerce: Mahir 2004 *American*

In its place, however, is not a completely formal market system. Very little is known about how markets operate in practice in Africa.²⁰

The reciprocity exchange system persists, albeit parallel to the more formal exchange systems, but equally complex.²¹ The system uses all media of exchange but following the traditional methods of contract formation and enforcement. The result is what is commonly known as dual economies, analogous to duality of law.

Duffy would argue that these dualisms do not exist, instead informal traders are part of a large complex system comprising of informal and formal traders extending to the global world.²² There is a consensus that dual economies are existent and universal in Africa.²³ It seems that there is a constant friction between the formal and the informal sector, and it was predicted by many that the informal sector would eventually be subsumed by the formal sector.²⁴ The gap between the informal and the formal sector in each economy may impede or aid the disappearance of the informal sector.²⁵ In Kenya, the informal sector grew despite this prediction that the formal sector would eventually swallow the informal sector, particularly in labour supply.²⁶

The concept of the "informal sector" was coined in the 1970s.²⁷ Informal trade owes its origins to the colonialists' imposed borders, "divergent currencies" and "repressive commercial legislation on pre-colonial trading networks in an attempt to gain control of the market."²⁸ The structural adjustment programmes introduced in the 1980s,²⁹

Anthropologist 71; A similar resistance persisted among the Dagaaba of Ghana: Yiridoe 1995 *Nordic Journal of African Studies* 16.

20 Bigsten *et al* 2000 *The Journal of Development Studies* 2.

21 Meagher 1990 *Review of African Political Economy* 64-67.

22 Duffy 2007 *Journal of Modern African Studies* 185-186.

23 Bigsten *et al* 2001 *The Journal of Development Studies* 702.

24 Onwe 2013 *Journal of Economics and Development Studies* 60-74.

25 Gibson and Kelley *A Classical Theory of the Informal Sector* 81-96.

26 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 252.

27 Hart 1973 *The Journal of Modern African Studies* 61-89. Other more historic terms include: underground economies, black market economies, subterranean, shadow, informal, hidden, parallel, black, clandestine, second, household: Gerxhani UNKNOWN www.ifwea.org/@Bin/217843/Gerxhani.pdf 5.

28 Meagher 1990 *Review of African Political Economy* 65.

29 Meagher 2001 "Throwing out the Baby to Keep the Bathwater" 48.

and high levels of migration further exacerbated informal cross-border trade.³⁰ Intra-regional migrants, for instance, constituted 24% in Ghana in the 1960s.³¹

Informal trade exists amid various regional institutional, yet haphazard attempts at regulating intra-African trade. None of these policies has made provision for dispute resolution in the informal sector as part of the intra-African trade. These policy initiatives include the following: NEPAD, which is intended for political and economic development,³² and SADC, which has tariff reduction as one of its main goals, through the trade protocol, amongst others.³³ The rest are country-specific.³⁴ Although policy making is regarded by many as "selfish"³⁵ in Africa, it is but a start. Ideally the policy initiatives aimed at the informal cross-border trade are aimed at poverty reduction and economic empowerment.

Informal trade has often been associated with the struggle for economic empowerment. At the national level, an attempt to regulate the trade has often been met with resistance. In the case of Lesotho, for instance, a classic, yet recent example is the case of *Khathang Tema Baitsooli v Maseru City Council*,³⁶ which revolved around the translation of the right to livelihood into the right to life. The West-Nile in Uganda provides another example of informal cross-border trade that is morally justified, albeit illegal, by a people who feel that they have been denied the economic freedom that they deserve.³⁷ Cross-border trade is thus viewed as legitimate in the entire region.

30 Adepoju 2001 *International Migration* 43-60.

31 Keith 1973 *The Journal of Modern African Studies* 61.

32 www.nepad.org

33 Articles 3 and 4 of the SADC Protocol on Trade (1996); See the criticism by Kalenga "SADC Trade Protocol" 17.

34 They include the following examples from South Africa: Cross-border and Spatial Development Initiatives, higher rates of economic growth and employment creation. (Localised border economies); Manufacturing and Export Promotion policies – emphasises production of products that actually dominate in the informal sector; Strategy for development and promotion of small business in South Africa 1995, uplifting the role of SMMEs.

35 Ackello-Ogutu *Informal Cross-Border Trade* 1.

36 *CONST/C/1/2004*; see similar cases in RSA, *South African Informal Traders Forum v City of Johannesburg*; *South African National Traders Retail Association v City of Johannesburg* (CCT 173/13 ; CCT 174/14) [2014] ZACC 8.

37 Titeca and De Herdt 2010 *Africa* 581-582 and 585.

Distinction is drawn between formal and informal³⁸ and (informal) cross-border trade,³⁹ and indeed, what is known as "flea-market trade"⁴⁰ in America. Hart says the distinction between informal and formal incomes lies in the distinction between wage earning and self-employment.⁴¹ Informal trade activities range from "marginal operations to large enterprises, whether their productivity is relatively high or low remains a question of empirical verification." Informal trade is still high in Africa,⁴² and is a continuum of historical trading patterns in Africa.⁴³ In fact, according to Lesser and Moisé-Leeman,⁴⁴ in some countries informal trade constitutes a significant volume of the economy. The informal economy accounts for 50% of the GDP in Russia.⁴⁵

According to Ackello-Ogutu, goods passing through the unofficial routes without customs officials make up only one form of unrecorded trade.⁴⁶ Other forms of unrecorded trade include under-invoiced goods and goods that are not declared at customs, amongst others.⁴⁷ He says informal trade is a misnomer.⁴⁸ If we accede to the notion that "informal trade" is a "misnomer", especially if regard is had to its linkages with the formal sector, then to this extent it does not require exclusive dispute resolution methods, but the dispute resolution methods employed by the formal sector would be more efficient if they cater for the informal sector as well.

Cross-border traders largely fall into five categories⁴⁹ Which include

traders who travel to South Africa for short periods (1-4 days) to buy goods (usually from formal sector retail and wholesale outlets and farms) to take back to their home country to sell. These goods are sold in markets, on the street, and to formal sector retail outlets and to individuals. This category of trader appears

38 Bigsten *et al* refer to it as "low wage sector" trade: Bigsten *et al* 2001 *The Journal of Development Studies* 704.

39 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy*; Cross-border trade can also take the form of internet trade: Sebenius 2002 *Harvard Business Review* 76-85.

40 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 231.

41 Keith 1973 *The Journal of Modern African studies* 68.

42 As of 2000 it was estimated at 43%, almost equal to formal trade: Lesser and Moisé-Leeman *Informal Cross-Border Trade* 12.

43 Meagher 1990 *Review of African Political Economy* 64-83.

44 Lesser and Moisé-Leeman *Informal Cross-Border Trade* 13.

45 Cross 2001 *Tex L Rev* 18.

46 Ackello-Ogutu *Methodologies for Estimating Informal Cross-Border Trade* (August 1996) 3. MacGaffey *Entrepreneurs and Parasites* 69,112,139 and 170.

47 Ackello-Ogutu *Methodologies for Estimating Informal Cross-Border Trade* (August 1996) 3.

48 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 36.

49 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 37.

to be the most numerous and can be called "shoppers"; traders who travel to South Africa for longer periods (1week to 2 months) who carry goods to sell in informal and retail markets. The profits are then invested in buying goods which are then taken back to their home countries for sale in informal and formal sector markets; traders who travel across three or more countries including South Africa, buying and selling as they go; a seemingly small category of traders who only bring goods from their home country to sell in South Africa without taking goods out for sale in their home country; and South Africans who take goods to sell in other Southern African countries in markets, on the street and to formal sector retail outlets.

In South Africa, the business involves traders from a number of SADC countries, including Angola, Lesotho, Botswana, Mozambique, Malawi, Namibia, Zimbabwe, Swaziland and Zambia.⁵⁰ This sector recruits from the small entrepreneurs,⁵¹ refugees,⁵² and a high number of educated persons.⁵³ It therefore constitutes a form of trade running "parallel"⁵⁴ with formal trade. Characteristics of parallel trade are the following:⁵⁵ existence of the same ethnic groups on both sides of the border, the important role played by commerce, and the preponderance of migrant labour moving or remitting wages across the border. The combination of all these categories forms "networks" that serve as sources of information and rules of the trade.

"Networks" are "collections of facilities and rules that facilitate contact between users of a good or service ('network members') and thus enable the realisation of network effects."⁵⁶ They thus benefit their members "by enforcing norms that facilitate a variety of activities, such as social interaction, spiritual support, and the opportunity to exchange goods".⁵⁷ Examples of such pre-colonial networks abound. The Wangara, for instance are said to have pioneered "intra-regional long distance trading and investment" in West Africa.⁵⁸In East Africa, the Yao and Nyamwezi

50 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 40.

51 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 40.

52 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 40.

53 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 40.

54 Meagher 1990 *Review of African Political Economy* 65-66.

55 Meagher "The Hidden Economy" 504; Meagher 1990 *Review of African Political Economy* 65-66.

56 Aviram 2004 *Yale Law and Policy Review* 5.

57 Aviram 2004 *Yale Law and Policy Review* 5.

58 Ochonu ME "The Wangara Trading Network" 9.

networks dominated.⁵⁹ These networks persisted until, and survived the advent of colonialism.

In Ghana, it is reported that there exists an extensive network of traders to serve as go-betweens.⁶⁰ Rather than solicit a supply of lumber, say from an unknown company directly, a firm enlists a trader that it knows and that knows the lumber company. The personal relationships provide the buyer and seller with some assurance that the lumber will be delivered and payment received, but at a price and this has the effect of raising the costs of doing business.⁶¹

The continuation and sustenance of this kind of trade depends on the reputation of participants.⁶² Bernstein refers to this as the "reputation mechanism,"⁶³ And it featured prominently in the networks mentioned above. This situation is analogous to the 11th century trade in the Mediterranean,⁶⁴ and 19th century Mexican-Californian trade, where, by sharing information and punishing "cheaters," coalitions of long-distance traders ensured the honesty of agents.⁶⁵ This is resonant of the principles of *ubuntu* in that dispute resolution was not conditioned on future relationships per se. Moreover, as demonstrated by Milgrom *et al*,⁶⁶ the reputation mechanism was effective among a large community of merchants because of the information provided by the Law Merchant system in the 12th and 13th centuries. Formation and enforcement of contracts depended on reputation.

Contracts and agreements are important tools for carrying out trade, whether formal or informal.⁶⁷ These agreements and contracts create obligations between parties.

59 Rockel S *Caravan Porters of the Nyika* 1997 52-62.

60 Fafchamps 1996 *World Development* 427-448.

61 Messick 1991 *The World Bank Research Observer* 121; see also Fafchamps 1996 *World Development* 427-448.

62 According to Clay 1997 *Journal of Law, Economics and Organisation* 210: "The theory of repeated games suggests that when individuals cannot enforce contracts but can observe one another's behaviour, a reputation mechanism may allow them to credibly commit not to cheat. The central idea is that a principal conditions hiring on an agent having been honest in the past and pays an agent a wage such that his expected present value of being honest is at least as large as his expected present value of cheating and being punished. This reputation mechanism, which links past behavior and future payoff, creates incentives that are known ex ante for the agent to be honest ex post and enable the principal to trust the agent".

63 Bernstein 1992 *The Journal of Legal Studies* 116.

64 Greif 1989 *The Journal of Economic History* 857-882; Greif 1993 *The American Economic Review* 525-548.

65 Clay *Trade, Institutions and Law*.211.

66 Milgrom and North 1990 *Economics & Politics* 1-23.

67 Mokyr *The Oxford Encyclopaedia of Economic History* 531.

There is bound to be conflict in any such commercial relationship, especially where performances have to take place in different countries and over long distances.⁶⁸ It becomes a concern of law and or dispute resolution mechanisms where such conflicts graduate into disputes.⁶⁹ Although they may centre on virtually similar aspects, disputes in the context of the intra-African trade may be peculiar because of the nature of intra-African trade.

5.2 Disputes and their resolution

The informal sector is not immune to disputes resulting from contractual performance or non-performance. Disputes relate to late payment or non-payment by clients although late payment is more common than non-payment.⁷⁰ These disputes arise out of written and mostly unwritten contracts. Contract formation through offer and acceptance is informal in the informal sector of African economies.⁷¹ Most importantly in ICL, there must be transfer of property and/or "symbolic performance" (i.e. transfer of a gift) before there can be a contract.⁷² This should be followed by a subjective meeting of the minds.⁷³ The process would involve the family and/or ethnic group of the contractant. Trade in Africa is historically family- and community-oriented.⁷⁴ In this way, it was "morally reprehensible to breach a promise."⁷⁵ Symbolic transfer may not occur in the current informal sector, whereas other features still recur. Most transactions are based on cash and carry or give and take.⁷⁶ It is doubtful whether a high incidence of breach results from unsophisticated markets.⁷⁷

68 Schmitthoff *Clive M Schmitthoff's Select Essays* 353.

69 Menkel-Meadow 2004 *Journal of Legal Education* 12; Burton 1991 *Global Change, Peace & Security* 62.

70 Bigsten *et al* 2000 *The Journal of Development Studies* 10.

71 Van Niekerk 2011 *De Jure* 371.

72 Van Niekerk 2011 *De Jure* 370.

73 Van Niekerk 2011 *De Jure* 375.

74 Walther 2015 *The Journal of Development Studies* 4.

75 Van Niekerk 2011 *De Jure* 378.

76 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 230.

77 Bigsten *et al* 2000 *The Journal of Development Studies* 16.

5.2.1 Resolution of disputes

Trust is the most important ingredient of the trade relationship⁷⁸ because accumulated trust boosts productivity.⁷⁹ The importance of trust that is built through face-to-face interactions between trading partners is also evident in "formal" international trade. In this form of trade, social or business networks also play an important role.⁸⁰

Social networks are sometimes likened to informal relations.⁸¹ In intra-African trade, social networks or social relations are an important element of trade, especially informal cross-border trade. Firms that have limited access to courts must rely on alternative institutions, such as business relationships and networks.⁸² These relationships and networks are based on extreme loyalty.⁸³ Firms in some African countries rely on regular relationships with suppliers.⁸⁴ According to their study, Bigsten *et al* established that these relationships are based more on business acquaintance than family or ethnicity.⁸⁵ Cases of breach occur mostly with long-term suppliers.⁸⁶ The same business travel requirement in informal trade applies equally in formal international trade.⁸⁷ Hence, in transplanting the *lex mercatoria*, other applicable laws in formal international trade may be applied to the informal cross-border trade as long as they are made to fit the cultural underpinnings of formal cross-border trade.

Breach is limited by the types of contract concluded by parties. Informal trade tends to be "cash and carry."⁸⁸ Breach was shown to be low among the grain growers of Madagascar.⁸⁹ Where there was breach, it was mostly solved through negotiations

78 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 251; see also Doney and Cannon 1997 *the Journal of Marketing* 35-51.

79 Walther 2015 *The Journal of Development Studies* 5.

80 Cristea 2011 *Journal of International Economics* 208.

81 Walther 2015 *The Journal of Development Studies* 5.

82 Bigsten *et al* 2000 *The Journal of Development Studies* 3.

83 Bigsten *et al* 2000 *The Journal of Development Studies* 8.

84 Bigsten *et al* 2000 *The Journal of Development Studies* 9-10.

85 Bigsten *et al* 2000 *The Journal of Development Studies* 10.

86 Bigsten *et al* 2000 *The Journal of Development Studies* 10.

87 Poole 2010 *UC Santa Cruz, Mimeo* 2.

88 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 230 and 241.

89 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 230.

or using a mediator.⁹⁰ Recourse to legal institutions is rare but its frequency depends on the severity of the dispute.⁹¹

Despite efforts at integration and harmonisation in all its aspects, disputes still arise between African countries, generally, relating to every aspect of trade. Language is one very important aspect of trade contracts that has formed the subject of a dispute because of the diversity of African culture, including the use of colonial languages. In one market access dispute, involving Zambia and Zimbabwe, there was an allegation that Zimbabwe had suddenly demanded that products imported from Zambia should be branded in Shona and Ndebele languages.⁹²

Language is also a critical aspect of customary law. Most players in the informal sector are illiterate or semiliterate.⁹³ This includes an inability to write and speak, especially a foreign language. Is it possible to use a common but indigenous language? If the languages of *Kiswahili*⁹⁴ and *Fanakalo*⁹⁵ are taken to be indigenous African languages in the sense that they have developed from Africa, then there is a possibility of using them for East African intra-trade and southern African intra-trade respectively.⁹⁶ This invites a debate on the universality of mainly European languages, especially in the administration of justice. For the application of customary law inside one country language would not be a barrier. There would not be a problem even in the informal sector where trade is between two countries because most of the cross-border trade in the informal sector takes place at the border where a common language may be in use. A formal system applying customary law, however, would have to come up with a common language to be used at the proceedings. On the other hand, language should not be a barrier since most of the trade takes place at the borders for instance where the disputes arise.⁹⁷

90 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 23.

91 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 23.

92 PANA www.panapress.com.

93 Rwodzi Linguistic Challenges 119.

94 Kiswahili has a reputation as a possible universal language of Africa. See generally Amidu 1995 *Nordic Journal of African Studies* 50-70.

95 Fanakalo (or Fanagalo as it is often referred to) is a pidgin language of trade in South Africa. See Newby-Rose *Fanakalo as a Trade Language* 1.

96 This possibility is a little distant for *Fanakalo*. See Rwodzi Linguistic Challenges 65-66. As for *Kiswahili* Rwodzi says the legacy of *Kiswahili* as a language of international trade especially between east Africa and India goes back to the 15th century, almost the same time that European languages were introduced to Africa. Rwodzi *Linguistic Challenges* 38.

97 Adepoju 2001 *International Migration* 43-60.

A state-to-state dispute, such as the Zimbabwe versus Zambia dispute, can transform into an individualised dispute where a party fails to perform because of the state requirement, i.e. fails to deliver a product that is branded in English, for instance. Before formal courts, there is a valid defence of *casus fortuitus* to a claim under these circumstances. A different mechanism will, however, be used where the dispute involves informal actors.⁹⁸

In situations where a private individual or company has a claim against a government, regional organisations would not preside over the dispute. On 6 December 2012, the court in the COMESA decided for the first time that companies can actually sue governments in the COMESA. The issue revolved around payment of tax. The company was registered. If it took this long for a registered company to have the so-called *locus standii* in the COMESA, a challenge remains regarding informal/unregistered companies. Except for completely private disputes, the regional mechanisms are still subject to unnecessary formalities. This problem becomes more acute where the traders are informal traders. In this instance, one is likely to be met with the equity principle that compliments the common law that "he who comes into equity must come with clean hands."⁹⁹

5.2.2 Dispute resolution: "Principles"

Informal trade is considered part of the informal economy because it takes place outside of the formal regulatory state institutions.¹⁰⁰ This under-regulation does not necessarily mean absence of regulation.¹⁰¹ However, it marks the defining features of the informal sector in that it is generally outside the purview of mainly legal and financial regulation. Informal traders do, however, occasionally make use of the public services in their respective countries, including the courts. At the level of cross-border trade, under-regulation is visible mainly in the avoidance of tariffs and other import/export duties. Nonetheless, mechanisms for resolving disputes between the traders themselves are rather dubious.

98 Adepoju 2001 *International Migration* 43-60.

99 This doctrine was applied in the old famous case, known as the Highwayman case, *Highwayman (Everet v. Williams, Ex. 1725, 9 L.Q. Rev. 197)*.

100 Titeca and De Herdt 2010 *Africa* 577.

101 Titeca and De Herdt 2010 *Africa* 578.

There are two competing theories regarding dispute resolution methods and prevalence of breach.¹⁰² On the one hand, some people argue that dispute resolution methods play a deterrence role. Other people argue that the presence of efficient dispute resolution methods encourages more disputes.¹⁰³ According to Bigsten *et al*,

Firms operating under the protection of an effective legal system take more risks with clients and suppliers and thus face more problems that they handle through legal channels¹⁰⁴

Neither is entirely true. What seems to be true is that where there are efficient institutions dealing with disputes, disputes and their resolution are better recorded. Actually, reference to institutions in this context is often reference to formal institutions of dispute resolution.¹⁰⁵ Disputes may indeed be deterred by presence of efficient formal institutions. Equally, an informal justice system based on what is customary amongst the traders may have a similar effect depending not on efficiency per se, but on predictability. For members of the same community of traders it is easy to predict what the method of dispute resolution and likely outcome would be. Knowledge itself is sufficient to suppress a possible dispute, or to encourage referral of more disputes.¹⁰⁶

Parties use "practical norms"¹⁰⁷ for resolving and preventing disputes within the informal sector. Many of those practical norms are in theory illegal.¹⁰⁸ These practical norms are usually expressed in the form of the following doctrines.¹⁰⁹ Some goods and services are considered as more illegal than others. Smaller quantities of food can be smuggled without fear of confiscation. "Threshold days" are days on which tax rates are cut or discounted. There is no use of excessive force and women carrying babies will not be subject to strict border controls. Moore refers to these practical norms as "processes of regularisation" in which "people try to control their

102 Bigsten *et al* 2000 *The Journal of Development Studies* 13-14 and 24.

103 As in the example of Zimbabwe in Bigsten *et al* 2000 *The Journal of Development Studies* 10.

104 Bigsten *et al* 2000 *The Journal of Development Studies* 24.

105 Note the distinction made between formal and informal institutions by Zenger *et al* 2002 *Advances in Strategic Management* 277-306.

106 Bigsten *et al* 2000 *The Journal of Development Studies* 14, have the following to say: "given the existence of business networks in African manufacturing...one also expects better connected firm managers to screen clients and suppliers more easily and thus to experience fewer cases of breach."

107 Titeca and De Herdt 2010 *Africa* 578.

108 Titeca and De Herdt 2010 *Africa* 580.

109 Titeca and De Herdt 2010 *Africa* 583-584

situations by struggling against indeterminacy, by trying to fix social reality, to harden it, to give it form and predictability."¹¹⁰ They represent an alternative to formal institutions of adjudication, if not litigation specifically. For example out of the six countries studied, only Zimbabweans are eager to go to court.¹¹¹

Practical norms seem to be informed by morality. Speaking specifically about arbitration, the Book of Judges says: "The [moral] power of arbitration is greater than that of adjudication."¹¹² To resolve disputes most firms resort to negotiations.¹¹³ For especially smaller firms in Africa, negotiation is always preferred as it is more cultural and less confrontational.¹¹⁴ Negotiation is actually the most used method of dispute resolution.¹¹⁵ Fafchamps and Minten thus report similar results to those reported by Bigsten *et al* for "African manufacturers."¹¹⁶ It can, therefore be concluded that relationships are important for African traders and for resolving trade disputes.

Not adhering to these norms entails the threat of a sanction.¹¹⁷ The sanctions can take any of the following forms:¹¹⁸ guilt, harassment, loss of relationship and reputation, recourse to legal institutions, such as courts and lawyers, and recourse to private arbitration and the police. The choice of a sanction depends on the costs and effectiveness.¹¹⁹ Fear of a sanction induces parties to comply with their contractual obligations.¹²⁰ In fear of a sanction, therefore a party is able to preserve his or her reputation.

Reputation is very important in contracts for the preservation and continuity of relationships, for example to obtain credit, some traders will seek information about the reputation of the client before giving him/her security. In other words,

110 Moore *Law as Process* 50.

111 Bigsten *et al* 2000 *The Journal of Development Studies* 10.

112 *The Book of Judges- Code of Maimonides* 1949 66, quoted by Tiewul and Tsegah 1975 *International and Comparative Law Quarterly* 395.

113 Bigsten *et al* 2000 *The Journal of Development Studies* 10.

114 Bigsten *et al* 2000 *The Journal of Development Studies* 27.

115 Fafchamps and Minten 2000 *Economic Development and Cultural Change* 230 and 251.

116 Fafchamps and Minten 2000 *Economic Development and Cultural Change* 230.

117 Titeca and De Herdt 2010 *Africa* 578; Bigsten *et al* 2000 *The Journal of Development Studies* 22.

118 Bigsten *et al* 2000 *The Journal of Development Studies* 22.

119 Bigsten *et al* 2000 *The Journal of Development Studies* 18 and 22.

120 Bigsten *et al* 2000 *The Journal of Development Studies* 17; See generally Platteau 1994 *The Journal of Development Studies*, and Greif 1993 *The American Economic Review*.

relationships/networks play a vital role in the gathering and sharing of information.¹²¹ The importance of reputation is underscored in the example given by Bernstein as follows: the diamond industry's private dispute resolution mechanism and its ability to create strong reputational bonds, which is in turn used to enforce judgments. The system in the diamond industry is quick and efficient.¹²²

A mechanism, short of a method or system that is used to preserve the relationships, is known as the reputation mechanism. This is a "typical mechanism associated with private ordering".¹²³ Reputation and trust give rise to what is called "relational contracting."¹²⁴ This constitutes a contract that is common in Africa. According to Fafchamps, relational contracting is the key enforcement mechanism.¹²⁵ It has its own disadvantages.¹²⁶

5.2.3 Enforcement

Once entered into, a contract must be enforced. In dealing with contract enforcement in Africa Fafchamps,¹²⁷ ignores the difference between the informal and the formal sectors of the economy and deals with the African economy *holus bolus*. He characterises the African culture as "laid back"¹²⁸ He describes contract enforcement as "an institution that deters opportunistic breach of contract".¹²⁹ In other words, a mechanism deals with conflicts before they mature into disputes. Any dispute resolution mechanism should have the effect of deterring or preventing further or new disputes. Fafchamps identifies three types of enforcement mechanism employed in African economies to ensure compliance, namely those based on guilt, those based on coercion and those based on repeated interaction. The first type relies on family values. The second type relies on illegitimate or legitimate threat of

121 Fafchamps *Market Institutions in Sub-Saharan Africa* 192.

122 Bernstein 1992 *The Journal of Legal Studies* 116.

123 Richman 2004 *Columbia Law Review* 2328.

124 Bigsten *et al* 2000 *The Journal of Development Studies* 2.

125 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 252; see also Hedley *et al* 2000 *Europe-Asia Studies* 627-629.

126 For example, it can be costly to switch partners: Bigsten *et al* 2000 *The Journal of Development Studies* 4.

127 Fafchamps 1996 *World Development* 427.

128 Fafchamps 1996 *World Development* 427.

129 Fafchamps 1996 *World Development* 427.

forceful deprivation. The third involves reputation, which is a device that is used for circulation and coordination of information regarding bad players, to enforce retaliation through groups, or what Fafchamps calls *quid pro quo*.¹³⁰ As diverse as African nations are, language and ethnicity do not seem to be an obstruction when sharing information among the traders at the borders.

In the formal sector, enforcement depends on formal institutions of government. While in the informal sector, the benefits of the formal institutions may extend to informal sector, but there is greater dependence on the threat of exclusion,¹³¹ although it is not a dominant form of contract enforcement.¹³² Trust is indeed the object of these mechanisms:

Mutual trust among the people is evidently what a society needs to be able to sustain a market order on a long-term basis and at reasonable (transaction) costs.¹³³

There is no clear distinction between relational and reputation mechanisms as tools of resolving a dispute in order to preserve relationships. Both emanate from the nature of the contracts that parties enter into in trade in the informal sector. Both are part of what are referred to as IJS.

5.2.4 Informal Justice Systems (IJS)¹³⁴

IJS are also known as "non-state"¹³⁵ or "non-formal"¹³⁶ justice systems, and in some cases, the two concepts are used interchangeably.¹³⁷ According to Nyamu Musembwi, they refer to "any system that applies norms/rules the source of which is

130 Fafchamps 1996 *World Development* 428.

131 According to Aviram 2004 *Yale Law and Policy Review* 1, private legal systems also depend on threat of exclusion for enforcement.

132 Fafchamps and Minten 2001 *Economic Development and Cultural Change* 252.

133 Plateau 1994 *The Journal of Development Studies* 757; Fafchamps and Minten 2001 *Economic Development and Cultural Change* 230.

134 Compare with private legal systems, which it is said do not grow spontaneously, but build up on existing institutional infrastructure: Aviram 2004 *Yale Law and Policy Review* 1.

135 Nyamu-Musembi "Non-State" *Justice Systems* (February 2003) 4; Golub *Non-State Justice Systems* 7-8; Forsyth *Bird that Flies with Two Wings* 201-248; According to Wojkowska *Doing Justice* 9, other terms that are used to refer to the IJS include "indigenous", "restorative", "popular", "customary", "traditional".

136 Kane *et al* "Equitable Access to Justice for the Poor" 1-34; Hohe 2003 *Conflict, Security & Development* 335-357.

137 Nyamu-Musembi "Non-State" *Justice Systems* (February 2003) 4.

(or purports to be) primarily non-state in origin."¹³⁸ IJS are often defined in contradistinction to formal justice systems in that whereas formal justice systems entail civil and criminal justice, including the police, prosecution, courts and custodial measures or correctional services, "IJS are used when referring to dispute resolution mechanisms falling outside the scope of the formal justice system."¹³⁹ The distinction therefore lies in the source of the rules and the mechanisms of enforcement. Aviram gives an analogous conceptualisation in the form of "private legal systems", defined as "non-governmental institution intended to regulate the behaviour of its members."¹⁴⁰

Caution should be taken that the IJS are not used to refer to ICL in its pure indigenous form, recognising that ICL is or has become subject to the state administration in one way or another. IJS are looked at as systems that include application of customary law in the conventional sense.¹⁴¹ In any case, the so-called "informal sector" is not exclusively informal.¹⁴² Judging by the bases of the IJS as suggested by the UNDP,¹⁴³ it seems that the idea is the continued top-down approach of not recognising them for what they are, but formalising the IJS by making them adhere especially to human rights standards.

Nyamu-Musembi breaks the non-formal justice systems into three categories, namely:¹⁴⁴

- a) "state-sponsored" arrangements;
- b) community based arrangements; and
- c) NGO-sponsored alternatives.

Thus, IJS do not necessarily provide a parallel system of law. It is the extent of the involvement of the state that marks differences in categories on the one hand, and

138 Nyamu-Musembi *"Non-State" Justice Systems* (February 2003) 4: This report uses the term "non-formal justice systems" interchangeably with "non-state justice systems." Much of what are referred to as IJS seem to have the likeness of the coalition as described by Clay 1997 *Journal of Law, Economics, and Organization* 202-231. The coalition was described by such concepts as trust, reliance on community pressure for compliance, and networks for provision of information.

139 Wojkowska *Doing Justice* 9.

140 Aviram 2004 *Yale Law and Policy Review* 4.

141 As defined in the case of *Van Breda v Jacobs* 1921 AD 330.

142 Gerxhani UNKNOWN www.ifwea.org/@Bin/217843/Gerxhani.pdf 18.

143 Wojkowska *Doing Justice* 10.

144 Nyamu-Musembi *"Non-State" Justice Systems* (February 2003) 13.

the interrelationships on the other hand. The community-based arrangements seem to provide an all-embracing category in which traditionally customary-based systems, including committees and associations that developed out of communities sharing similar experiences are to be found.¹⁴⁵ This category could accommodate the IJS as described above. The system of tribunals or as Nyamu-Musembi puts it: the "continuum" provides sufficient room for manipulation by way of harvesting useful principles from customary law. Community-based arrangements find high use in the rural areas.¹⁴⁶ High use of IJS in the rural areas does not necessarily mean that they are the best; it may be that they are the only ones available.¹⁴⁷ Nonetheless, IJS are generally characterised by the following:¹⁴⁸

- Viewing the problem as relating to the whole community as a group – there is a strong consideration for the collective interests at stake in disputes.
- Decisions are based on consultation processes.
- There is an emphasis on the reconciliation and restoration of social harmony.
- Arbitrators are appointed from within the community on the basis of status or lineage.
- There is often a high degree of public participation.
- The rules of evidence and procedure are flexible.
- There is no professional legal representation.
- The process is voluntary and the decision is based on agreement.
- They have a high level of acceptance and legitimacy.
- There is no distinction between criminal and civil cases; informal justice systems often deal with both.

145 Nyamu-Musembi *"Non-State" Justice Systems* (February 2003) 15-16.

146 Nyamu-Musembi *"Non-State" Justice Systems* (February 2003) 6.

147 Nyamu-Musembi *"Non-State" Justice Systems* (February 2003) 6.

148 Wojkowska *Doing Justice* 16.

- There is often no separation between IJS and local governance structures – a person who exercises judicial authority through an IJS may also have executive authority over the same property or territory.
- Enforcement of decisions is secured through social pressure.

Looking at the characteristics of the IJS it can be concluded that the difference between them and the ICL is a difference without a distinction. What differs is perhaps nomenclature. It may be wrong to assume that IJS apply customary law only, if customary law is taken to represent informal law. In some cases, it is not rare to find that they apply to both informal and formal law.¹⁴⁹ While IJS can be partners with formal justice systems,¹⁵⁰ the question is whether that makes IJS any better than ICL. To answer this question one needs to reflect on the most important criticisms of ICL, for the same criticisms may be levelled at the IJS.

5.2.4.1 Reflecting on the most important criticisms of ICL

ICL has attracted considerable criticism from all perspectives.¹⁵¹ First, it is acknowledged that generally speaking, ICL was not based on an economic development ideology. According to Bamodu,¹⁵²

... the ideology behind customary law systems was not geared towards economic objectives but in each case essentially towards the preservation of the communal group and the maintenance of peace.

The most popular criticism of ICL is that it is discriminatory against women and children, as are the IJS.¹⁵³ This is a criticism that cannot be ignored, especially in the informal cross-border business sector where women constitute a larger percentage of participants.¹⁵⁴ It therefore requires revision, not of ADR but of ICL, or to find in ICL the pro-women protective principles that may be applied to ensure inclusion. It should not be a problem, for instance to overturn some of the male chauvinistic

149 Kane *et al* "Reassessing customary Law Systems" 23.

150 Nyamu-Musembi "Non-State" Justice Systems (February 2003) 17; see also Lazzarini *et al* 2004 *Journal of Law, Economics and Organisation* 261-298.

151 Fallers *Law without Precedent* 3; Ndulo 2011 *Indiana Journal of Global Legal Studies* 87-120.

152 Bamodu 1994 *JAL* 127.

153 Wojkowska *Doing Justice* 21; Williams 2011 *Indiana Journal of Global Legal Studies* 65-85; Bond 2010 *Southern California Law Review* 509-573; Ssenyonjo 2007 *JAL* 39-67.

154 Peberdy *Regional Integration, Poverty and South Africa's Migration Policy* 40.

principles if the forum constituting the dispute resolution forum comprised mainly women. This is possible, as it has already been said that women represent a larger proportion of participants in the informal cross-border trade. Moreover, most African countries have introduced reforms aimed at decentralisation of political power through local government electioneering.¹⁵⁵ At a very simplistic level, in places where men are fewer than women in terms of population distribution, it should be easy to have those women elected into local councils and/or local dispute resolution fora. However, it is through policy that some countries have managed to increase the number of women in important decision-making processes.¹⁵⁶ What is ultimately important is not the numerical representation of women, but the representation of their interests. In the same vein, removal of those bottlenecks in ICL that risk the interests of women should be prioritised.

ICL has also been criticised for being susceptible to power dimensions,¹⁵⁷ lack of accountability,¹⁵⁸ deprivation of "legal rights"¹⁵⁹ and for non-adherence to international human rights standards.¹⁶⁰ According to Shinwari, "Parallel informal systems that lack technical knowledge and flexibility often violate human rights, especially in relation to women and minority groups".¹⁶¹ In addition, it is said that IJS are unsuitable for certain disputes that are important for security and sustainable development.¹⁶² This latter criticism is important for it brings into question the very relevance of these methods to intra-African trade disputes. It presupposes that the IJSs may not apply or work well in resolving large or complex commercial disputes. However, the informal cross-border trade as an aspect of intra-African trade minimises the implication of the criticism as it provides a perfect context for the IJS, notwithstanding the criticism.

5.2.4.2 Highlighting the strengths of IJS

155 Kauzya "Political Decentralization in Africa" 3.

156 Goetz 1998 *Review of African Political Economy* 241-262.

157 Wojkowska *Doing Justice* 20.

158 Nyamu-Musembi "Non-State" *Justice Systems* (February 2003) 4; Wojkowska *Doing Justice* 22.

159 Wojkowska *Doing Justice* 22.

160 Wojkowska *Doing Justice* 23.

161 Shinwari *Understanding the Informal Justice System* 85.

162 Wojkowska *Doing Justice* 23.

The strengths¹⁶³ of the IJS are important for the purposes of improving dispute resolution as a factor in intra-African trade. IJS are said to be understandable and culturally comfortable.¹⁶⁴ For example, in formal courts, matters are often complicated by a requirement of interpretation that may cause unnecessary delays, postponement and costs. In the informal systems, a common and understandable language may be used. In informal cross-border trade the same applies, because in most cases the borders divide people of the same ethnic group, for instance in Lesotho, people living in Southern Lesotho speak *isiXhosa*, which is a language spoken in the neighbouring Eastern Cape Province of the RSA.¹⁶⁵ Those who live in Northern and Eastern Lesotho speak Sesotho, which is a language of the Free State Province of the RSA.¹⁶⁶ The same applies throughout Africa, and in fact throughout the world.¹⁶⁷

Other known strengths of the IJS include the following: the systems focus on consensus, reconciliation and social harmony.¹⁶⁸ This has been said of ADR, and in fact is commonly found in the indigenous laws of most societies.¹⁶⁹ It seems to be accepted that because they are consensus-driven, they are therefore important for fostering social harmony and the enforceability of decisions becomes less of a problem. IJS can be good partners with formal justice systems.¹⁷⁰ They provide swift solutions¹⁷¹ and thus breathe life into the old adage that 'justice delayed is justice denied'.¹⁷² They provide social legitimacy, trust and an understanding of local problems¹⁷³ and they are geographically and financially accessible.¹⁷⁴

A combination of the above principles, as discerned from ICL, and the so-called IJS make up what could best be referred to as IMADR. Despite the name, they constitute more of processes than of methods. The argument is that these informal systems should be applicable even in cities because most African countries have been

163 Wojkowska *Doing Justice* 16-24.

164 Wojkowska *Doing Justice* 23.

165 Bainbridge *South Africa Lesotho and Swaziland* 652.

166 Bainbridge *South Africa Lesotho and Swaziland* 652.

167 Touval 1966 *International Affairs* 641.

168 Wojkowska *Doing Justice* 17.

169 Havenga *et al Commercial Law* 298; Morgan 2010 *Golden Gate University Law Review* 4.

170 Wojkowska *Doing Justice* 18.

171 Wojkowska *Doing Justice* 18.

172 Mitchell 1971 *U. Fla. L. Rev* 230.

173 Wojkowska *Doing Justice* 18.

174 Wojkowska *Doing Justice* 18.

affected by increased rural to urban migration and indeed the informal sector thrives not only in the rural areas but in the cities as well.¹⁷⁵ These services can always be extended to international trade extending beyond Africa. Inasmuch as international trade outside the informal cross-border intra-African trade also depends on relationships and use of agents, it is through the same agents that the IJS can be accessed. In the circumstances where Africa is experiencing reforms in the form of ADR, amid Courts, IJS, ICL and other forms of private ordering, the practical way of avoiding duplication and conglomeration is by finding the best way to harmonise the systems. Having identified the weaknesses and strengths, particularly of the IJS as they operate in the informal sector, revisiting the challenges facing the ADR will help find this balance.

5.3 Efficacy of ADR

The attitudes of Africans to ADR are patriotic. This is demonstrated by the membership of the conventions dealing with ADR. For example, about half of the ratifications of the Convention on the Settlement of Investment Disputes are from African States.¹⁷⁶ With this demonstrable willingness on the part of African countries, it would not be difficult to explore the revival, (in most cases) of the ICL, especially for intra-African trade. Nevertheless, where would the ICL principles revived in this way fit into our legal systems? To answer this question there is a need to take a second look at the ADR and to identify the lacunae that could be filled by adopting the ICL. Put differently, a further critical, albeit brief look at ADR will help contextualise the informal justice systems.

It should not be assumed that formal justice systems are without challenges or that once a case has been put on the agenda of the courts it will proceed smoothly.¹⁷⁷ In the end, it is a question of weighing the options, and finding a good symbiosis or

175 Meagher and Mohammed-Bello *Passing the Buck* 1, 37.

176 Tiewul *et al* 1975 *International and Comparative Law Quarterly* 407.

177 Galanter 1981 *The Journal of Legal Pluralism and Unofficial Law* 1.

blend between ADR and litigation. The symbiosis can be established by looking at ADR and its effectiveness since its adoption in Africa.

Firstly, "ADR was seen as being conducted by a neutral facilitator or mediator, outside the court system and largely independent of it."¹⁷⁸ Challenges of newly introduced ADR thus point to privatisation¹⁷⁹ or devolution of ADR. However, ADR has graduated from a wholly privatised system to a public system, thereby adopting elements of coercion and compulsion.¹⁸⁰

ADR (new) was introduced in Africa to solve problems associated with the costs of litigation, delay and the technicality of the litigation process.¹⁸¹ These technicalities manifest in the complicated rules of evidence and so-called interlocutory procedures.¹⁸² The idea was to simplify access to justice,¹⁸³ to relax some of these traditional technicalities and thereby to reduce the backlog of cases.¹⁸⁴ In the process, the litigants would get speedier and cheaper justice. However, the studies so far, after over ten years of trial, do not offer a scientific conclusion that ADR has contributed specifically in the reduction of waiting time before a matter can actually be finalised. In ten years of trial, the waiting period for a mediation to be heard has extended from 24 hours to three months.¹⁸⁵ Having been set down, the mediation is still subject to frequent postponements at the end of which a failed mediation results in the case being brought back into court.¹⁸⁶ It seems that ADR can best work under the shadow of the traditional litigation system.¹⁸⁷

Secondly, "entry into the ADR process by disputants was voluntary, not mandatory or compulsory."¹⁸⁸ However, most African countries introduced ADR by incorporating it into the court system. Court-annexed or court-mandated mediation has been

178 Dwight 1989 *Bond L Rev* 6.

179 Dwight 1989 *Bond L Rev* 8.

180 Katz 1993 *Journal of Dispute Resolution* 1.

181 This was the case in most common law countries such as Australia, Canada and the USA: Alexander 2001 *Bond L Rev* 4; see also Dwight 1989 *Bond L. Rev.*1-2.

182 Dwight 1989 *Bond L Rev* 1.

183 Hammergren "Institutional Development" 203-205.

184 Dwight 1989 *Bond L Rev* 6; Nolan-Haley and Annor-Ohene 2014 *Harvard Negotiation Law Review*.

185 Interviews of court officers at the Lesotho High Court. September 2015.

186 This happens mostly in court-annexed mediation such as happens in Lesotho for instance; see The High Court (Mediation Rules) 2011.

187 Dwight 1989 *Bond L Rev* 35.

188 Dwight 1989 *Bond L Rev* 6.

subject to challenges to the court and this adds to the prolonging of the case.¹⁸⁹ In labour matters, it is always followed by arbitration,¹⁹⁰ whereas in ordinary court matters it is followed by litigation.¹⁹¹

Thirdly, "the outcome or result, if any, was not binding on the parties unless and until they agreed on it."¹⁹² The decision was consensual and thus inherently enforceable. With court-annexed mediation, such consensus is sometimes arrived at by using threats of ordinary case implications. For example, parties may be persuaded to settle (against their will) merely because the mediation process is held at the court premises and ignorant parties regard the mediator as if he were a judge.¹⁹³

Fourthly,

... the ADR process, and all that occurred in it, was confidential and under no circumstances to be admissible, or directly used in subsequent litigation. Related to this is the notion that the court in subsequent litigation should be impartial in the sense of not being influenced by what occurred during, or resulted from, the ADR process.¹⁹⁴

The court that ordered mediation is the same court that will hear the case upon failure of mediation. Even if not expressly asked, the question of the failed mediation is likely to influence the outcome of the court case, especially where the court felt very strongly that the case could be settled. After all, where the mediation is court-annexed, the court officers are usually used as mediators. The likelihood of the court knowing what actually transpired in the mediation is high despite a rule of confidentiality.¹⁹⁵

It would be wrong to generalise and say mediation has failed in Africa. There have been reported failures in political mediation, but not in commercial mediation. The causes of failure of mediation in political disputes in Africa have been listed, amongst

189 *Moolman v Border Technikon* [1997] 12 BLLR 1648 (CCMA) 1648.

190 *Goodwin Stable Trust v Duohex (Pty) Ltd* [1996] 2 All SA 558 (C).

191 Muigua 2014 www.ciarbkenya.org 5.

192 Dwight 1989 *Bond L Rev* 6.

193 In Lesotho Registrars and Judges' Clerks do an additional duty of mediation in the context of court-annexed mediation, whereby all disputes filed with the High Court are referred to mediation. Mediation is always held at the High Court premises. Parties do not quite choose their own mediator. Mediation cases are "allocated" indiscriminately. There is no requirement that the mediator should have skills relevant to the dispute; neither is there accreditation of mediators and a predetermined fee structure as in the RSA.

194 Dwight 1989 *Bond L Rev* 6.

195 For other scope and limitations of Mediation in this context see, Faris *Theory and Principles of Alternative Dispute Resolution* 164-168.

others to include the following; history, nature and causes of conflict, the goals and conduct of disputants, the role of foreign powers and neighbouring states, and the style and methods of the mediator.¹⁹⁶ This means that for the mediation to succeed the style and methods must be relevant, and the history and nature of the conflict that gave rise to the dispute must be comprehensible. The South African Truth and Reconciliation Commission is an example of mediation that is relevant in terms of locality and culture and custom.¹⁹⁷

Generally, the ADR would not solve the informal sector disputes, especially the cross-border informal sector disputes because by being court-annexed they are virtually taken away from the people. They are no different from the courts despite the many benefits attached to them.

Where it is connected to the court, mediation may be used by the parties only for testing evidence, without intentions of settling. In the end, it would not serve its purpose. IJSs could therefore be empowered in the same manner that the local courts have been empowered in order that they provide a forum of first instance, open to review or appeal to the formal court system. The threats of exclusion would still work as a mechanism for ensuring enforcement for anyone who takes up the appeal or review.

To the extent that some of the IMADR rules are actually illegal, they would be equally contrary to 'official' customary law. The challenge therefore is the eradication of illegal rules and their replacement with legal rules. A thorough study of all these systems could help come up with a good amalgam of feasible and practical rules to deal with the most dominant form of intra-African trade. If one takes a constitutional perspective, one is met with the repugnancy rule. The alternative is to take the "justice" perspective in order to be able to recognise the customary rules for what they are before merging them with formal rules. There is a need therefore to re-define justice in the context of informal cross-border trade.

196 Nathan 1998 *Track Two: Constructive Approaches to Community and Political Conflict* 1.
197 Gibson 2002 *American Journal of Political Science* 540-556.

5.4 Re-defining "justice" for ICL-based mediation

The starting point is that there is no perfect justice.¹⁹⁸ Justice is often used interchangeably if not as a substitute for rule of law. As a result of discretion that goes with the interpretation and application of statutory law, justice then becomes fluid. Plato says that 'justice is serving the interests of the stronger'.¹⁹⁹ However, the ideal justice is supposed to provide legal satisfaction to either of the parties. In ADR it is still possible to actually satisfy both parties.²⁰⁰

There is a fear that allowing ICL to be benchmarked on the constitution in fact perpetuates the continuing disappearance of ICL.²⁰¹ Even in recreating customary law for intra-African trade, there remains the challenge of defining it in terms of law. It is apposite at this stage to quote the definition of customary law extensor:

A custom is a particular rule, which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law....As regards the matter to which it relates, a custom takes the place of the general common law, and is in respect of that matter, the common law within the particular locality where it obtains.²⁰²

It is in this context that ICL could become the common law of Africa in the context of intra-African trade manifested by informal cross-border trade.

It appears that, and particularly in common law systems, not only is it said that law must be consistent with the constitution, but the ultimate decision lies with the court. In the case of *Marbury v Madison*,²⁰³ Marshall said, "it is emphatically the province and the duty of the judicial department to say what the law is ... if two laws conflict with each other, the courts must decide on the operation of each." This may seem and sound like a ceiling on the possibility of ICL acquiring the status of law. However, increased research into ICL would allow or empower the judge sitting upon

198 Scalia 1989 *The University of Chicago Law Review* 1177.

199 Hourani 1962 *Phronesis* 1962 110.

200 Scalia 1989 *The University of Chicago Law Review* 1177; see also Menkel-Meadow 2004 *Cardoso Journal of Dispute Resolution* 99.

201 Earlier court decisions have held in South Africa that customary law should not be benchmarked on the constitution. See *Bangindawo v Head of the Nyanda Regional Authority and Hlanthalala v Head of the Western Tembuland Regional Authority* (1998) 3 SA 212. The trends seem to be pointing in a direction where reference will always be made to the constitution whether to confirm or expunge a customary rule. See analysis of the authorities in South Africa in Nhlapo "Customary Law in Post-Apartheid South Africa" 1-35.

202 Hailshorn *Harlsbury Laws of England* paragraph 401; see *Van Breda v Jacobs* 330.

203 5 US 137, 2L Ed. 60, 2 L. Ed. 2d 60 (1803).

a case involving mediation in the common law court to uphold an ICL principle even where it appears to be *prima facie* unconstitutional, as long as it provides an acceptable solution to the parties. For, very true to the principles of constitutionalism, the basis for the parties' readiness to accept the solution may very well be constitutional, albeit unwritten as emanating from the community from which the disputants come. In any case, legislature is best suited to decide on the question of repugnancy because it is more representative of the "people" than the courts.²⁰⁴

Section 173 of the Constitution of the Republic of South Africa provides that the superior courts have "an inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice". 'Interests of justice'²⁰⁵ has a wide meaning, including equitability and apparent justice. The development of the ICL of Africa implies development of the common law of Africa. Hence, the constitution thus already permits recognition and application of ICL at least nationally. This being common in constitutional democracies of Africa,²⁰⁶ the challenge would then simply be regionalisation of such principles of ICL as are common in Africa. Avenues that are open to the governments of Africa include declaring that certain statutory or common law principles should not apply to intra-African trade disputes. The King of England promulgated the "Statute of the Staple" in 1353, which prohibited the Common law courts from adjudicating over contracts from important markets, such as the wool market. The Statute created courts specifically for adjudicating over those contracts.²⁰⁷ One can therefore conclude that plurality of law and legal systems needs to be maintained.²⁰⁸

204 Even in interpreting the constitutions, regard must always be had to the original intent of the constitution so that law will not simply be declared non-law because it appears to be against a certain constitutional provision. See Scalia 1989 *The University of Chicago Law Review* 1175-1188 regarding his originalism theoretical approach.

205 *Minister of Justice v Ntuli* 1987 (6) BCLR 677.

206 'Nyane 2014 *Lesotho Law Journal* 62.

207 Aviram 2004 *Yale Law and Policy Review* 4.

208 Cannan (ed) *Adam Smith* 1776.

5.5 How the ICL-born alternatives could help

It has already been stated that ICL is more procedural than substantive. Accordingly, it offers procedural rather than substantive justice. According to Hampshire, procedural fairness is more important than substantive fairness,²⁰⁹ for "legal justice is not always actual justice."²¹⁰ However, his argument, reducible to adversarial systems as the most competent to offer such fairness, is qualified by Menkel-Meadow, who argues that alternatives more appropriate to the "fuss" offer the necessary fairness.²¹¹ There is always more involved in a dispute than is apparent, especially if the dispute relates to a trade transaction. In the context of ICL, community-based dispute resolution is always resorted to because relationships are always at the top of the priority list.²¹² This implies a public form of administration of justice.

An indigenous method of dispute resolution that is public in nature is also justified by the diminishing privacy in ADR (mediation) as a result of the internet.²¹³ Advantages of a "public mediation" are captured well under the IMADR. The effect, which is deterrent, is to name and shame the bad players and this is a catalyst for trust and the preservation of relationships.²¹⁴ Rabinovich-Einy also observes that because of swift technological changes, which seem to supersede social change, we can expect to see a society, "...in which greater transparency and looser attitudes toward privacy will dominate." It seems that for the transformation of the private (particularly internet-based mediation) into the public sphere, the requirement, as far as Rabinovich-Einy is concerned, is change of attitudes.

As far as the IMADR is concerned, there is not a need for a change of attitudes. It has already been stated that ICL does not distinguish between a private and a public issue.²¹⁵ This is not to say that there is no privacy in ICL, or indeed in IMADR. Privacy has to do with the control of information. With the use of the mediator,

209 Hampshire *Justice in Conflict* Chapter 1.

210 Menkel-Meadow 2004 *Journal of Legal Education* 8.

211 Menkel-Meadow 2004 *Journal of Legal Education* 8.

212 Johnson *et al* 2002 *Journal of Law, Economics and Organisation* 221-277; see also McMillan and Woodruff 2000 *Michigan Law Review* 2421-2458; Also see Kali 1999 *Journal of Law, Economics and Organisation* 615-636.

213 Rabinovich-Einy 2002 *Virginia Journal of Law and Technology* 2.

214 See Chapter 4.

215 See page 110.

parties are able to control information sharing while at the same time entrusting the mediator to resolve the dispute.²¹⁶ Contrary to this, disputes in customary law are always held in public unless the issue involved is a sensitive one requiring privacy, in which case information will still be shared freely without fear of prejudice, though in camera.

It is suggested by some scholars that governments should actually institutionalise the IMADR currently operational in the informal sector, without necessarily incorporating them into the public institutions. The suggestion to institutionalise the IMADR at work in the informal cross-border trade is based on the submission by Meagher that,

Without an institutional framework to direct and incorporate informal economic activity in support of national and regional economic activities, it can only serve to erode trust, cooperation and stability at the national as well as the regional level.²¹⁷

Increased privatisation would be seen by Meagher as throwing away the baby to keep the bathwater. That may not necessarily apply to the privatisation of dispute resolution. What is important is the accessibility of justice to all, which means including through informal non-public means. In this case, access means being able to resolve the dispute without having to go to the public institutions of justice. This can be illustrated as follows.

Aviram²¹⁸ presents a hypothetical story of ranchers who have a trespass dispute with farmers. To resolve the dispute, the ranchers could either fence off the farmers or fence themselves in. As there are more ranchers than the farmers, it could be less costly for the ranchers to provide the farmers with fencing than to fence themselves in. Litigation could simply apportion blame. An *ubuntu*-influenced approach to the dispute would influence consensus towards making the ranchers provide the farmers with fencing even where the ranchers are entirely not to blame for the trespass. To do so would ultimately help preserve the relationship between the ranchers and the farmers.

216 Rabinovich-Einy 2002 *Virginia Journal of Law and Technology* 23.

217 Meagher "Throwing out the Baby to Keep the Bathwater" 41.

218 Aviram 2004 *Yale Law and Policy Review* 10.

The search for new customary law-oriented dispute resolution methods is justified by the "new" regionalism,²¹⁹ which is marked by renewed enthusiasm for the role of the informal economy. New regionalism seems to replace the old regionalism that seemed to be state driven. The new wave of regionalism is thus driven by a combination of state and non-state actors and it recognises the importance of the informal sector in Africa's development.²²⁰ Emphasis is on development from below. While there is doubt as to the contribution of the informal sector to regional integration, it is admitted that it will not go away completely or at least any time soon. Law reform that recognises the significance of the informal sector will at the very least secure the traditional symbiosis between the informal and the formal sectors. The Asian miracle provides a good example of the relevance of law reform for economic development in that context.²²¹

5.6 Conclusions

The main question was whether IMADR as gleaned from ICL bears any relevance to the nature of commercial disputes prevalent in intra-African trade today. Intra-African trade has a long history that predates colonialism. It has also grown over the years in terms of the number of countries, exports/imports, as well as in terms of FDI. While the growth can easily be attributable to formal trade, the contribution of informal trade is also significant, albeit sketchy.

Intra-African trade is defined by a high level of informal cross-border trade. It seems that informal trade is simply the other side of the coin. It is there to stay. In some countries, informal trade comprises a bigger contribution to trade than formal trade. The continuation and sustenance of this kind of trade depends on networks and reputation. These in turn provide the backdrop against which resultant disputes may be solved.

Informality does not necessarily mean that parties' relationships are non-contractual. The parties' relationships can still be defined in terms of a contract that gives rise to

219 Mulaudzi 2009 *Lusotopie* 47.

220 Mulaudzi 2009 *Lusotopie* 48-50.

221 See Pistor and Wellons *Role of Law and Legal Institutions* 1-6, 16-17.

obligations. Breach still occurs in the same manner as it occurs in formal contractual relationships; even though the extent of the breach is not defined by a specific principle of the law of contract per se. Remedies emanating from breach differ from those in the formal sector as they reflect on the applicable principles.

Parties in the informal cross-border trade use practical norms to resolve disputes. Practical norms are in turn informed by morality. They therefore differ from region to region. They are applied mainly through negotiations. Negotiations result in enforceable sanctions and the enforceability depends mainly on the fear of being excluded from the networks and having a blemished reputation. In some cases, enforcement depends on the indirect utility of formal institutions, especially at the national level. This benefit is wanting at the regional level. The so-called IJS do not have the benefit of regional institutions for enforcement in the same manner as the national IJS.

The IJS (non-formal justice systems) comprise a number of forms including state-sponsored IJS. They focus on the communities and associations and their interests are prioritised over the interests of the individuals. The emphasis is on consensus, reconciliation and social harmony. They remain largely informal and more people-oriented than the newly introduced ADR. In Africa, the newly introduced ADR has taken the form of court-annexed mediation, and therefore remains out of the reach of the informal traders.

The relationship between the formal and the informal sectors is a necessary symbiosis. In some cases, the informal sector provides a gateway to formal trade. While ideally the formal sector is supposed to swallow up the informal sector, the ideal is a mere utopia. This recognition requires not only the recognition and safeguarding of related dispute resolution mechanisms but their development to accommodate changes in circumstances. There is, therefore, a need for a systematic research into the possible synergy between the two sectors. Moreover, there is a lesson or two to be learned from the way in which the informal sector resolves commercial disputes, regard being had particularly to the fact that there are similar instances in some of the most advanced economies of the world.

ICL is most relevant to intra-African trade because intra-African trade is generally informal in nature. IMADR could thus constitute the *lex mercatoria* or a regime of law common to all African countries in trade, and this will, as in the European system be a compendium of enacted propositions.²²² Legrand warns that to try and include the cultural diversities of member states would be defeasible.²²³ However, it is possible to combine legal science, legal education and systemic enactments to come up with a code that represents a common law of Africa. Its uniqueness will be defined by the inclusion of IMADR. This has to transcend to regional intra-African trade. In the next chapter, the extent of this recognition at the regional African level is explored by comparing it with the regions of Europe and Asia.²²⁴

222 Legrand 1996 *International Comparative Law Quarterly* 53.

223 Legrand 1996 *International Comparative Law Quarterly* 53.

224 Hay and Shleifer 1998 *American Economic Review* 398-403.

CHAPTER 6

Addressing Africa's problems through IMADR: lessons from Asia and Europe

6.1 Introduction

It is important to emphasise that constitutional silence on the issue of customary law does not mean that customary law does not exist or is unimportant or irrelevant in a country. As long as there is no provision expressly excluding or limiting the application of customary law, there is potential scope to develop the relationship between customary and statutory law.¹

In the previous chapter, the informal nature of intra-African trade was discussed, underscoring that most of the trade takes place in the form of informal cross-border trade.² Alongside this trade exists what are referred to as IJS.³ In their nature, IJS are predominantly customary law-related. They are flexible, rely on relational contracting, and trust for enforcement.⁴ It was concluded that the interface between ADR or mediation and litigation is necessary for purposes of enforcement.⁵ With this necessity in mind, ICL remains a possible, albeit hardly absolute, solution to the problems of African trade. National reforms have not included ICL in the African legal systems.⁶ While the new ADR offers an opportunity for inclusion of IMADR at the national level, regionalisation furthers that opportunity to include the IMADR in the ADR that deals with disputes among African traders.

Regionalisation is an offspring of globalisation and is driven by harmonisation and integration.⁷ The integration of economies and politics manifests in or is driven by

1 Cuskelly *Customs and Constitutions* 27.

2 See Chapter 5. See also Meagher "Throwing out the Baby to Keep the Bathwater" 48; Adepoju 2001 *International Migration* 43-60.

3 Nyamu-Musembi "Non-State" *Justice Systems* (February 2003) 4; Aviram 2004 *Yale Law and Policy Review* 1-68; Golub *Non-State Justice Systems* 1-33; Forsyth *Bird that Flies with Two Wings* 201-248; Wojkowska *Doing Justice* 9; Kane *et al* "Reassessing Customary Law Systems" 1-34; Hohe 2003 *Conflict, Security & Development* 335-357.

4 Bigsten *et al* 2000 *The Journal of Development Studies* 2; Fafchamps and Minten 2001 *Economic Development and Cultural Change* 252; see also Hedley *et al* 2000 *Europe-Asia Studies* 627-656.

5 Woon "The Asean Charter" 72, is of a view that, "It would be unrealistic to pretend that all disagreements can be resolved through dialogue, consultation and negotiation."

6 See Chapter 1.

7 The catch is in the definition of globalisation itself. There is no generally accepted definition of globalisation. It is, however, acknowledged that globalisation is a process influenced and directed by the behaviour of transnational cooperation and international non-governmental organisations. See Jovanovic 2008 *International Economics* 47-80. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1165362 3.

policy and institutionalisation.⁸ It is a two-way process that demands that regional policies are replicated at the national levels of member states and *vice versa* and it involves harmonisation.⁹

Latin America, Asia and Africa on the one hand, and Europe, Australia and America on the other hand, offer a comparable history of regionalisation. Each one of these regions has unique experiences regarding legal reform and inclusion or exclusion of ICL. In all the regions it can be said that legal reform is but continuing.¹⁰ The question of inclusion or exclusion of ICL arises where its exclusion leaves a clearly visible lacuna in the legal system. This is a question of reform.

Reforms in individual African countries have been sponsored from the West, and Asia in some cases.¹¹ The nature of reform has been through the transplantation of some of the developments in the West.¹² The question that remains is whether there is anything to learn from the experiences of other regions in "indigenising" ADR and or legal reform. In other words does culture really matter in law reform. Put differently, the question is whether inclusion of IMADR in the reformed laws has any bearing on the ability of the reformed laws to foster rule of law, and ultimately to influence the development path and pace. The pertinent question, therefore, is to what extent indigenous law has helped relate legal development to economic development, particularly in the context of integration.

The comparison with other regions will therefore enable one to draw conclusions on the value of transplants from outside Africa. The idea is to draw analogies on the best approach to reform at the regional level, and how to make an otherwise transplanted model work. The argument is that in Africa there is a greater need and more room for the inclusion of IMADR in the commercial dispute resolution regime at the regional level than in other regions of the world. Regionalisation itself is a process of reform; legal reform is part of political-economic reform.

8 Montecinos 1996 *Studies in Comparative International Development* 111-112; Rodrik *et al* 2004 *Journal of Economic Growth* 131.

9 Hence harmonisation has been referred to as "integration in disguise": Faria 2009 *Unif L Rev* 7

10 Christiansen and Jorgensen 1999 *European Integration Online Papers (EIoP)* 3-4.

11 Taylor "Rule-of-Law Assistance Discourse and Practice" 165; Alter 2012 *West European Politics* 144.

12 See Chapter 3. See also Greco 2009 *Pepp Disp Resol LJ* 649; Watson *Legal Transplants* 95.

Although comparison is done at the regional organisational level, reference to individual countries will be made for emphasis and for illustrative purposes, especially where the systems of those countries are predominant in the region. Any such significance will therefore be highlighted as the case may be.

The regions chosen for this comparative analysis are Europe¹³ and Asia,¹⁴ both due to their known growth in economic development.¹⁵ Comparison will therefore enable the writer to look at the most pertinent aspects of the role of mediation in the "law-economic" development debate in the context of integration. The approach adopted here is rather unique in that, not only is the comparison done between the Asian and European region, but analogies are also drawn between the two and Africa at the same time. This is done in order to immediately relate the implications that result from the comparison to the African situation. In other words, it is important at this juncture, to highlight the situation of Africa regarding regional dispute resolution in order to link up the comparison with the previous chapter in which the significance of cross-border trade and the informal mechanisms of dispute resolution were emphasised.

Firstly, the historical development of institutions of integration and their mandates are presented.¹⁶ Secondly, the sources of law for the regional dispute resolution are discussed.¹⁷ The question is to what extent the principles seek to include the ICL or IMADR principles and whether it is necessary. Thereafter, a look is taken at the institutions that actually apply the law to resolve the disputes.¹⁸ The forum to which the dispute is taken, is as important as the substantive law applied in it. Most pertinent here is the question of access. To what extent do the forums of the different regions guarantee access to the courts by private individuals regarding commercial disputes?

13 Focus will be on the European Community, including members of the European Union.

14 Focus will mainly be on Southeast Asia, including individual countries of Southeast Asia where necessary.

15 See Chapter 1 for more reasons why the two regions have been chosen for this analysis.

16 Section 6.1.1.

17 Section 6.1.2.

18 Section 6.2.

6.1.1 Institutions of integration

Integration can be divided into five types,¹⁹ namely trade integration, labour market integration, capital market integration, integration of government cooperation and monetary integration.²⁰ These manifest in a number of institutional arrangements,²¹ including monetary unions, customs unions, economic communities, political institutions, and legal policy institutions. These have all occurred in Africa and other regions inspired by the desire to develop economically and be relatively self-sufficient.

6.1.1.1 Africa

Integration in Africa was initially more politically motivated.²² Political integration was intended to retain the colonial borders and to emphasise that economic integration was indispensable across Africa.²³ Integration was also seen as the way to decolonise Africa.²⁴ One other important aim of integration through regional groupings and cooperation has been to ease up border controls on the movement of labour²⁵ and goods.²⁶

Regional integration and cooperation were justified on the following grounds: replacement of links with former colonial countries, economic development, promoting regional stability, and guaranteeing African participation and influence in international negotiations. Institutionalisation was seen as the driving force necessary for integration. A number of institutions have been formed to facilitate integration. These institutions range from political to political-economic, purely economic cooperation, cultural and social groupings. They occupy two of the most

19 De Melo and Panagariya *New Dimensions in Regional Integration* 239.

20 Foroutan *Regional Integration* 1.

21 Mirus and Rylska 2001 *Western Centre for Economic Research* 1-5.

22 Hartzenberg *Regional Integration in Africa* 2-5.

23 Mistry 2000 *African Affairs* 553.

24 Banjo 2007 *Africa Development* 71.

25 ECOWAS has reached a landmark decision for its citizens by implementing the free movement of people across borders at its 48th Ordinary Summit held in Abuja, Nigeria on 13 December 2015. ECOWAS UNKNOWN www.ecowas.int/achievements-of-ecowas-at-40.

26 The latest example is of the SADC Protocol on Employment and Labour 2014 articles 3 and 4; delays in implementation remain a major challenge to the realisation of these goals. See for example, on the SADC Trade Protocol, Kalenga *Implementation of the SADC Trade Protocol* 17.

important levels of integration and economic cooperation, namely regional and international cooperation.

The process of economic integration started with the formation of the Southern African Customs Union (SACU) in 1910.²⁷ The second phase of what is referred to as the 'first generation' model of integration began in the 1960s and is generally regarded as having failed.²⁸

Mistry notes that treaties and regional institutions do not result in integration.²⁹ He asserts further that, in Africa, economic integration failed because of the external factors as well as ill-defined development models.³⁰ He divides the reasons for the failure of the first generation of integration into two categories, namely micro and macro economic reasons.³¹ Most notable micro reasons include) "absence of effective dispute settlement procedure" and "low levels of intra-regional trade". Other reasons include the multiplicity of regional organisations having a similar mandate. While there are a number of regional bodies created and geared towards integration, with overlapping mandates, some countries are a member of more than one such grouping.³² These overlaps and duplications would feature less in the "second generation" integration that began in the 1990s, underscored by a shift from state-driven to market-driven economies.³³

The Francophone West African Economic Community (CEAO) was established in 1962³⁴ and succeeded UDEAO. The CEAO was itself replaced by the West African Economic and Monetary Union (WAEMU) in 1994,³⁵ thus marking a transition from the first-generation to the second-generation integration. Mistry remarks that, for the "second-generation" efforts at integration to succeed, there is a need for among others,

27 Geda and Kebret 2008 *Journal of African Economies* 357.

28 Mistry 2000 *African Affairs* 557.

29 Mistry 2000 *African Affairs* 561.

30 Mistry 2000 *African Affairs* 557.

31 Mistry 2000 *African Affairs* 557- 560.

32 Mistry 2000 *African Affairs* 562.

33 Mistry 2000 *African Affairs* 559-560.

34 Banjo 2007 *Africa Development* 71.

35 Kaptoum "The West African Economic and Monetary Union" 12-13.

... effective impartial mechanisms for understanding and settling disputes; more pragmatic long-term and intermediary goals; and increased cross-border mobility of 'factors' meaningful debt relief.³⁶

The history and background to a pan-Africa's integration efforts begin with the formation of the Organisation of African Unity (OAU) in 1963.³⁷ It was the belief of the OAU that greater integration of the African continent could be achieved through the formation of Regional Economic Communities (RECs).³⁸ The OAU subsequently established the AEC³⁹ in the second wave of integration.⁴⁰ Article 28 of the Treaty establishing the AEC (the AEC Treaty), provides as follows:

During the first stage, Member States undertake to strengthen the existing regional economic communities and to establish new communities where they do not exist in order to ensure the gradual establishment of the community.

Article 78 then excuses Botswana, Namibia, Swaziland and Lesotho from application of some of the provisions of the Treaty because of their special circumstances as members of the SACU. SACU and the Multilateral Monetary Union (MMU) are seen as a model that should inspire further integration within the sub-region and in the entire region of Africa.⁴¹

Prior, during and after the formation of the AEC, the formation of the OAU was followed by, amongst others, the establishment of the first regional economic community in 1975, ECOWAS,⁴² followed by the Southern African Development Coordinating Community (SADCC) in 1980, the Preferential Trade Area (PTA) in 1981, the Economic Community of Central African States (ECCAS) in 1983, the Arab Maghreb Union (AMU) in 1989, the replacement of the PTA by the COMESA in 1994, the Organization for the Harmonization of African Business Law (Organisation

36 Mistry 2000 *African Affairs* 565.

37 The OAU itself replaced the Union of African States, which was formed in the 1960s by Kwame Nkrumah and Haile Selasse, and was succeeded by the African Union in 2001.

38 Hartszenberg *Regional Integration in Africa* 4-6.

39 Adopted in Abuja, Nigeria on 3 June 1991 and entered into force on 12 May 1994. Also called the "Abuja Treaty".

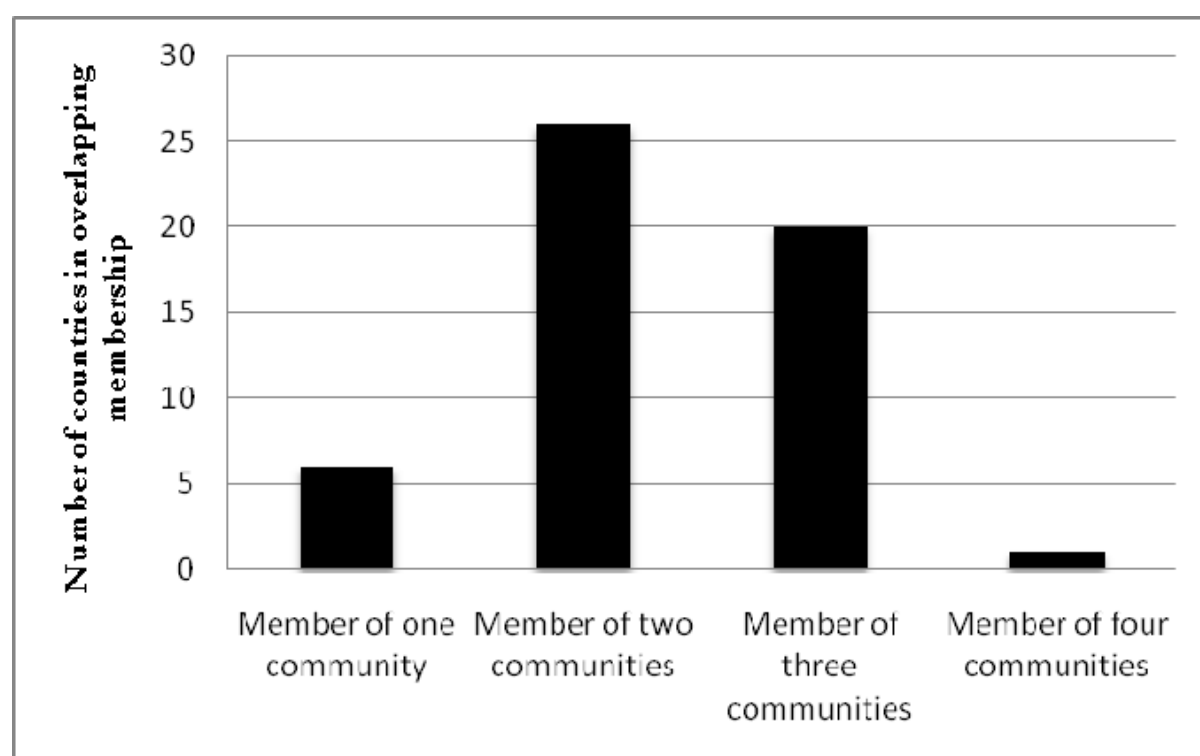
40 Mistry 2000 *African Affairs* 559-560.

41 In fact, its pedigree goes back to what was known as the Custom Union Convention that existed between the Cape of Good Hope, the Orange River Colony, Natal, the Transvaal, and Southern Rhodesia, and which included the Territories of Basutoland, Swaziland, and North-Western Rhodesia, and the Protectorate of Bechuanaland before 1910 (www.sacu.int).

42 The ECOWAS CCJ was created pursuant to the provisions of Articles 6 and 15 of the Revised Treaty of ECOWAS. The Mandate of the Court is to ensure the observance of law and of the principles of equity and in the interpretation and application of the provisions of the Revised Treaty and all other subsidiary legal instruments adopted by Community. See Ecowas UNKNOWN <http://www.courtecowas.org>.

pour l'Harmonisation en Afrique du Droit des Affaires) (OHADA)⁴³, the WAEMU,⁴⁴ the Inter-African Conference on Insurance Markets (CIMA),⁴⁵ NEPAD in 2002, the Tripartite Free Trade Area (TFTA) agreed to be formed by the COMESA, the EAC, and the SADC in 2008, and there was also a decision by the January 2012 African Union Summit of Heads of State and Government to establish a Pan-African Continental Trade Area (CFTA) by the indicative year of 2017.⁴⁶ The process of integration in Africa is described as a conglomeration of overlapping memberships as shown in figure3 below.

Figure 3 Multiple RTA Membership of SSA Countries⁴⁷



The African Union is the most ambitious in the integration efforts in Africa.⁴⁸ However, unlike in Europe where sub-regional communities resulted in the regional

43 OHADA www.ohada.org.

44 The West African Economic and Monetary Union (also known as UEMOA from its name in French, *Union économique et monétaire ouest-africaine*) was established in 1994 and is membered by eight West African states.

45 CIMA was established in 1992, see CIMA www.cima-afrique.org.

46 Uneca DATE UNKNOWN <http://www.uneca.org/pages/action-plan-boosting-intra-africa-trade>; Ghana and Kenya are to register a Pan-African Economic Hub, Michira 2015 <http://www.standardmedia.co.ke/business/article/2000185638/kenya-ghana-push-for-african-trade-market>.

47 Afesogbor and Bergeijk 2014 SAEJ 13.

European Community (EC) and ultimately the EU, in Africa, the process of continental integration seems to fit the idiom "putting the cart before the horse", whilst the EU has now assumed a more political than economic identity, the AU was initially more political than economic.⁴⁹ The AEC was only formed in 1991, post-OAU, while in Europe, the Community preceded the Union. In fact, with the exception of a few, most of the sub-regional communities of Africa came after the AU. The path followed by the EU has its own shortcomings.⁵⁰

6.1.1.2 Asia

Asia has also had its share of regional groupings aimed at integration and harmonisation. The most notable of the integration groupings is the Asia Pacific Economic Community (APEC). APEC was founded in 1989 and had three goals, namely to develop and strengthen the multilateral trading system to increase the interdependence and prosperity of member economies and to promote sustainable economic growth.⁵¹ Intra-regional growth was further facilitated in 1994 when the members committed to reducing trade barriers and promoting the free flow of goods and services in the region. APEC is unique compared to other regional groupings, in that its decisions are consensus-driven, and there are no binding commitments. Compliance is ensured through discussion and mutual support through economic and technical cooperation.⁵² Asia's mediation efforts seem to lag behind.⁵³ The Eminent Persons Group⁵⁴ (which was created by the APEC Fourth Ministerial

48 Zamfir 2015
[www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA\(2015\)551306_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA(2015)551306_EN.pdf) 1-2 .

49 As a matter of course this depends on the perspective from which one looks at it. In this context it is presumed that the path of development that Africa has sought to follow has generally been influenced by the development in Europe and America. Grimm *et al* "European Development Cooperation to 2020" 4-35 agrees.

50 See generally Legrand 1996 *The International and Comparative Law Quarterly* 52-81; Legrand 1997 *The Modern Law Review* 44-63.

51 APEC 2014 www.apec.com/publications.

52 APEC 2014 www.apec.com/publications.

53 Izor 2013 *Asian JM* 2. Izor suggests that the failure of mediation taking root in Asia can be blamed on failure to take the cultural differences into account.

54 The group was created in order to generally examine trade and economic issues confronting APEC. McGivern 1996 *International Legal Materials* 1103.

Meeting) recommended in 1994 that Asia should form a dispute mediation services.⁵⁵

Another important regional organisation in Asia is the Association of Southeast Asian Nations (ASEAN), (now ASEAN+3 after adding Japan),⁵⁶ which is Asia's longest-standing regional grouping.⁵⁷ ASEAN was established on 8 August 1967 and had two goals, one of which was—

to accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations.⁵⁸

The Enhanced ASEAN Dispute Settlement Mechanism (ASEAN DSM) was created in 2004 and is a copy of the GATT/WTO system.⁵⁹ It has compulsory jurisdiction over members.⁶⁰ It, however, falls in the sphere of public dispute resolution, which effectively does not apply, to resolution of disputes between individuals. ASEAN countries are currently negotiating a regional comprehensive Economic Partnership to deal with, amongst others, dispute settlement,⁶¹ which, it is hoped, will deal more with private disputes.

The ASEAN approach is different from that of the EU in that it does not seek to impose supranational law over member states.⁶² ASEAN also started with a political mandate as did the AU, but has not redefined its goals to include economic cooperation through intra-regional trade. As such, ASEAN relies on national courts and other forums for resolution of disputes.⁶³ There is a recognised need for the

55 McGivern 1996 *International Legal Materials* 1103.

56 ASEAN has grown from ASEAN to ASEAN+3 to ASEAN+6. See Kawai and Wignaraja "ASEAN+ 3 or ASEAN+ 6" 3.

57 Dobson 2001 *The World Economy* 1007.

58 www.asean.org/asean/about-asean/overview/. According to the ASEAN Integration Report of 2015, intra-regional trade in ASEAN grew from 51.7% in 2007 to 58.9% in 2014. See Report of 2015 page xviii-xiv: www.miti.gov.my/miti/resources/.

59 Mansfield and Reinhardt 2003 *International organization* 838; Van der Muur "The Legal Nature of the ASEAN Economic Community" 11.

60 Alter 2012 <https://www.researchgate.net/> 7.

61 *ASEAN Integration Report* 2015 102.

62 Van der Muur *ASEAN Economic Community* 3.

63 Van der Muur W *ASEAN Economic Community* 12.

establishment of a regional dispute resolution mechanism that is in tune with the ASEAN culture, as intra-regional trade increases in the ASEAN.⁶⁴

Others include the Pacific Trade and Development (PAFTAD), the Pacific Economic Cooperation Conference (PECC), the Pacific Basin Economic Committee (PBEC), and the Asian Business Advisory Committee (ABAC), which is part of APEC and provides APEWC leaders with advice regarding the private sector.⁶⁵

The South Asian Association for Regional Cooperation (SAARC) is perhaps one of the most useful tools in the move towards the economic integration of Asia. The SAARC was formed in 1985. It established the South Asia Preferential Trade Agreement (SAPTA) in 1995. The SAPTA was intended to promote and sustain mutual trade and economic cooperation through the exchange of concessions within the region to pave the way for the South Asia Free Trade Area (SAFTA), which came into being in 2005.⁶⁶ Many members of the SAARC had started liberalising their economies as early as the 1970s, but without realising any increases in intra-regional trade.⁶⁷ It was established that trade with countries outside the region sustained intra-regional trade in Asia.⁶⁸

The report⁶⁹ by an official bi-national study group laid the groundwork for regional negotiations in Japan and Singapore and recommended the following for items of agenda: reduction of tariff and non-tariff barriers, creation of dispute resolution mechanisms, etc. The report recommended that the bilateral agreement (FTA) between Japan and Singapore should encourage the use of ADR through national mechanisms.⁷⁰ It should be noted that it is widely acknowledged that the Small and Medium Enterprises (SMEs) are the backbone of South Asian economies.⁷¹ Any dispute resolution mechanism must therefore address this peculiarity. No particular reference was made in the report's recommendations.

64 Unfortunately, the ASEAN DSM has not been used. Suspicion is that there is a reluctance to use it because it does not quite conform to the ASEAN culture. Van der Muur *ASEAN Economic Community* 12-13.

65 Dobson 2001 *The World Economy* 1068.

66 Hirantha *ETSG* 2004 2.

67 Hirantha *ETSG* 2004 2.

68 Hirantha *ETSG* 2004 3.

69 Joint Study Group Report 2000 www.mofa.go.jp/region/asia-paci/singapore/econo_b.html .

70 Joint Study Group Report 2000 www.mofa.go.jp/region/asia-paci/singapore/econo_b.html 2.42 and 2.43.

71 De Mel *et al* "Vertical Integration" 168.

6.1.1.3 Europe

The history of economic integration in Europe goes back to the 19th century. Europe had tested a number of schemes of economic integration before ending up with the European Union. However, the EU still does not represent the entire European continent,⁷² and then one is not even mentioning the apparently looming disintegration because of a threatened withdrawal by Britain.⁷³

One of the first customs unions in the world was established by Prussia with Hesse-Darmstadt in 1828 to be followed by the Bavaria Württemberg Customs Union, the Middle German Commercial Union, the German Monetary Union and the German Reich.⁷⁴ The EU itself was proposed in the beginning of the last decade of the 19th century.⁷⁵ The metamorphosis that began with the formation of the European Coal and Steel Community (ECSC) (1952) culminated in the 1957 Treaty of Rome establishing the EC, which is now the EU.

It would appear that the treaties establishing all these regional integration organisations and other related documentary instruments are very much the same, as if the same template was used.⁷⁶ Exceptions exist in those areas where the instrument does not create binding rules on the member states, such as for example in Asia.⁷⁷ Dispute resolution is one of the areas where there is a notable difference.

6.1.2 *Dispute resolution and sources of law for intra-African trade disputes*

It is important to establish whether the mechanisms of dispute resolution are commensurate to the processes of integration. Regional integration in Africa is

72 Eriksen and Fossum (eds) *The European Union's Non-Members* Xv-xvi.

73 Eriksen and Fossum, (eds) *The European Union's Non-Members* Xv-xvi.

73 Oliver "A European Union without the United Kingdom" 6-9. "Brexit" (an abbreviation for British exit from the EU) presents a mirage of problems for the continued integration of Europe. See also, Glencross 2015 *International Affairs* 303-317.

74 Mattli *The Logic of Regional Integration* 1.

75 Mattli *The Logic of Regional Integration* 2.

76 Mistry 2000 *African Affairs* 564-565.

77 See for example APEC whose decisions are consensus-driven and non-binding on members. APEC 2014 www.apec.com/publications.

fraught with problems⁷⁸ that will certainly have an impact on the performance of contractual obligations. It is one thing to have mechanisms that deal with the disputes, but it is quite another thing to apply laws that are understandable and accessible to those in dispute.

Cognisance is taken in this regard, of the growing institutionalisation at the global level. A number of legal institutions dealing with disputes related to trade and development exist at the international level, including international courts⁷⁹ and other forums.⁸⁰ The purpose is to argue that simply copying Europe will not help Africa. While the importance of transplants in legal development cannot be denied, context really does matter. In this case, the nature of trade and law in Africa as predominantly informal should be considered. What is being questioned is the inclusion of ICL principles in the dispute resolution mechanisms, particularly in trade.

In intra-African trade, as in any form of regional or international trade private, as well public entities constitute the main actors. It should be expected, therefore, that disputes in the context of intra-African trade would necessarily emanate from between individual and individual, the government and an individual, and government and government transactions. The dispute resolution mechanism in place must address all categories of traders. Most importantly, the efficiency of such a mechanism would be judged among others on its relevance.⁸¹ Such relevance is difficult to judge where integration is marked by fragmented membership of regional bodies.

The one peculiarity about fragmented dispute resolution mechanisms is that it may promote forum shopping where an aggrieved party may choose a forum where its dispute would be decided favourably.⁸² The advantage would, however, be that whereas rules of one organisation may allow private disputes, the others may not. There may be other advantages, such as administration, efficiency and precedential value. Complainants may choose a certain forum in order to provide a precedent for

78 Africa Growth Initiative 2012 www.brookings.edu 2-4.

79 Alter 2006 *Comparative Political Studies* 26-27.

80 Other forums include the arbitration and mediation under the auspices of GATT/WTO and their replicas around the world, and/or privately run arbitration and mediation services.

81 *Order without Law* 422; Also see Jayasuriya "Analysis of Legal Institutions" 1.

82 For other considerations that determine forum shopping, see Busch 2007 *International Organization* 735-761.

themselves in future dealings.⁸³ It would seem that forum shopping generally may create a general impression of a manipulated justice system.⁸⁴ However, our court system seem to tolerate forum shopping, at least to the extent that there are specialised and spread courts.⁸⁵ There is bad, and there is good forum shopping.⁸⁶ Nonetheless, it is hoped that in the final analysis, all these fragmented organisations will be combined and subsumed into one regional body with one system of law, for the relationship between law and globalisation is "reflexive."⁸⁷

6.1.2.1 Africa

The issue of the applicable law is not settled in Africa.⁸⁸ It is generally governed by the international law and conflict of law principles.⁸⁹ It is easier for those countries that have signed the United Nations Convention on the International Sale of Goods (CISG), for instance to decide the cases by using the CISG principles.⁹⁰ Most of the organisations have not committed to a single definite source of law. For instance, the fact that the COMESA Treaty does not define law or provide sources of law⁹¹ in the COMESA is good because then member states can bring their own laws.⁹² This augurs well for the application of the ICSG and/or the inclusion of ICL.

The AEC Protocol⁹³ recognises international custom as one of the sources of the law, but does not go on to recognise ICL, common to both parties, as another important source of the law. Failure to do so is attributable in part to its failure to appreciate the role of the informal sector in intra-African trade to which this particular

83 Busch 2007 *International Organization* 743.

84 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (16703/14) [2015] ZAWCHC 99.

85 See generally Algero 1999 *Neb L Rev* 79-112.

86 Maloy 2005-2006 *QLR* 25.

87 Flood "Globalisation and Law" 327.

88 Kuhlmann *East Africa Legal Guide* Aspen 4-6.

89 Kuhlmann *East Africa Legal Guide* Aspen 4-6.

90 Article 1.1 (a) of the CISG; Some African countries have not joined the CISG although there is more support for joining it than arguments against joining it. See for instance; Matinyenya *South Africa's Non-Ratification of the CISG* 12-20; Malahlela *Should South Africa Ratify the CISG?* 25-35.

91 Kiplagat 1995 *North-western Journal of International Law and Business* 450.

92 In fact article 31 (1) of the Treaty establishing the Court of Justice of the African Union recognises as sources of the law in the court: "the general principles of law recognised universally or by African States." .

93 Protocol to The Treaty Establishing The African Economic Community Relating to The Pan-African Parliament.

source of the law might be relevant. For instance, in cross-border informal trade, parties may share a common indigenous culture⁹⁴ in terms of which their dispute could easily be resolved. Most notable, however, is article 20 (2) which provides that "this provision shall not prejudice the power of the court to decide a case *ex aequo bono*, if the parties agree thereto."⁹⁵ Although it subjects the diversion to the agreement between the parties, this could very well accommodate the use of ICL principles in certain situations. The provision should have gone further to explicitly state recognition and application of ICL, especially where we have the civil law legal systems that rely mostly on written codes compared to the common law systems. Moreover, cross-border trade is important because of the recognition by the AU of the importance of borders as catalysts of growth, and socio-economic and political integration in Africa.⁹⁶

Chapter XVIII of the AEC Treaty is dedicated to "Settlement of Disputes". Article 87 (1) thereof provides for the amicable settlement of disputes through "agreement", failing the Court of Justice may be approached within a period of 12 months of that failure. It does not mention ADR or any of its forms, nor does it provide a forum for settlement by "agreement". There is no attempt in the Treaty to define "agreement", although it seems that the idea was to refer to "agreement" as a method of dispute resolution.⁹⁷ The necessary implication is that when the referral is eventually made, there must be proof that an attempt was made at resolving the dispute by agreement. It is a redundant provision, therefore, because ordinarily parties will always go to court because they are in disagreement. What seems to have been intended by the provision is that parties should consider ADR first.

The contemplated Regional Border Consultative Committees (RBCCS) to be established by the RECs in terms of article 9 of the Niamey Convention provides another forum for the dispute resolution of intra-African trade disputes. The RBCCSs

94 Refer to Chapter 5, page 10.

95 In the context of arbitration, for instance, it refers to the power of arbitrators to dispense with consideration of the law but to consider mainly what they deem to be fair and equitable before them. Article 38(2) of the Statute of the International Court of Justice (ICJ) provides that the court may decide cases *ex aequo et bono* only if the parties agree.

96 See the objectives (article 2 read with article 3 (2) of the African Union Convention on Cross-Border Cooperation (Niamey Convention) 2014.

97 There is a need to define this form of agreement to avoid confusing it with, for instance a barter agreement, which is defined as "any agreement under which goods and services imported into a Member State may be paid for in full or in part by direct exchange of goods and services."(Article 1 of the AEC Treaty).

are aimed at ensuring border cooperation at the level of RECs. The Convention is more explicit on the resolution of disputes. It refers to "negotiation" instead of "agreement."⁹⁸

An attempt to harmonise the laws at the regional level is illustrated by the establishment of the OHADA. The OHADA was formed in 1993⁹⁹ and aims at ensuring that business law is harmonised through the elaboration and adoption of simple and modern common rules, appropriate legal proceedings and by encouraging the use of arbitration to settle contractual disputes.¹⁰⁰ It creates unified business codes for African countries. What has made the codes attractive was the attempt to adapt them for the developing countries, thus making them more relevant.¹⁰¹

While the provisions clearly have not expressly included mediation as one of the methods of alternative dispute resolution encouraged for member countries, it does not necessarily exclude it. The reading of Article 1 of the OHADA Treaty also indicates that where the members have mediation in their legal systems, the same could be considered for harmonisation. In the event that amendments are made to include mediation, reference will also need to be made to ICL. This would facilitate increased participation by the economies of member states of the OHADA, which remain informal and thus outside the scope of the OHADA¹⁰² even though the OHADA is much more advanced than other regional organisations.¹⁰³ However, its relevance to Africa remains a major point of criticism.¹⁰⁴

98 Article 13 entitled "Settlement of Disputes" provides further that "where the dispute is not resolved through direct negotiation, the State Parties shall endeavour to resolve the dispute through other peaceful means, including good offices, mediation and conciliation, or any other peaceful means agreed upon by State Parties..."

99 Alter 2012 *West European Politics* 148.

100 Article 1 of the OHADA Treaty; Mouloul "Understanding OHADA" 21.

101 Alter 2012 *West European Politics* 149.

102 Alter 2012 *West European Politics* 150.

103 The WAEMU is a replica of the OHADA. It was created in 1994 and is regarded as the most recent attempt to regional integration. Declared goals of WAEMU are similar to those of OHADA and its court of justice emulates the European counterpart. See Grimm 1999 *Africa Spectrum* 5, 16.

104 Madsen 2016 *Law and Contemp Probs* 30, citing Dickerson 2016 *Law and Contemp Probs*.

6.1.2.2 The ASEAN¹⁰⁵

Like the AU, the ASEAN countries also have diversified legal regimes because of their colonial history. For instance, Malaysia, Singapore and Brunei inherited the common law system of England, while Thailand and Indonesia inherited a civil law system.¹⁰⁶ With a view to integrate the economies of the ASEAN, the Asian Charter of the Southeast ASEAN countries provides the source of law in Asia.¹⁰⁷ However, it deals mainly with disputes between member states. Individual members of the ASEAN have embraced ADR in the form of court-annexed mediation as a conventional way of dealing with national disputes.¹⁰⁸

The Asian approach can be described according to the following traits:¹⁰⁹ Confucianism, which comprises elements such as hierarchical societal relationships, relationships as the core of societal makeup, social harmony as the overall goal of all human affairs, and being non-litigious, compromising and yielding as virtues. The other trait is collectivist inclinations that emphasise the importance of the collective.¹¹⁰ Lastly, the approach is based on the reverence of "face" concerns, with the focus on respect and the avoidance of shame.¹¹¹

Having identified the fundamental differences between the Western and the Eastern approaches to mediation, Izor persists with the idea of reform by exporting Western mediation to Asia.¹¹² He submits that the reform can work in Asia if the process is described in such a manner as to impress upon Asia that despite its pillars and its virtues as a Western concept, it is aimed at the prevention of conflict and building social harmony.¹¹³ He does not address the fundamental question of why the Western system should be regarded as superior to the Asian system. This submission by Izor is a misrepresentation and may be seen as perpetuating

105 For ASEAN integration generally see, ASEAN UNKNOWN
http://www.miti.gov.my/miti/resources/ASEAN_Integration_Report_20151.pdf

106 Koh 1996 *International and Comparative Law Quarterly* 846-847.

107 The Charter came into force in December 2008. It has 15 objectives that deal with political, economic and development issues.

108 Limparangsi 2006 www.aseanlawassociation.org/9GAdocs/w4_Thailand.pdf 5.

109 Izor 2013 *Asian JM* 4-5.

110 Izor 2013 *Asian JM* 4-5 see Chapter 4 for comparison with Africa.

111 Izor 2013 *Asian JM* 5.

112 Izor 2013 *Asian JM* 1-13.

113 Izor 2013 *Asian JM* 5-6.

imperialism.¹¹⁴ On the contrary, is it not more important to return the eroded virtues of humanity and social harmony to the West by exporting the Asian model to the West instead?

The difference between Asia and Europe in dispute resolution lies in their respective, albeit different conceptualisations of law and contracting.¹¹⁵ McConnaughay paints a picture of the Asian conception of law that is more analogous to that of Africa.¹¹⁶ He observes that law in Asia was traditionally viewed as having vertical rather than horizontal application, as a command from the sovereign that must be respected by the citizenry. Thus private relationships were subject to regulation by the parties involved. The approach to commercial relationships and disputes that arise therefrom were "relational."¹¹⁷

Traditional contracting practices of Asia were at stark variance with those of the West.¹¹⁸ For example, whereas contracts could still be written, they were open-ended in terms of time and manner of performance,¹¹⁹ whereas the English contract requires strict adherence to the written letter of the contract.¹²⁰ In similar vein, the African traditional contract, though, would not be invalid for being unwritten. In any case under the common law or Roman Dutch law operational in most of Southern African countries a contract can still be valid even if unwritten.¹²¹ However, there is always a risk that if it is open-ended there is a risk that it could be declared void for vagueness.¹²² That risk did not exist under ICL.

114 See Capulong 2012 *Ohio St J on Disp Res* 641-642.

115 Driberg postulates that "In business relationships between South-South countries, in particular between China and sub-Saharan countries in Africa, one can only assume that the two parties would be that much closer to problem solving through amicable means, such as mediation rather than litigating so as to allot blame to one party or another" Driberg 1934 *Journal of Comparative Legislation and International Law* 622.

116 McConnaughay 2000 *Virginia Journal of International Law* 3-4.

117 Macneil 1986 *Stanford Law Review* 325.

118 McConnaughay 2000 *Virginia Journal of International Law* 16-20; Ginsburg 2000 *Law & Society Review* 834-835.

119 See Chapter 4 where it is stated that in the context of traditional contracting in Africa a contract was always seen as the start for new and continuous relationships. Whereas an open-ended contract could be declared void for vagueness under common law

120 McConnaughay 2000 *Virginia Journal of International Law* 17.

121 Van der Merwe et al *Contract* 8. Even contracts of employment do not have to be written to be valid as, for example in terms of the Employment Act (Botswana).

122 Van der Merwe et al *Contract* 51.

The important point of difference lies in the open-endedness of the Asian contract relationship.¹²³ This meant that parties were free to alter the contract as they progressed in the commercial relationship without having to follow strict rules.¹²⁴ An analogy can be drawn between this unending contractual relationship and a principle sometimes laughed at in mockery by those educated in the Western system that in Africa *molato ha o bole*, meaning "a debt does not prescribe".¹²⁵ China and Africa enjoy a high level of similarity in customary law approaches to dispute resolution. Driberg observes that,

In both China and Africa, the contract is perceived as a lasting relationship – like a marriage – rather than as a spot allocation of obligations and rights established at the start, once and forever – with litigation as the inevitable outcome for any situation of non-compliance.¹²⁶

There is, however, an apparent convergence in the emerging Asian contract law. While the CISG seems to have great influence in the development of the Principles of Asian Contract Law (PACL),¹²⁷ the PACL was developed with more ambition. On this, Ka has the following to say,

I want to emphasise that while PACL is to reflect the unique traditions and legal cultures of Asia, PACL should not stop there. We should also strive to make the norms of PACL have equal standing with other international model laws, and at the same time, be accessible and practical in commercial transactional practices.¹²⁸

This is an indication that the trends are towards contextualisation of legal reforms in Asia.

6.1.2.3 Europe

Europe uses a system of directives for the publication of laws. In the area of contract law, the Commission on European Contract Law (aka Lando Commission),¹²⁹ which is styled after the UNIDROIT Working Group, was established and commenced

123 McConnaughay 2000 *Virginia Journal of International Law* 16-20.

124 McConnaughay 2000 *Virginia Journal of International Law* 16-20.

125 Driberg 1934 *Journal of Comparative Legislation and International Law* 238.

126 Driberg 1934 *Journal of Comparative Legislation and International Law* 622.

127 Wang (ed) *Codification in East Asia* 188, 192.

128 Ka 2013 www.victoria.ac.nz/law/.../05%20Ka 65.

129 The commission was established in the 1980s and is called thus in honour of its Chairman and founder, Ole Lando; See Bonell 2008 *The American Journal of Comparative Law* 9.

business in 1982. Its mandate was to prepare principles of European Contract Law.¹³⁰ The Lando Commission sourced material from all over the world and used all these resources, including the CISG.¹³¹

When it comes to the substantive law to be applied to resolve the disputes, the EU has developed principles that are similar to the UNIDROIT Principles.¹³² There are differences regarding certain rules, including *inter alia*, receipt and dispatch rules, usages, price determination by a third person, exceptions to specific performance of monetary obligations, payment of an obligation expressed in currency other than that of the place of payment, and the right to cure.¹³³

The implications of any regional law or any law for that matter for integration can only be tested in proper and appropriate forums. International tribunals of various kinds have provided such forums.

In Europe, the EC uses a court system and an elaborate supranational organisation, the European Free Trade Area Court (EFTAC), the European Court of First Instance (ECFI), the European Court of Human Rights (ECtHR), and the European Court of Justice (ECJ). Despite these efforts, it is said that European legal systems are not converging.¹³⁴ Legrand maintains that that convergence has not happened, it is not happening and it will not happen.¹³⁵ Emerging scholarship has however, put this view by Legrand to doubt by holding that there is an apparent convergence.

According to Garoupa and Ogus,¹³⁶

countries hesitate to modify their laws toward another country's regime because they hope to free ride on the efforts of the latter to modify their laws toward convergence.

Since the change of laws has always come from outside by way of transplants, convergence can still be achieved in Africa. Such convergence will not only be

130 Bonell 2008 *The American Journal of Comparative Law* 9.

131 Bonell 2008 *The American Journal of Comparative Law* 4.

132 Bonell 2008 *The American Journal of Comparative Law* 9.

133 See generally Hartkamp 1994 *European Review of Private Law* 341-357; Bonell 2008 *The American Journal of Comparative Law* 1-28.

134 Legrand 1996 *International and Comparative Law Quarterly* 52-81.

135 61-61

136 Garoupa and Ogus 2006 *Journal of Legal Studies* 359.

facilitated by transplants, but Africa should continue to replicate the effort of the EC in working towards convergence.

6.1.3 Mediation forums and access to private entities

The development of international courts was buttressed by, among others, their enforcement capability that comes with compulsory jurisdiction.¹³⁷ They somehow have stood above national jurisdictions, thus providing a check on national public institutions.¹³⁸ The international courts that have been more efficient are those that deal mainly with trade, because of the underlying agreements and their private nature.¹³⁹ As a result, of the inherent privacy in international trade agreements, there is a desire to make them work. Hence, Africa, Europe and Asia have contributed to replicating these global institutions, albeit at varying degrees and paces.

The Constitutive Act of the AU establishes the Court of Justice of the AU.¹⁴⁰ The protocol to set up the African court of Justice was adopted in 2003 and entered into force in 2009. This was superseded by the protocol creating the African Court of Justice and Human Rights, which was adopted in 2008.¹⁴¹ Individuals from States that have made a declaration accepting the jurisdiction of the Court can also institute cases directly to the court.¹⁴² Article 30 extends access to the court to individuals and NGOs generally on issues concerning human rights violations. By these provisions, the court seems to anticipate a possibility of disputes that emanate from intra-African trade transactions to come before it. However, there are presently no express provisions for ADR or mediation. The issue of *locus standi* remains critical.¹⁴³ In any case, the court has dealt with only one case thus far amid challenges regarding resources.¹⁴⁴

137 Alter 2006 *Comparative Political Studies* 25-26.

138 Alter 2006 *Comparative Political Studies* 1-2.

139 Alter 2006 *Comparative Political Studies* 28.

140 Article 18 (1).

141 Protocol on The Statute of The African Court of Justice and Human Rights 2008.

142 Article 30 of the Protocol on the Statute of the African Court of Justice and Human Rights 2008.

143 The COMESA Treaty has failed to adequately deal with the question of *locus standi*. Access by natural and artificial persons is not as clearly provided for as in the member states. States (individuals and legal persons) may be parties. Private persons are also allowed under the Treaty to sue a member State in the COMESA Court challenging the legality of any act,

The situation is not any different at the regional level.¹⁴⁵ For instance the SADC tribunal¹⁴⁶ is now suspended. Access to the Tribunal was given to private parties, but there is no mechanism for mediation within the court process. Access to private parties may well be removed when the tribunal is ultimately resuscitated. The 2012 SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.¹⁴⁷ The ECOWAS CCJ on the other hand, exercises powers of arbitration and not mediation.¹⁴⁸

The Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States,¹⁴⁹ establishes a tribunal, which entertains disputes in terms of Articles 10 (1) and 40. Article 10 (1) provides that,

There is hereby established a judicial organ to be known as the Tribunal of the Preferential Trade Area, which shall ensure the proper application of the provisions of this Treaty and adjudication upon such disputes as may be referred to it in accordance with article 40 of this Treaty.

Article 40 provides under "Procedure for the Settlement of Disputes" that,

Any dispute that may arise among the Member States regarding the interpretation and application of the provisions of this Treaty shall be amicably settled by direct agreement between the parties concerned. In the event of failure to settle such disputes, the matter may be referred to the tribunal by a party to such dispute and the decision of the tribunal shall be final.

This regime seems to emulate the OHADA system. The Common Court of Justice and Arbitration (CCJA) for the OHADA looks at disputes concerning uniform laws,¹⁵⁰ and provides advice to the Council of Justice and Financial Ministers of the member states on proposed uniform laws before they are adopted. It also acts as court of *cassation*, in place of national courts of *cassation*, on all issues concerning uniform

directive regulation, or decision of such Member State under the Treaty. Nonetheless, there is no express provision for mediation. See Kiplagat 1994-1995 *North-western Journal of International Law and Business* 462.

144 Zimmerman and Baumler *Current Challenges* 52.

145 See Alter 2012 *West European Politics* 145.

146 The SADC Tribunal was established by the Protocol on the Tribunal, which was signed in Windhoek, Namibia during the 2000 Ordinary Summit, and was officially established on 18 August, 2005 in Gaborone, Botswana.

147 <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>.

148 Oppong *Legal Aspects of Economic Integration in Africa* 133.

149 Of 21 December 1981.

150 Pict UNKNOWN <http://www.pict-pcti.org/courts/OHADA.html>.

laws.¹⁵¹ It has already been said that although the OHADA offers access to private individuals, it is only in relation to arbitration. Overall, the OHADA has generally been criticised for being irrelevant to the informal economy of Francophone Africa.¹⁵² It has, on the other hand, been applauded for its contribution to the growth and harmonisation of formal law.¹⁵³

The situation is equally complicated in other regional forums. Access to the WAEMU Court is granted to individuals, but is impeded by many obstacles.¹⁵⁴ In the East African Court of Justice (EACJ), access is given to traders, but they hardly exercise their rights of access. Instead, all the cases that have been coming to the court are the human rights-related cases despite there being no provision for their submission.¹⁵⁵

Further afield, Hong Kong has introduced what is called "facilitative mediation" modelled along the lines of the EU Mediation Directive.¹⁵⁶ The function of the facilitator is to "structure a co-operative, interest-based process for the purpose of assisting the disputing parties to reach a mutually agreed settlement."¹⁵⁷

The European experience is much advanced in this regard. The definition of mediation in the Directive¹⁵⁸ is restrictive; it only applies to civil and commercial disputes. It also does not accommodate use of other approaches to mediation, such as, for example, subjecting the mediation to elders or members of a certain community, be they cartels or trade associations to which disputing parties may belong. It is inflexible.¹⁵⁹

The Directive aims,

151 Ecowas UNKNOWN <http://www.courtecowas.org/>.

152 Madsen et al 2016 *Law and Contemporary Problems* 30. See also Dickerson 2016 *Law and Contemporary Problems* 63.

153 Dickerson 2011 *European Journal of Law Reform* 462.

154 Grimm enumerates a number of obstacles that stand in the way of private access: Grimm 1999 *Africa Spectrum* 16.

155 Gatii 2015 "The Variation in the Use of Sub-Regional Integration Courts" 1.

156 *The Working Group on Mediation* DATE UNKNOWN
www.gov.hk/en/residents/government/publication/.../Mediation.pdf 87.

157 Koo and Zhao 2011 *Common Law World Review* 263-264.

158 *Directive 2008/52/EC*, Article 1.1.

159 Article 3 (a).

to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.¹⁶⁰

According to the Directive, mediation is not compulsory for the parties to a case.¹⁶¹ The ECJ has, in the *Allassini* cases, made allowance for the national courts to otherwise make it compulsory if they so wish.¹⁶² The effect of the decision of the court in the *Allassini* cases was to legitimate the Italian mediation rules which made it compulsory for the parties to try mediation first.¹⁶³ The Directive applies only to cross-border disputes.¹⁶⁴ Enforceability is ensured through 'homologation' or by submission to notary public or through enshrining the mediation report in the court judgment as is the case in the UK.¹⁶⁵ English courts have punished parties who refuse to mediate, with costs. For example, in the case of *Dunnet v Railtrack Plc*¹⁶⁶ the Court withheld costs from the party that had unreasonably refused to mediate. The same attitude was manifest in the case of *Earl of Malmesbury v Strutt and Parker*.¹⁶⁷

In implementing the Directive, Italy introduced mandatory mediation whereby parties were to try mediation even before serving court papers,¹⁶⁸ court-annexed mediation¹⁶⁹ and assisted negotiation,¹⁷⁰ thus adhering to the multi-door court house concept. This is an example of what is meant by members playing an active role in implementing decisions of the regional bodies. The idea of making these processes mandatory is also significant in that, without making them mandatory, parties would not consider them first. In today's modernised systems, the first instinct of plaintiffs to solve their disputes is to go to court. It must be the court therefore, that offers several doors to justice. To a litigious person, utilising the alternatives would still be utilising the court system. At the same time, it would offer the necessary mechanism to those whose first instinct is to negotiate through mediation or conciliation.

160 *Directive 2008/52/EC*, Article 1.1.

161 *Directive 2008/52/EC* Article 5 (2).

162 Joined cases *Allassini v Telecom Italia SpA C-317/08 to C-320/08*.

163 Italy has now introduced the "assisted negotiation" in addition to other forms of ADR; see Lupoi 2014 www.academia.edu/ (04.02.16).

164 Friel and Toms DATE UNKNOWN www.brownrudnick.com/ 2.

165 Friel and Toms DATE UNKNOWN www.brownrudnick.com/ 3.

166 [2002] EWCA Civ 302.

167 2008 EWHC 424

168 Lupoi 2014 www.academia.edu/ 97-98.

169 Lupoi 2014 www.academia.edu/ 98-99.

170 Lupoi 2014 www.academia.edu/ 104-105.

There is a contrary view that dispute resolution mechanisms can still work even if they are not compulsory.¹⁷¹ All that is required is for the mechanism to provide a "fair" procedure. Whether the procedure is made compulsory should be determined on the basis of among others, the cultural context of the legal system in which it is introduced.

The Directive applies to cross-border disputes, but does not distinguish between informal and formal cross-border trade.¹⁷² A cross-border dispute is a dispute in which at least one of the parties is "domiciled or habitually resident in a member state other than that of any other party."¹⁷³ It is a generic word therefore, which includes informal cross-border dispute. Formal questions of domicile, residence, and the incorporation of a company may not be necessary in informal cross-border trade because it is a form of trade that basically avoids formalities.¹⁷⁴

The question now is, where there is provision for alternative dispute resolution methods either explicitly or implicitly, to what extent does it include ICL, or comparable, principles?

6.2 Inclusion of indigenous law in modernised integrated systems

Africa still represents the region with the highest level of constitutional recognition of customary law.¹⁷⁵ The approach in most African jurisdictions has been to make a general or umbrella provision for the recognition of (indigenous) customary law,¹⁷⁶ without re-enacting the ICL principles in legislative tools. Other African jurisdictions, particularly common law jurisdictions, have gone further to invoke the principles in court decisions including in courts ordinarily designated for non-customary law.¹⁷⁷ The latter remains a possibility in some of the RECs in Africa.

171 Alter 2006 *Comparative Political Studies* 30.

172 See pages 7,119-121 above for the difference.

173 Article 2 of the *EC Directive 2008*; See Steffek 2012 <https://e-justice.europa.eu/> 9.

174 Nkendah "The Informal Cross-Border Trade" 22.

175 Cuskelly *Customs and Constitutions* 6.

176 Africa has the greatest number of states that give constitutional recognition to customary law, see Cuskelly *Customs and Constitutions* 6.

177 In Lesotho, the courts have used this concept very loosely to cover almost every aspect of society: including *inter alia*, inhuman treatment (*Thabo Fuma v The Commander LDF CONST/8/2011*); execution of property of a widow (*Mokoena v Mokoena*

In Asia,¹⁷⁸ there is some semblance of recognition of customary law, particularly in South East Asia, although it is not as detailed as it is in Africa; for the most part the laws deal with the protection of culture.¹⁷⁹ West Asia has the lowest rate of recognition.¹⁸⁰ In South and East Asia, many constitutions simply recognise customary law in relation to the preservation of culture.¹⁸¹ Other constitutions have provisions that define law to include customary law,¹⁸² such as the Constitution of Bangladesh,¹⁸³ the Constitution of India,¹⁸⁴ and the Constitution of Malaysia.¹⁸⁵ The Pakistani Constitution goes further to exclude the application of any Acts and the Supreme Court or High Court to "Federally Administered Tribal Areas and Provincially Administered Tribal Areas."¹⁸⁶ Unlike most African countries where dualism is such that customary law occupies a rather subordinate position to common law or statutory law,¹⁸⁷ in Brunei the two systems occupy an equal position.¹⁸⁸ However, the formal status of customary law in Asia is that it is subordinate to written laws.¹⁸⁹

The recognition of customary law in Western Europe is broad, but not strong.¹⁹⁰ For instance, the Spanish Constitution is said to be the only one in Western Europe referring to customary law and traditional courts.¹⁹¹ Section 125 of the 1978 Constitution of Spain provides that,

Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.

(CIV/APN/216/2005); inheritance (*Lepule v Lepule* CIV/APN/193/13); and in commercial issues (*Limo v LNGI* [2013] LSHC 82): see chapter 7.

178 Cuskelly *Customs and Constitutions* 17 and 20.

179 Cuskelly *Customs and Constitutions* 16-17.

180 Cuskelly *Customs and Constitutions* 17.

181 Cuskelly *Customs and Constitutions* 16.

182 Cuskelly *Customs and Constitutions* 17.

183 Constitution of the People's Republic of Bangladesh 1972, article 152.

184 Constitution of India 1949 article 13 (3) a.

185 Constitution of Malaysia 1957 article 160(2).

186 Cuskelly *Customs and Constitutions* 17.

187 See Chapter 4 above.

188 Blach 2003 *Int'l Trade and Bus Law* 186.

189 Roy *Traditional Customary Laws* 6.

190 Cuskelly *Customs and Constitutions* 22.

191 Cuskelly *Customs and Constitutions* 23.

Through the participation of citizens in a jury in customary and traditional courts, it guarantees the engagement of the citizens and thus opens avenues for the utility of customary law in resolving disputes.

6.2.1 *Mediation and its application*

The COMESA Treaty of 1993 ushers new life into regional dispute recognition and settlement. Kiplagat commends the creation of the COMESA court, although he is critical of the regime of the COMESA Treaty generally.¹⁹² Despite the procedures contained in the Treaty, the disputes that arose between parties were often solved through informal negotiations.¹⁹³ This augurs well for the possible inclusion of ICL principles in IJS.

It would seem that in terms of the COMESA Treaty, private parties have no *locus standii* to sue.¹⁹⁴ Kiplagat posits that the system born out of the Treaty was not successful, or rather, failed because member states themselves did not have such a good "judicial discipline as to be able to cede to the regional system, the Treaty was also very narrow in its scope of application."¹⁹⁵ The OHADA exemplifies relative success because of increased awareness campaigns. Following the European example, an NGO was formed in the name of the Association for the Unification of African Law (UNIDA) to promote awareness of the OHADA and its laws.¹⁹⁶ The UNIDA functions much like the Euro Law Associations,¹⁹⁷ which helped promote awareness of European law.¹⁹⁸

Asia is lagging behind in awareness campaigns of the nature described above. Despite visible efforts at legal reform, there has not been an accompanying change of attitude in individual business persons of Asia.¹⁹⁹ This confirms that legislation may not easily change culturally embedded practices. The dilemma can be solved by one of two ways, namely either by including indigenous elements in the reform, in

192 Kiplagat 1994-1995 *North-western Journal of International Law and Business* 490.

193 Kiplagat 1994-1995 *North-western Journal of International Law and Business* 445-446.

194 Kiplagat 1994-1995 *North-western Journal of International Law and Business* 446.

195 Kiplagat 1994-1995 *North-western Journal of International Law and Business* 447.

196 Alter 2012 *West European Politics* 150.

197 Alter 2012 *West European Politics* 147.

198 Alter 2012 *West European Politics* 150; See generally Chapter 4 above.

199 McConnaughay 2000 *Virginia Journal of International Law* (abstract).

order to make it easy for the parties to identify with and own the reformed systems (indigenous resource theory)²⁰⁰ or to follow up the reforms with systematic awareness campaigns. Unfortunately, reform should, as a necessity, include mediation. Mediation is indigenous in most societies, including in Asia. Including it in the Asian system, would require training and contextualisation. The reform must address the cultural character of the Asian societies in their diverse forms.

It is argued that the way to overcome cultural problems in international commercial mediation is by playing the "culture card."²⁰¹ Africa is already known for its cultural diversity. Cultural diversity may be a hindrance to the efficacious use of mediation. Mediation itself is inherently a flexible method of dispute resolution. Moreover, the idea is to recognise these cultural differences and to play the cultural card to provide the solution that cements the business relationship between the disputants.

The Chinese court-related mediation is, contrary to the Western concept of mediation, the main door to access to justice. That is, whereas in the West mediation is considered as an alternative to litigation, in China, litigation is secondary and thus provides an "alternative" to mediation.²⁰² In other words, the costs and delay implications usually associated with litigation in the West can actually be found in mediation in China.²⁰³ This difference is peculiar and it may well be the substance of what the African traditional mediation may have come to, had there been no interference. The focus of the Chinese mediation is on the interest of the parties rather than on determining their rights. African traditional mediation also focuses on the interests of disputing parties. The imported ADR also focuses on interests.²⁰⁴ However, it must be noted that in China, mediation offers the very first and the last steps in the resolution of disputes without the expectation that the dispute might end up in litigation, because in most cases the mediator may eventually preside as judge where the mediation failed.²⁰⁵

200 Alter 2012 *West European Politics* 150.

201 Posin 2003 *Fodham Journal of Corporate and Financial Law* 471-473.

202 Huang 2007 *Modern China* 182-183.

203 Huang 2007 *Modern China* 183.

204 Fisher, Ury and Patton *Getting to Yes* 4-14.

205 Huang 2007 *Modern China* 184.

In China, disputants are under pressure to accept the court's mediation efforts.²⁰⁶ Under Chinese mediation, the court can make factual findings, whereas it may not, under the Western system,²⁰⁷ which is why the Chinese system is increasingly gaining popularity as "mediation-arbitration" in the West.²⁰⁸ The factual findings allow the court to make findings that may reveal the actual truth. This brings into question the stage at which court-annexed mediation is introduced in the process of litigation: should it be after the pleadings are closed and evidence led or before? If it takes place after evidence has been led, the courts would also have the benefit of factual findings, without which it enters into the arena by way of intervention, and it may not deliver justice.

Because of the Chinese revolution, an almost hybrid form of ADR has developed in the form similar to "med-arb," adopting both Chinese and Western methods, though not because of the reform agenda of the West.²⁰⁹ There seems to be growing interest in the importance of combining mediation and arbitration, particularly in international commercial disputes.²¹⁰ At the regional level, the next important issue relates to enforcement.

6.2.2 *Advancing the rule of law through enforcement*

The survival of any legal system depends on its enforcement mechanisms;

in the context of economic integration, enforcement mechanisms are avenues through which community and national legal systems are linked.²¹¹

Enforcement of community law takes place at the community level and at the national level. The efficacy of the enforcement mechanism depends on its ability to take advantage of existing institutions. We have already stated that the success of the IJS has so far been based on networks and to some extent as pre-existing

206 Huang 2007 *Modern China* 184.

207 Huang 2007 *Modern China* 184.

208 Huang 2007 *Modern China* 185.

209 Huang 2007 *Modern China* 185.

210 De Vera 2004 *Colum J Asian L* 152-157; Burton 1994 *Hastings Int'l L Rev* 637.

211 Oppong *Legal Aspects of Economic Integration in Africa* 165.

institutions.²¹² Much work has to be done for a formal and strengthened symbiosis between the IJS and formal institutions:

... a developed private international private law regime can provide legal certainty for cross-border transactions and, at the same time, ensure that substantive national laws are not fundamentally changed.²¹³

Secondary legislation is important for the success and efficacy of regional courts. The OHADA enjoys some success because of this. According to Alter, most regional ICs are hampered by a lack of secondary legislation that might spur litigants to invoke community law and judges and administrators to work with community institutions.²¹⁴

Concerning intra-African Trade disputes, ADR operates in the context where the regime of law dealing with the enforcement of foreign judgments is uncertain in Africa.²¹⁵ Owing to the colonial legacy, it seems easier for former colonists' judgments to be recognised than for judgments emanating from African countries, let alone from within the same region.²¹⁶ On its own, this brings into doubt the possibility that pre-existing institutions could be relied on for the enforcement of (informal) mediation reports. Reform in the context of integration should not only seek to harmonise laws particularly in the context of enforcement of foreign judgment, but must also specifically make provision for the registration of foreign judgments, including ADR/mediation reports, as a simplified method of ensuring enforcement.

On the other hand, there are some manifestations of comity amongst members of the regional African bodies, such as the SADC. For instance, in the case of *Herbst v Surti*,²¹⁷ Zimbabwe refused to enforce a contract concluded in the RSA because under South African law the contract would be illegal. To some extent, this is a step in the right direction for in certain cases, there is a need to allow the application of other countries' substantive laws.²¹⁸

212 Chapter 5. See also Bigsten *et al* 2000 *The Journal of Development Studies* 3.

213 Oppong *Legal Aspects of Economic Integration in Africa* 165.

214 Alter 2012 *West European Politics* 150.

215 De Wet 2014 *PER* 558,612; See generally, Oppong and Niro 2014 *Journal of International Dispute Settlement* 344-371; *Rossouw Harmonisation* 235.

216 Oppong *Legal Aspects of Economic Integration in Africa* 278.

217 *Herbst v Surti* 1990 [2] ZLR 269.

218 Oppong *Legal Aspects of Economic Integration in Africa* 279; see also *Coutts & Co. v Ford* 1997 (1) ZLR 440 1.

Ultimately, any legal system should be geared towards the advancement of the rule of law, even at the international level.²¹⁹ At the international level, there are no institutions, such as the World Trade Organisation (WTO) or the Preferential Trade Agreements (PTA) to ensure rule of law in private transactions. There is no global state with the benefit of a substantive legal order and police for enforcement.²²⁰ Enforcement and compliance rely on voluntarism.²²¹ The International Chamber of Commerce relies on voluntarism.²²² At the regional level, attempts have been made to emulate the International Chamber of Commerce in creating private institutions.²²³ Compliance with award rendered by the ICC depends on a number of factors, including fear that 'reputational risk' will affect further transacting.²²⁴

Although the private system of international adjudication has been commended as efficacious, especially where there are repeated transactions, it is only the case where the economies are driven mainly by markets.²²⁵ Private international law has been instrumental in aiding the enforcement of foreign decisions in addition to national legislation to do so.²²⁶ It does not, however, extend to peculiar cross-border transactions, such as operate in Africa, where the public element is not entirely excluded.²²⁷

The shadow of state enforcement has ensured compliance with international arbitral awards even in international dispute resolution.²²⁸ For example, the New York Convention (NYC) contains a policy that ensures that where a party fails to comply with an arbitral award, enforcement could be sought before the national courts.²²⁹ It

219 For example, Article 14 of the 1949 Declaration on Rights and Duties of States, the International Law Commission provides in article 14 that: "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law."

220 Hale 2015 *European Journal of International Relations* 483.

221 Hale 2015 *European Journal of International Relations* 484.

222 Greenwash *Standing in the Way of Sustainable Development* 14; ICC UNKNOWN <http://www.iccwbo.org/>.

223 Hale 2015 *European Journal of International Relations* 486-487.

224 Hale 2015 *European Journal of International Relations* 487.

225 Hale 2015 *European Journal of International Relations* 487.

226 In the context of arbitration enforcement of foreign decisions could be done under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which convention has been ratified by most African countries.

227 Hale 2015 *European Journal of International Relations* 487.

228 Hale 2015 *European Journal of International Relations* 487.

229 Hale 2015 *European Journal of International Relations* 487.

is this kind of reinforcement that may be necessary, even when adopting ICL methods in dispute resolution. The need for backup institutions cannot be ignored.

In the context of Africa, the recognition of private international law occurs, for instance, under articles 57 (1) and 126 of the ECOWAS Treaty and the EAC Treaty respectively, but no further rule making in the form of protocols has taken place to effectuate these provisions.²³⁰

In the EU, the principles are very clear. According to the Brussels Regulation,²³¹ articles 59 and 60 provide that,

(59) A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments.

(60) The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.²³²

Article 6 of the Regulation requires member states to ensure that a settlement agreement is enforced by consent of parties.²³³ This requirement should be easy where member countries share and apply the same rules regarding intra-trade disputes.

The failure of states to commit to integration was the cause of the failure to develop the rule of law in Europe as it is in Africa.²³⁴ Rules in the African regional courts that require national courts to enforce community or regional rules are what can revitalise a seemingly sluggish process of integration.

230 Opong *Legal Aspects of Economic Integration in Africa* 275.

231 *EC Regulation* 2001. A similar provision appears in the 2012 (latest) version of the 2001 Regulation

232 The requirements are amply set out in article 58 of the Regulation.

233 It should also be noted that this instrument does not apply to arbitration.

234 Alter 2012 *West European Politics* 139-150.

6.3 Conclusions

The routes taken by different regions suggest that there is an increasing tendency to recognise ICL in both the civil law and common law legal systems. The utility of indigenous customary law is better seen or highlighted where there is explicit recognition and application in the form of codification. Some countries, such as Tanzania²³⁵ have gone the route of the systematic revamp of ICL, thus allowing for further development through the application of ICL. Other countries, such as South Africa²³⁶ have gone the route of merely recognising that customary law may apply in certain instances. Brunei has gone further, placing ICL on an equal footing with other law.²³⁷ The use of customary law in resolving commercial disputes appears to be rare, particularly at the regional level. The EU leads the way in the codification of certain principles of dispute resolution, especially mediation. Some of these principles reflect on the principles of ICL, although they are not referred to as such.

The idea of codification is very persuasive, especially at the regional level where as the UNCITRAL has recognised, to find common ground would be difficult. However, it can be concluded that, concerning ICL, there are a few relevant principles that have a universal application in Africa, and these are the principles that can be codified to apply in dispute resolution, especially in a dispute that involves African traders. A simple recognition clause that is similar to the proclamation 2B clause will not suffice. There is a need for a more detailed provision, either in the procedural rules or in the contract laws, such as produced by the OHADA to allow for the invocation of the customary law principles in dealing with a dispute between Africans and/or Asians where there are similarities.

Private international law is important because it informs the direction and the content of reform. For instance, the international court of justice has influenced the types of court developed in the EU.²³⁸ Law of contract has been influenced in some countries by the UNCITRAL model laws. The attempt at unification and harmonisation by such

235 Cuskelly *Customs and Constitutions* 14-17.

236 Cuskelly *Customs and Constitutions* 24.

237 Blach 2003 *Int'l Trade and Bus. Law* 186.

238 The importance of private international law in economic integration was given due recognition in the EU. Oppong *Legal Aspects of Economic Integration in Africa* 274; Article 220 of the Treaty of Rome, which resulted in the Regulations on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

regional groupings as the OHADA, for example are a continuation of the international influence on the development of law in the member states, which is why reform that is based on international trends is called for, especially in the sphere of cross-border trade. In its nature, private international law does not aim at changing national laws. It deals more with procedural aspects of justice. On the other hand, ICL or IJSAs also deal more with the process than the substance of the law. The reform of private international law at the regional level, and by including what is particularly common and indigenous among African countries, should not be seen as a threat to the (legal) sovereignty of African countries.²³⁹

The approach is not to isolate Africa from the trends, but to find a perfect symbiotic and complementary model that, while in keeping with the trends in trade and economic development, uses tradition and culture as the benchmark or premise.²⁴⁰

In the next chapter, conclusions will be drawn by debating regulation against non-regulation. The decision of including IMADR in the modern mechanisms of dispute resolution for the promotion of intra-African trade revolves around the importance of regulation. In the previous chapters, including the present one, it was inconclusive whether the incorporation should be done through codification or be left to the private sector. This is a question of regulation. Regulation should ensure incorporation of ICL and IMADR into the existing system of justice at the regional level thereby ensuring access to justice to both formal and informal traders.

239 Opong *Legal Aspects of Economic Integration in Africa* 274.

240 See MacGinty 2008 *Cooperation and Conflict: Journal of the Nordic International Studies Association* 152-155; see also Huang 2007 *Modern China* 163-194.

CHAPTER 7

Conclusions: Regulating for improved intra-African trade

7.1 Introduction

Ours is an era of change, and it is not surprising that change rather than stability nowadays attracts the attention of social scientists, comparativists, and scholars of international relations.¹

In this study, a multidisciplinary theme requiring the identification and interpretation of mostly complex, if not ambiguous concepts, such as alternative dispute resolution (ADR), legal transplants, the West, African and intra-African trade, international trade, private international law, customary law and ICL were addressed. The interplay of these concepts in the African context portrays an Africa that trades less with itself, despite the growing economic and political integration on the one hand, and an Africa whose legal systems are still undeveloped and inefficacious on the other hand. The result is stagnant economic development. The underlying presumption was that a good dispute resolution method can enhance intra-African trade and fillip economic growth.

The main research question related to the extent to which African traditional or IMADR can be applied to commercial disputes to enhance intra-African trade. The focus of the dissertation was on mediation as one of the ADR mechanisms. IMADR was therefore looked at as some form of mediation or simply as an alternative to litigation.

In order to fully address the main research question, the nature of the exchange systems in Africa and their possible uniqueness was considered. A related question was the status of trade relationships between African countries. It was equally important to look at the relationship between rule of law or legal reform and economic development. Moreover, to assume that legal reform was necessary for Africa's growth required a closer look at the status of the traditional IMADR, particularly in the context of commercial relationships in Africa. The extent to which the legal reforms have promoted domestic business intercourse or domestic investment in the individual countries of Africa would help determine the relevance of those reforms.

1 Levi-Faur 2005 *International Organization* 451.

It cannot be ignored that recent reforms have introduced ADR to Africa as if it was new. Conversely, when ADR was so introduced, there were already established methods of dispute resolution in different African countries. Therefore, it was important to consider the extent to which the conventional methods of commercial dispute resolution have replaced the traditional customary ones. Ultimately, the relevance of the established methods of commercial dispute resolution to the African commercial context and the utility of the traditional IMADR in the context of commercial disputes in Africa was presented.

What follows is a conclusion on the extent to which the above questions have been answered and have helped answer the fundamental question regarding the utility of IMADR in enhancing intra-African trade. The first part² deals with the relevance of ADR to African dispute resolution. Drawing from the conclusions reached in the previous chapters, the underlying question raised, namely whether ICL can be utilised in resolving mainly intra-African trade disputes is answered. The second part of this chapter³ establishes how such utility can be realised, thus suggesting that regulation should ensure the development of a system of dispute resolution that takes cognisance of the African commonality in diversity in law. The last part raises more general questions regarding the development of dispute resolution systems that can help address Africa's economic growthrelated disputes.

7.2 Overview of the intra-African trade problematique

In the first chapter, a conceptual framework for the entire study was provided by exploring such concepts as intra-African trade, international commercial agreements, commercial disputes, ADR, IMADR, customary law, legal transplants, the West, African and *ubuntu*. By relating these concepts to the situation in Africa, it was revealed that Africa traded less with itself. More specifically, intra-African trade is low.

2 Section 7.2.
3 Section 7.3.

7.2.1 *Intra-African trade problem*

The purpose of Chapter 1 was to state the problem in relation to dispute resolution and economic development through intra-African trade, and to propose how to go about solving it. The aim was to relate IMADR to the promotion of intra-African trade. The proposal was based on a basic assumption that dispute resolution is crucial for boosting trade, and trade is in turn necessary for economic development. It was concluded that Africa needs to trade more with itself in order to grow economically. The state of the law is, however, an impediment to this required growth. Furthermore, legal reforms have not helped improve intra-African trade. The challenge was identified as the irrelevant legal reforms that seem to stall economic growth. These irrelevant reforms blurred the law-development nexus further. However, it was important to answer the question of whether there is indeed a causal relationship between law and development and in that way, to evaluate the contribution that law made to African economic development.

7.2.2 *The law-development nexus⁴*

In Chapter 2 it was assumed that the availability of clear and easily accessible rules of dispute resolution, which are understood by the participants, should provide a fertile ground for economic growth.

The debate on the law-development relationship continues. The nature of the debate is somewhat analogous to the chicken and egg causality dilemma. What seems unavoidable is that there is a symbiotic relationship between law and economic development. After all, legal development, as with economic development, refers to advancements that are supposed to lead to the betterment of lives. Law could also help give meaning to development by regulating the fair distribution of resources. This requires a re-definition of development as an all-inclusive concept to include sustainability. The goal of economic development must be *just*⁵ development.

4 Chapter 2.

5 As in 'fair'.

Economic growth should, however, bring about meaningful development in the form of just development. The achievement of just development also depends on the peculiar trade circumstances of each country or region. It seems that African trade is dominated by the informal sector, and this implies that any innovation in the aspect of dispute resolution must relate directly to the informal sector. It is equally important to promote ROL in the informal sector, inasmuch as ROL is essential for economic growth. It was concluded, therefore, that ADR helps to enhance the ROL. Moreover, the current ADR movement, as well as the heightened legal reform agenda, provide an environment conducive to reviving and relating some of the IMADR to current issues in intra-African trade.

The apparent growth in economic and political integration brings with it potential disputes that derive from commercial agreements. Most of the integration agreements are aimed at easing up trade between member countries. The result is that there will be increases in cross-border or intra-African trade. Increased intra-regional trade implies an increase in the disputes between parties from different states. Such increases should be matched by efficacious dispute resolution mechanisms. ADRs that have come by way of legal reform appear to be inadequate, if not irrelevant to the resolution of disputes, regard being had to the nature of trade between African countries. The national reforms were mere Western transplants that disregarded the local context. Local context was defined by, among others, informal methods of dispute resolution. Very few of these national reforms were translated to the regional level. One of the identifiable discrepancies in the newly introduced ADR is the absence of the element of *ubuntu*. ADR mechanisms without an element of *ubuntu* cannot realise their full potential in the context of intra-African trade disputes. They cannot help achieve just development.

Just development can be achieved where the ROL prevails. ROL can only exist where it is easy to deduce rules and principles from the legal system. This requires a continuous revision of the existing laws, coupled with research on existing legal *lacunae*. Thus, the relationship between formal and informal sources of law should be recognised. ADR falls in the category of informal sources of the law. Inasmuch as the legal systems dominated by the application of formal rules through litigation rely on

formal sources of the law, ADR should be explored with the emphasis on indigenous and/or informal sources of the law.

ADR has a long history in the world in general. It generally takes on the forms of mediation, arbitration, negotiation and many more variations of the afore-mentioned. The mediation aspect of ADR has a long history in Africa. Mediation was reintroduced to Africa through the help of donors, with strings attached. Its reintroduction to Africa has generally taken the form of court-annexed mediation. Court-annexed mediation has its pros and cons. Its greatest benefit is the reliance on public institutions for enforcement. Conversely, mediation may as a result of being court-annexed, be swallowed up by the adversarial system, thus compromising such values as flexibility, cooperation, and empowerment.⁶ Furthermore, a complete reliance on consensus that results from mediation for enforcement may not generally work well for the parties. A thorough study of the ICL and further research on IJSs should enable a consensus-driven regulatory regime that ensures the ROL. It does seem that mediation does ensure the ROL as a complement in its own right.

While the contribution of law to economic development is undeniable, the extent to which the legal reforms have promoted domestic business intercourse or domestic investment in the individual countries of Africa has not been established. It would require much more scientific research to establish a causal relationship between ROL because of ADR and domestic business intercourse. It might be too early for such a study for most African countries. It certainly cannot be established now, as the regional level for ADR is yet to be fully introduced. At the national level, the newly introduced ADR provide a platform for developing relevant alternative methods of dispute resolution, through pure transplantation or indigenisation. Nevertheless, the experience of Africa in this regard leaves much to be desired.

7.2.3 *Experience of Africa in ADR reform*⁷

An evaluation of the extent to which the conventional methods of commercial dispute resolution have replaced the traditional customary ones in today's systems was also

6 Thompson 2004 *Ohio State Journal on Dispute Resolution* 517.
7 Chapter 3.

undertaken. ADR continues the legacy of colonialism, of fostering continued exploitation of African resources for the benefit of Western-based multinational corporations. In the same vein, the introduction of ADR does not seem to have the effect of enhancing or bettering the lives of the poor in terms of access to justice.

The history of ADR can generally be traced back to Biblical times. Reform by way of introducing ADR is a recent phenomenon. Africa has had its taste of legal reform by introducing ADR. Generally, Africa's experience of ADR varies. Some countries have introduced mainly court-annexed mediation, while others have adopted the arbitration form of ADR. The reforms have not yet covered the entire continent. There is also a demonstrable flirtation between these imports and dispute resolution according to customary law. However, there is no systematic, albeit scientific study, which shows the direct link between these reforms and economic growth.

There are, however, criticisms levelled at the ADR in Africa. Fundamentally, the conclusion was that, viewed from the perspective of the "Transplant theory" the ADR reforms remained generally irrelevant, because they ignore the local circumstances. It was equally recognised that there were some success stories to replicate. These successes could be attributed to attempts during reforms to adapt the ADR to local circumstances. However, the shortcomings of the new ADR outweigh its advantages. On the one hand, it is difficult to judge the contribution of the new ADR to trade because of a lack of statistical records. Furthermore, the ADR reforms do not address the core of Africa's ills, which includes, amongst others, the scourge of corruption at the national institutional level. On the other hand, African countries are members of multiple regional agreements or organisations, sometimes with contradictory mandates, thus making it difficult to define the applicable law.

Another criticism of how ADR was introduced is that ADR was introduced at different periods in different African countries and in a non-uniform manner. Moreover, in most cases it was introduced with its inherent flaws. Different approaches were also used to transplant ADR, in some cases, through rules of court and in other cases through Acts of parliament. The reform exercise was also replicated at the regional level although on a smaller scale and at a slower pace.

Africa has failed to ratify some of the most important international instruments in the context of the enforcement of international decisions. For example, none of the African countries has adopted the model law on international commercial conciliation. Legal reform in Africa by way of ADR has been criticised.

The top-down manner by which mediation was introduced created hostilities in the recipient populations. The hostilities stalled the efficacy of the newly introduced mediation in some countries to some extent. Therefore, it has taken time to take root, and in the meantime, it was an epitome of wasted resources. However, an argument for the bottom-up approach would not necessarily hold sway because such approaches are slow and might not fast track the "catching up" with international trends. Nonetheless, there are a few success stories to replicate. In the end, despite the credibility of the transplant theory, an attempt should always be made to indigenise, without necessarily encouraging a bottom-up approach to reform. Hence, the common elements of an apparently diverse system of law in Africa have to be studied and defined.

7.2.4 *Is ICL law?*⁸

In Chapter 4 the metamorphosis of customary law in Africa with a view to discern useful and relevant principles of customary law that bear relevance to commercial disputes was investigated. This was done by looking at the influence of colonialism in the development of customary law, as well as making comparisons between the principles of customary law and the imported colonial law. Analogies were drawn between such principles of law as prescription, frank pledge, confidentiality and others in customary law and modern law. The most important element to emerge was the outstanding features of customary law that make it unique. These included *ubuntu* and collectivism.

The study also aimed to investigate the IMADR, particularly in the context of commercial relationships in Africa. This required a definition of ICL as distinct from customary law, and thus elucidating IMADR out of the ICL. Defining African ICL should

8 Chapter 4.

expose the mediation face of the ICL of Africa, in the form of IMADR. The entire discussion was based on legal pluralism and its contribution to the scholarship on ICL. This pluralism becomes more explicit and more defined during and after colonialism. While the result of colonialism was to create a dualist system of law, which existed side by side with civil or common law, it is also said that colonialism actually created customary law. The result was that it is difficult to find the system of law that is purely customary or indigenous to Africa. The contamination augurs well for the development of ICL on the one hand, and the development of a synergy between ICL and civil or common law on the other hand.

The most outstanding principles of ICL, which appear to be common throughout Africa, are the *involvement of the community* in mediating criminal and or civil cases (there was no distinction between criminal and civil cases in traditional dispute resolution in Africa). Consequently, under ICL there were generally no sanctions in the sense provided for by common or civil law. The other unique principle was *prescription*. In most African countries debts existed in perpetuity. It was through a continued indebtedness that relationships were maintained.

Divinities as a composite of customs, taboos, mediumship, ordeals and divination played a crucial role in ensuring compliance and harmony. In this way in the ICL, there is no division between morality and law. There were also hierarchies in the community courts, which did not necessarily define jurisdiction but "reverence". Elders and outstanding members of the community were granted important roles in the proceedings. Even the smallest of "the voices" could always participate. Disputes were approached with *ubuntu*. *uBuntu* simply refers to the idea that every form of transaction should be treated with deserving compassion and reverence. The question then was whether ICL is actually law.

The question of whether ICL is law was answered by first deciding the indigenoussness of law. The indigenoussness of any law is a political issue that is decided by looking at the political history of the concerned society. For Africa, therefore, customary law would be indigenous in so far as it originates from Africa and is without Western or colonial influence. Hence, ICL was looked at as law that predated colonialism. It can be concluded that, although ICL virtually deals more with the procedure than with the substance of the law, it does pass the test criteria of law. However, it is difficult to sift

out what could be the original indigenous law from the recorded aspects of customary law, while the colonists were the ones who kept the records. When they recorded these aspects of customary law, they were already biased regarding what constitutes law. The decisive factor seems to be the formal recognition (or absence thereof) of ICL as law. Whether it is law depends largely on its recognition as such in the respective countries.⁹ Nonetheless, ICL does manifest certain legal if not logical principles of dealing with relationships and disputes.

The comparison of ICL with other legal systems reveals a similarity of certain principles. The Western concept of "frank pledge", for instance, could signify collective responsibility as manifestly common in the African ICL. The role of power dimensions is also not unique to ICL. It was also revealed that the principles of due care and reasonableness standard manifest the collective nature of ICL. There are other common or civil law concepts that could be said to have a bearing on ICL, such as the restoration of justice, good faith, and equity. There is a belief that *ubuntu* includes all these principles. Hence, it was concluded that ICL is law that is as susceptible to change as any other law.

The conclusion was that infusing ADR reforms with these two principles would save our humanity. How such a fusion could be achieved, was discussed in Chapter 5.

7.2.5 *Relevance of IMADR to present intra-African trade*¹⁰

In Chapter 5, the fundamental question was whether the IMADR as gleaned from ICL bears any relevance for the nature of the commercial disputes plaguing intra-African trade today. This question was answered by first reviewing the nature of intra-African trade. It was revealed that informal cross-border trade, which used mainly IJS for the resolution of disputes, dominated intra-African trade. The overlaps between these IJS and ICL point to one form of dispute resolution that could apply across the spectrum, namely IMADR. It was concluded that IMADR could indeed be used to resolve intra-African trade disputes. The argument was that the nature of trade dictates what

9 Constitutional recognition of ICL is higher in Africa than in other regions of the world. See Chapter 4.

10 Chapter 5.

methods are relevant at any given point in time. IMADR provides a more relevant alternative because it is inherently flexible, albeit informal.

Informality does not necessarily mean that parties' relationships are non-contractual. The parties' relationships can still be defined in terms of a contract that gives rise to obligations. Breach still occurs in the same manner that it occurs in formal contractual relationships; even though the extent of the breach is not defined by a specific principle of the law of contract per se. Remedies emanating from breach differ from those in the formal sector, as they reflect on the applicable principles.

The relationship between the formal and the informal sectors is a necessary symbiosis. Customs and voluntary arrangement should not necessarily replace formal institutions in ensuring trade and economic growth.¹¹ Braithwaite puts the interplay between litigation (as an example of formal institutional mechanisms) and ADR (as an example of informal dispute resolution methods) succinctly, as follows:

the pathologies of ADR and of litigation are not so much achieved by reforming each, but by putting restorative justice and litigated justice in fertile interplay. This means covering the pathologies of litigation with the strengths of restorative justice, and the pathologies of restorative justice with the strengths of courts.¹²

Restorative justice falls in the category of informal means of dispute resolution just like mediation. In some cases, the informal sector provides a gateway to formal trade. While ideally the formal sector is supposed to swallow up the informal sector, this ideal is a mere utopia.

The nature of trade dictates the kinds of dispute resolution relevant at any given point in time. Little recorded (cross-border) informal trade has dominated intra-African trade. This form of trade runs parallel to formal trade and does not necessarily depend on market operations, but rather on "networks" that work as sources of information and rules of the trade. Inasmuch as dispute resolution is community-based, trade is also community-based, and dominated by families and ethnic groups.

Parties use practical norms to prevent and resolve disputes. Practical norms are informed by morality. As in the ICL, the application of sanctions is one of the mechanisms of ensuring compliance in informal trade. Reputation and relational

11 Cross 2001 *Tex L Rev* 3, 7 and 16.

12 Braithwaite "Meta Regulation of Justice" 3.

contracting are additional mechanisms used to ensure enforcement. The forums that provide the platform for the application of the mechanisms are known as informal justice systems (IJS). The IJS (also known as non-formal justice systems) comprise a number of forms, including state-sponsored IJS. They focus on the communities and associations and their interests are prioritised over the interests of the individuals. The emphasis is on consensus, reconciliation and social harmony. They remain largely informal and more people-oriented than the newly introduced ADR.

IJS do not refer to ICL. Rather IJS are looked at as systems that apply their own customary law, common law and/or civil law. Their success in resolving cross-border informal trade disputes is not well documented. There is a need for more research on not only the full extent of IJS, but also on their philosophical and ideological underpinnings. This could inform the kind of regulation required for IJS. One could begin by looking at what other regions of the world have already done.

7.2.6 *Comparisons between other regions*¹³

Political and economic integration offer a platform for improved intra-African trade through dispute resolution. This has been put in doubt by the recent and phenomenal exit by Britain from the EU.¹⁴

In Chapter 6, an answer was sought regarding the issue of the inclusion of IMADR in intra-African trade dispute resolution. The question was whether there is anything to learn from the experiences of other regions in "indigenising" ADR and/or legal reform. The comparison between other regions enabled one to draw conclusions on the value of transplants from outside Africa. The argument was that in Africa there is much more need and room for inclusion of IMADR in the commercial dispute resolution regime at the regional level, than in other regions of the world.

The study of the institutions of integration revealed that all the types of institutional integration have occurred in Africa. Africa boasts some of the oldest customs unions in the world. Nevertheless, it has fallen prey to membership of many regional

13 Chapter 6.

14 Karuhanga 2016 "What does Brexit mean for East African Community?" www.newtimes.co.nr.

organisations, in some cases with contradictory mandates.. The AU remains one of the most ambitious integration efforts in Africa. The AU recognises 8 regional Economic Communities, which includes SADC, and the plan is that SACU will at some point be incorporated into SADC, thereby paving the way for the smooth harmonisation process within the AU.¹⁵ All these regional organisations have provisions in relation to the settlement of disputes. However, there are no specific provisions dealing with mediation.

The comparison between Asia and Europe revealed that regionalisation has become a universal phenomenon, with the EU leading the way in political and economic integration. There have been attempts in the Asian and European regions to integrate and harmonise legal systems. Among the pertinent issues in this exercise are the applicable law, jurisdiction and enforcement.

The fundamental criticism of the EU is that it overemphasised political integration over economic integration.¹⁶ The survival of the SACU seems to be standing proof that economic integration is more important. Nevertheless, integration does not occur of itself. It has proved to be a result of rule making. In this context, applicable law is one of the considerations, especially in relation to dispute resolution.

The issue of the applicable law is not settled in the African region. There is no apparent effort at creating the common law of Africa.¹⁷ The applicable law is therefore private international law and the conflict of law principles. Nevertheless, ICL or IMADR including IJS are generally left out, despite the undeniable prevalence of informal cross-border intra-African trade.

The only visible attempt at the harmonisation or establishment of the applicable law is that by the OHADA. It remains the most advanced regional organisation in terms of the harmonisation of laws. The OHADA is criticised for being irrelevant in respect of Africa's informal sector. There is, therefore, a need to influence research into the ICL or IMADR and IJSs to seek to include them in the harmonised law to address the informal sector and informal cross-border trade.

15 Barka 2012 *OPEV Newsletter* 10.

16 Karuhanga 2016 "What does Brexit mean for East African Community?" www.newtimes.co.nr.

17 There is recognition of the growing emergence of African international law on the other hand. See Gonidec 1997 *Afr J Int'l & Comp L* 807.

Asia starts on the same footing as Africa. She has a colonial history that has resulted in diversified systems of law. The ASEAN is one of the largest integration organisations in Asia. ASEAN relies on national courts for the resolution of disputes. To the extent of this reliance, the issue of the inclusion of ICL could best be decided by looking at national systems. However, for intra-regional disputes, their absence in regional mechanisms signifies that Asia may be leaving out the informal sector in the regionalisation efforts.

Analogies can be drawn between Asia and Africa in terms of ICL. As in Africa, the nature of contract in ICL in Asia was open-ended. Mediation efforts are also very similar. The EU has made big strides in the inclusion of mediation at the regional level, short of including ICL. In Asia, there is some recognition of ICL in the national constitutions. However, in both Asia and Europe it is not as strong as it is in Africa. The catalyst for inclusion in both instances is regulation.

7.3 Regulating for intra-African trade disputes

Presently, commerce is moving at a much more rapid, albeit complex, pace because of technological advancement and globalisation.¹⁸ In the past, trading and contracting were less instantaneous and usually in the absence of each other (*inter absentes*).¹⁹ There was not much need for regulation.²⁰ Nevertheless, the call is for regulation that will accommodate the nature of intra-African trade despite weak national regulation.²¹ International law prioritises the importance of national regulation.²² There are those that argue that there is no need for the regulation of the private undertakings of individuals, whether at the national or international level. The ICC has argued that because the business is doing fine voluntarily, there is no need for regulation.²³ Others

18 Hrynyshyn 2002 *Studies in Political Economy* 83.

19 See Chapter 4.

20 Oppong 2007 *American Journal of Comparative Law* 689.

21 Globalisation has weakened regulation at the national level of many countries, because of investor pressure and new international free-trade rules." Per International Council on Human Rights Policy "Beyond Voluntarism" 11.

22 International Council on Human Rights Policy "Beyond Voluntarism" 11.

23 "ICC is dedicated to business self-regulation and has developed a large array of voluntary rules, guidelines and codes to facilitate business and to spread best practice." See ICC UNKNOWN <http://www.iccwbo.org/about-icc/policy-commissions/>; Chen observes that "A missing regulatory environment can be as costly to informal operators as an excessive regulatory environment." Chen 2007 www.un.org/esa/desa/papers/ 10.

argue that regulation is necessary for a number of reasons, including lessening government intervention.²⁴ Regulation thus, has its own pros and cons.

7.3.1 *The justification for regulation*

The question of regulation brings up similar dilemmas that have besieged legal development over the years.²⁵ The issue becomes whether to instigate change or to wait for the circumstances to warrant change or whether to initiate legal change in anticipation of possible implications of changes in social, political and economic situations. To borrow the metaphors used by Mears, compliance can be achieved through policies influenced by Quakerism rather than Puritanism. Under the former, compliance is achieved through trust as opposed to coercion through hierarchical arrangements of authority as is typical of the latter. Quakerism implies "horizontal relationships between government authorities and individuals, as well as trust in authorities to produce compliance."²⁶ This is consistent with the so-called self-regulation as advocated by the ICC. However, self-regulation does not imply total absence of regulation.

The approach to norm regulation²⁷ comes close enough to dealing with regulation in relation to ICL, IMADR and IJS, for it brings to bear the study of the origins of the norms.²⁸ A thorough study of the origins of ICL, IMADR and IJS would enable intervention by law, by way of identifying dysfunctional rules, while at the same time recognising and enforcing the functional ones. *uBuntu* is a much more internalised "norm." Its regulation would help universalise it even to communities to whom the norm is alien.

24 The term regulation is so evasive that sometimes those who are against it prefer deregulation for removing restrictions. It seems that deregulation is but the tails part of the same coin. See Orbach 2012 *Journal of Regulation Online* 3-4. The distinction is often drawn between regulation, deregulation and absence of regulation. See Chen 2007 www.un.org/esa/desa/papers 9-10.

25 The question is whether to reform law for the sake of reform, or to reform in order to facilitate development. The latter also involves an analysis of the causal nature of law and development. See generally Davies and Prado UNKNOWN www.iilj.org/courses/documents/KevinDavisandMarianaPrado.pdf

26 Mears 2000 *Oregon Law Review* 393.

27 McAdams "The Origin, Development and Regulation of Norms" 1997 *Michigan Law Review* 391-400.

28 See Cave and Williamson *The Regulatory Challenge* on the difference between normative and positive theories of regulation.

In the context of intra-African trade, regulation is justifiable as follows,

Though the average individual in a community is unable to make large changes in the overall norms and values that define what is possible in the relationship market, certain individuals of high standing are.²⁹

The question becomes that of the importance of codification because regulation does occur of itself where it develops from customs such as in international law.³⁰ The trends are such that much of international law is simply codified customs. For the same to be nationalised and indigenised, there must be codification. The trends have also been to develop national laws based on model laws that are developed by international organisations. Moreover, national legal development has resulted from transplants from outside jurisdictions through some sponsorship. There is value in the submission that law is necessary particularly for large-scale economic development.³¹ Cross criticises the absence of law by looking at the tenets of private ordering. In general, private ordering may not augur well for growth.³²

Meta-regulatory theory provides the compromise approach to the regulation that should address the problems of intra-African trade. The theory,

asserts that the existence of more law and more public enforcement of it is one factor driving more private enforcement of law. As the quality of the law to be enforced grows, delegation to private regulation that is then publicly monitored becomes a coping strategy.³³

Braithwaite speaks of the need for a new paradigm in the form of meta-regulation.³⁴ He further asserts that,

The more formal and complex the law becomes, the more it favours formally rational organisations, such as business corporations that have evolved to govern complexity.³⁵

Reform must aim and struggle for responsive justice. The basis for responsive or restorative justice is that "because injustice hurts, justice should heal."³⁶ Responsive regulation

29 Sheneberger and van Stam 2011 *Economics and Finance Review* 31.
30 Melantzuk *International Law* 43, 71 and 228.
31 Cross 2001 *Tex. L. Rev.* 12.
32 Cross 2001 *Tex. L. Rev.* 9-16.
33 Braithwaite "Meta Regulation of Justice" 5.
34 Braithwaite "Meta Regulation of Justice" 7.
35 Braithwaite "Meta Regulation of Justice" 6.

means that governance should be responsive to the conduct of the regulated in deciding whether a more or less interventionist response is needed. Rule enforcers should be responsive to how effectively citizens or organizations are regulating themselves before deciding whether to escalate intervention. Responsive regulation is about state, corporate and civil society actors each regulating one another. It is about the ideal that they all do best to drive one another down to the deliberative base of pyramids of progressively more coercive interventions.³⁷

It is responsive if it deals with the particular characteristics of intra-African trade. In that context, justice should also be relational because it hurts relationships mostly,³⁸ be they contractual or social. After all, contractual relationships in intra-African trade have been described as relational.³⁹

The question is not whether institutions matter, but what kinds of institution matter.⁴⁰ It has already been argued that institutions do indeed matter and that the legal (ADR) institutions matter even more, at least to the extent that they relate to the rule of law.⁴¹ Regulation would imply a takeover of informal institutions by formal institutions or formalisation of the informal sector. This may be desirable because generally speaking, if informal institutions are allowed to flourish outside the purview of formal regulation, the risk is that they may end up being costly to the parties.

Private enforcement seems inferior to state enforcement of contracts, because private enforcement is typically more costly, creates a completion of violence, is more difficult to monitor, and often inhibits changes in economic institutions that may increase efficiency.⁴²

Moreover, regulation may enhance the ability of the informal sector to work for the informal traders.

7.3.2 *What regulation should seek to achieve in the context of intra-African trade*

The challenge to regulation is further how to avoid the apparent "co-opting" of mediation or to avoid what has been referred to as "a traditional bilateral negotiation

36 Braithwaite "Meta Regulation of Justice" 9.

37 Braithwaite "Meta Regulation of Justice" iv.

38 Braithwaite "Meta Regulation of Justice" 2.

39 See generally Sheneberger and Van Stam 2011 *Economics and Finance Review* 26-33.

40 Cross 2001 *Tex L Rev* 2.

41 See the discussion of some of the views of the most renowned concurrent institutional economists on the subject in Cross 2001 *Tex L Rev* 5-7.

42 Cross 2001 *Tex L Rev* 7.

session attended by a third party or a 'glorified' judicial settlement process."⁴³ Regulation must determine the right model of mediation and avoid rendering it to the same fate as judicial settlements. The disputants must own the process, and regulation should protect their ability to do so.

Regulation should also deal with whether the settlement agreement that results from mediation should be subjected to the law of contract principles or not.⁴⁴ If this question were looked at from the perspective of the ICL of contracts, then it would be wise to subject the agreement to the strict rules of the law of contract under common law (in the absence of legislation). Strict rules of contract emanating from common or civil law help determine certainty and finality, which may not be acquired under ICL. In the end, the enforcement of the agreement is of paramount importance. Therefore, a settlement agreement that results from mediation must be treated as a substitute contract under strict principles of the law of contract. It must be treated separately from the disputed contract from which it resulted. Indeed, more than just a mere contract, the court is also called in to intervene as the co-signer of the contract. Any resulting breach is tantamount to contempt of court.⁴⁵

Regulation should also be able to find convergences between formal and informal law and ICL. It should identify the strengths of ICL and combine them with the strengths of formal law.⁴⁶ For instance, it has been established that informal networks may have a negative effect on non-members of the network.⁴⁷ Networks form the backbone of informal trade. Because of their exclusive nature, it may be prudent to consider regulating them in order to minimise the exclusivity effect.

Nearly always, a seemingly mutual agreement between two parties may affect third parties.⁴⁸ Dispute resolution mechanisms should be capable not only of dealing with a

43 Bickerman 1999 *Disp Resol Mag* 3 and 5; see also Welsh 2001 *Wash U Q* 788.

44 Parker 1992 *Defence Counsel Journal* 322.

45 Under court-annexed mediation, the resulting mediation agreement is usually taken before the judge to be made an order of court. Thus failure to comply with it is tantamount to civil contempt of court.

46 Masten and Prüfer 2014 *The Journal of Legal Studies* 359-400.

47 Cross 2001 *Tex L Rev* 13.

48 In most jurisdictions law has intervened to provide an exception to the principle of privity of contract. This principle of the Law of Contract simply means that the contract is valid and enforceable between parties to it. (Rights of Third Parties) Act 1999 (CRTPA) of England provides exceptions to the principle. Where the resultant mediation agreement is taken as a substitute contract, caution must be taken to mitigate the implications of the substitute agreement on the third parties.

dispute as it affects the parties to an agreement, but also with how it may affect other parties as well. Actually, cross-border disputes deal with cross-border trade/exports and these also have a bearing on economic growth. The government in this context is the most likely third party to be affected by the outcome of the dispute resolution. Considering this, would mean linking up dispute resolution mechanisms either at the supranational or national level.

Context does matter. Bartolus, a leading jurist on Roman civil law, is often quoted as saying that, since custom

existed on the interface between formal law and popular practice, it would be a mistake to rely on juristic writings and ignore what was actually going on.⁴⁹

This highlights the importance of living law, and it augurs well for the recognition and application of the IJS that operate particularly in informal cross-border trade in Africa. Changing circumstances will always necessitate a revision of the *status quo*, where such is rendered irrelevant by changed circumstances. Even ICL requires revision and improvement. The monetisation of law in Ghana, for example, requires a revision of the customary law rules governing the land tenure system.⁵⁰ The 2010 Act made the application of customary dispute resolution to apply at the same level as modern dispute resolution.⁵¹

Custom remains an important source of the law. Article 38 (2) of the Statute of the International Court of Justice (ICJ) provides that “this provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.”⁵² In addition, article 38 (1) b identifies custom as the source of customary international law. Europe has a history of legal development through custom, especially in trade/business. The well-known *lex mercatoria* was developed from custom. Asia has a history of traditional law making and application that was, however, interrupted by colonialism. It seems therefore that the challenge is not only to recognise customary sources of law, but also to make provision for a continuous exercise of

49 See Tobin *Why Customary Law Matters* 21.

50 Crook *et al* "The Law, Legal Institutions and the Protection of Land Rights" 33-34.

51 Nolan-Haley and Annor-Ohene 2014 *Harvard Negotiation Law Review Online*, forthcoming 4; see Alternative Dispute Resolution Act, Act 798 of 2010 (Ghana)

52 The Latin phrase *ex aequo et bono* is a term of art in the law of alternative dispute resolution generally. Its simple English translation is "according to the right and good" or "from equity and conscience".

adopting/adapting customary principles as they develop.⁵³ In this case, historical experiences of other countries can always be used for reflection.

For countries that practice Roman Dutch Law, there are traces of similarity between inherited Roman law principles and the customary law of some African countries. In Europe, the persistence of some Roman principles is undeniable.⁵⁴ Customary law has, over the years, claimed superiority in the development of law in Europe, and culminated in the universal definition of customary law as found in *Justinianus's Corpus Juris Civiles*.⁵⁵ It is possible therefore to revive ICL and regulate for its adaptation into the more formal law and follow the same trend treaded by Europe in the development of its law.

Regional courts are generally founded on the European-styled international courts, where national judges/courts work with international courts to interpret and apply international legal rules that are also part of domestic legal orders. Alter notes that,

Europe's most important legal export is not so much its formal legal institutions, but rather the embedded approach to making international law effective.⁵⁶

Therefore, it is first the rules, international law principles, and then the approach of implementing and enforcing them. Alter also makes the point that the present replicas of the ECtHR and ECJ are at the stage where the original courts were in their formative years, and that it took years for the European courts to realise their potential.⁵⁷

When the international court of arbitration was established, private access was not part of the project, it was only included subsequently.⁵⁸ It would therefore be wise to consider not only private access to whatever mechanism is developed for intra-African commercial disputes, but also whether it should be compulsory.

53 Courts should develop customary law. See *Lesetla v Matsoso* www.leslii.gov.ls; the debate is on-going on the development of ICL in South Africa. See Oomen *Chiefs in South Africa* 77-84, 252.

54 See generally, Re 1960 *Fordham L Rev* 447-494.

55 Madden 2006 *London Law Review* 430.

56 Alter 2006 *Comparative Political Studies* 2.

57 Alter 2006 *Comparative Political Studies* 2.

58 Alter 2006 *Comparative Political Studies* 25-26.

7.4 General Conclusion and Recommendations

The topic of this study required a look at the possibility of utilising IMADR for resolving disputes to improve intra-African trade. The topic thus presupposed an existence of indigenous "methods," rather than processes or mechanisms of dispute resolution. This part therefore, deals with the question of how to integrate IMADR into the structures of regional dispute resolution forums.

7.4.1 General conclusion

It has been revealed that there are more processes of dispute resolution than methods in the ICL. Mechanisms can, however, be discerned from the customary law approaches. These approaches were not uniform; hence, the question of whether they can give rise to a method is destined for another study.

For the purpose of this study, a method can be developed in the form of mediation-arbitration (med-arb), which seems to be a common feature in the ICL of Africa. Med-arb is defined mainly by power dimensions that seem to have occupied most of the approaches to dispute resolution in Africa. Mediation in Africa was not pure mediation in the sense depicted by the Western mediation. The mediator seemed to retain ultimate powers of making the decision. Hence, the approach to dispute resolution was not purely mediation in the sense of Western ADR, notwithstanding that med-arb is a well-known method of ADR. The hybrid process that combines ICL with other dispute resolution mechanisms seems to take the form of IMADR.

What will make such known methods of ADR more African is to Africanise them by infusing them with the element of *ubuntu*. An IMADR that is purely African can be developed by including elements of *ubuntu* in it. Whether the result will be a method or process is neither here nor there, for *ubuntu* should be like blood running through the veins of dispute resolution and the entire human if not African interaction. Thus, mediation that is infused with *ubuntu* should rise above a mere alternative to litigation to a level of main dispute resolution process.

Western mediation is one of the alternatives to litigation in ensuring access to justice.⁵⁹ However, mediation has not resulted in ensuring access as initially contemplated, particularly in the context of intra-African trade. Instead, people resort to IJS and the courts for legal redress. This is a problem because it reflects badly on the legal reform projects (including ADR) that have been pursued in Africa in the recent past. The failure of ADR and or mediation thus justifies the existence of the court system, despite its known shortcomings. On the other hand, the reform processes provide a continuous opportunity to look closely at what may enhance the efficacy of the newly introduced ADR. *uBuntu* offers the perspective by which the transplanted ADR can be adapted to the unique circumstances of Africa.

However desirable it may be to wait for the IMADR to evolve from below, development is essentially a top-down process. Legal development is equally a reform process that should be guided by the authorities from the top downwards. That is the essence of regulation. In a broader sense, the question of whether there is a need for regulation where mediation is virtually a private affair is at the heart of the matter.

Regulation refers to the power to authorise and monitor.⁶⁰ According to Orbach,⁶¹ regulation refers to

[g]overnment intervention in the private domain or a legal rule that implements such intervention. The implementing rule is a binding legal norm created by a state organ that intends to shape the conduct of individuals and firms.

In the context of mediation, this would mean the making of rules and organising and coordinating the mediation landscape. How?

Regulation should work as the safety valve of market forces. In other words, it is market forces plus the absence of regulation that render mediation in the form of IMADR secondary and alternative even where they are most relevant. Alternatively, it is indeed regulation that has prioritised courts over private dispute resolution in all its forms. In the final analysis, regulation will help relate mediation to economic development.

59 Braithwaite posits that access to justice can best be achieved "by applying the principles of restorative justice and responsive regulation to the delivery of justice itself": Braithwaite "Meta-Regulation for Access to Justice" 1.

60 See Cave and Williamson "The Regulation of British Broadcasting" 160.

61 Orbach 2012 *Yale Journal on Regulation Online* 6.

The fundamental question sought to be answered by this research was whether African traditional or indigenous methods of dispute resolution can be applied to commercial disputes to enhance intra-African trade. It has been successfully argued that law in the form of dispute resolution methods is important for the facilitation of trade and economic growth. Nevertheless, such law should be relevant to the circumstances of African countries. Indigenous processes of dispute resolution can be used to develop a more relevant dispute resolution method to the peculiar forms of trade in Africa, notwithstanding that outside, international experiences will always influence the final model that could be relevant for Africa. This would require a further and systematic study. Any attempt at developing an African model without regard to the experiences of other nations would lead to integration in isolation, and that would be a recipe for further economic isolation and stagnation in African countries.

7.4.2 Recommendations

The conclusion drawn is that mediation is universal, and has a long tradition in most societies of the world, from biblical times to the present. For Africans, it has been present until it was interfered with by colonialism. It is internalised. That is why there is no need to train people in mediation. That is why mediators can be recruited from lawyers and non-lawyers alike.

Enforcement is as much an issue at the regional level as it is at the national level. The regime of the law dealing with enforcement is uncertain in Africa. While there is a need to reform Africa's legal systems in order to address the peculiar problems of the informal sector, for the betterment of intra-African trade, the enforcement of dispute resolution decisions is equally important. Regulation must therefore deal with substantive, as well as procedural aspects of dispute resolution.

It is concluded, however, that there is the possibility of finding Africanised systems without thinking in dualistic perspectives, by looking at the African system not as a parallel to another system, but as part of a large complex of systems. For instance, ICL should be looked at not as a part of a dual system of law, but as a source of law equal in standing to legislation and case law.

It is pertinent, therefore, to allow reform while avoiding cultural imperialism.⁶²

What is being proposed here is for the African states to look at the self-regulation of the informal sector at the national and regional levels and to decide if it is effective. It has been established in this research that IMADR or ICL and/or IJS are effective for the communities that they serve. Having concluded thus, African states should intervene by regulating these otherwise private mechanisms of dispute resolution without necessarily "formalising" them.

In developing a model for intra-Africa disputes, a distinction must be drawn between the following models of mediation: settlement, facilitative, therapeutic and evaluative.⁶³ The focus being on mediation, one is attracted to success stories, such as "mediation-only" as suggested for Delaware State in the USA.⁶⁴

The court-annexed mediation procedures adopted at national judiciaries should be adapted to the African court of justice. The definition of mediation in this context is the start. The definition of mediation in terms of the European Directive on Mediation would be adequate, except where it relates to ICL. There is a need to define it in such a manner as to accommodate the possible use of IJS. Art. 3(a) of the European Directive on Mediation reads:

Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

Art. 3(b): provides further that,

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

The only modification to the definitions above would be to include the possibility of additional mediator(s) in a dispute to inculcate the principle of community involvement. While it ensures access and guarantees compliance on the one hand, on the other

62 Pimentel 2010 *Hague Journal on the Rule of Law* 1-28.

63 Feehily Commercial Mediation in South Africa 59-60; Steffek "Mediation in the European Union: An Introduction" 1, mentions three types of mediation, namely private, court-annexed and judicial mediation.

64 Cross 2001 *Tex L Rev* 10.

hand it does not allow for equally voluntary withdrawal. Similar provisions in the context of Africa should read as follows,

Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator or a group of mediators chosen from their respective communities or chosen from the trade association (formal or informal) to which they belong.

Constitutions of member states must recognise the superiority of the regional court by making provisions in the constitutions to that effect in order to avoid situations such as arose in the case of *Okunda v Republic*,⁶⁵ in which case the Kenyan Government declined to obey the COMESA decisions because its constitution did not recognise it.

In order to relate the IJS to the formal court systems that provide court-related mediation, there is a need for a hierarchy of discussion forums that do not necessarily follow the example of formal institutions, but that enable constant and continuous discussions and debates regarding new developments and issues in intra-Africa trade. This could take the form of an Africa Round Table, that is, provide a forum where African economic leaders and participants in intra-African trade will meet to discuss issues that arise in commercial transactions between African states. The forum could also influence the liberalisation of laws in individual countries through reform.⁶⁶

Accepting that the transplant theory is the basis of all reform and that law has always developed through outside influence, amongst other factors, the CISG is the place to start, seeing that it has enjoyed very wide acceptance.⁶⁷ After the UNIDROIT principles, which provided the blueprint for the European principles, the choice is wide for the African countries. It must be born in mind that the purpose for the UNIDROIT principles was to strike uniformity. Moreover, the European principles operate in an equally diverse community to that of Africa. The questions that exercise one's mind in this regard, however, include the following: If the African contract principles are developed, what will be their status *vis-à-vis* the UNIDROIT principles? Should Africa choose between the European principles and the UNIDROIT principles?⁶⁸ Ultimately, ICL principles will help contextualise whatever set of principles is chosen, as a

65 1970 E Afr L Rep 453 (Kenya).

66 See the October 2013 Brief by Uttamchandani and Menezes "More than Just Words" 1-4.

67 Bonnel 2008 *The American Journal of Comparative Law* 4-5.

68 African countries are encouraged to choose the UNIDROIT instead of the European Principles Lando and Beale (eds), *European Contract Law* xviii.

blueprint into African customs and practices. These customs and practices feature very prominently in the informal sector. The draft by the OHADA, for instance, needs to be reviewed in that context.⁶⁹ *uBuntu* will provide the general guidance.

In the same manner that *ubuntu* could be used as one of the catalysts of integration and harmonisation, it can foster the creation of the common law of Africa, for *ubuntu* encompasses all the principles of ICL.⁷⁰ It has been used, for instance, in criminal law with reference to crimes against the state,⁷¹ in aggravation of punishment for crimes against foreigners,⁷² in dealing with issues that involve widows,⁷³ inheritance⁷⁴ and insurance-related commercial matters.⁷⁵ *uBuntu* is a very ambiguous concept, but it has very deeply entrenched meaning in dealing with dealings between Africans. It is also flexible and can suit any circumstance. Most importantly, its mere mention is likely to end any form of dispute. It is *ubuntu* to share one's wealth, it is *ubuntu* to avoid capital punishment⁷⁶, and restorative justice seems to be based on *ubuntu*.

The thesis is proposing the following changes to the African judicial system. Firstly, member countries should include in their legislation, principles recognising customary law and its use in commercial disputes. A few African countries have already done that. But such recognition should include making it imperative for African countries to consider use of ICL in dealing with a dispute emanating from intra-African trade

69 Dickerson 2016 *Law and Contemporary Problems* 462-463.

70 Rautenbach UNPUBLISHED 1-2.

71 In the Lesotho High Court, the charge, which was subject of review by the High Court, was expressed as follows: "provoking bloodshed ... and thereby contravening the law of *botho* (humanity or decency)." See *Thabo Fuma v The Commander LDF CONST/8/2011*.

72 In the case of *R V Khani* (CTHFT-000083-09) [2010] BWHC 439 the Botswana High Court held that "*botho* is the guiding cultural disposition of all humanity, all of us. *Botho* cannot support the abuse of visitors in this country".

73 In the case of *Mokoena v Mokoena* the court held as follows: It is contrary to Basotho culture, good conscience and a sense of what is right in the African sense - that applicant should be attempting to deprive the widow of her house and arable lands (*masimo*). It is not *botho* or *ubuntu* to dispossess a widow. It would seem therefore in terms of Section 14 (2) of the Laws of Lerotholi I, that applicant has to wait for the death of the widow before he can claim her home at Ha Lekhari and her arable lands." Paragraph 35-36.

74 In the case of *Lepule v Lepule* the court remarked "The court considers this case to present a typical social scenario in which the adversarial system of justice should accommodate the Restorative Justice Interventions. [1] This would be in an endeavor to restore the family relationship to its original position and to inject a spirit of *botho* (humanely thinking) into the justice of this case." Paragraph 32

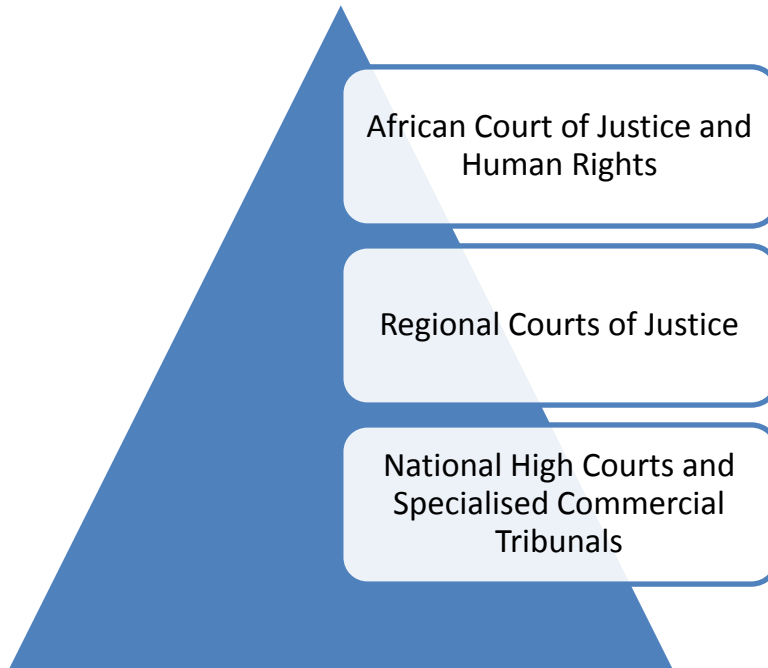
75 In the case of *Limo v LNGI* the court held that the Insurance company should consider the age of the victim in determining compensation, to demonstrate that "whilst it is business minded, it is, nevertheless, inspired by the spirit of *botho* and not exclusively by the profit making imperatives." Paragraph 51.

76 *S v Makwanyane* 1995 (6) BCLR 665 (CC).

transaction. In other words, parties should be given an opportunity to opt in or out of use of customary law principles in dealing with their disputes. OHADA is already ahead in codifying formal legal principles in the sub-region. The same codification should be extended to cover the larger region as well as to incorporate the substantive principles of customary law that could apply to commercial disputes as argued in Chapter 6. This suggests that parties should equally be allowed to opt in or out of use of IMADR to resolve their disputes.

It is suggested here that IMADR should be made part of the resolution of disputes involving Africans from different states at different levels of the existing forums of justice delivery. All sub-regions have one form or another of institutions of justice delivery. Indeed just like the African court of justice, some of these regional bodies are having challenges of implementation. They are generally stagnant. But in an ideal situation the suggestion is that they should all be overhauled and remodelled along the African court of justice. Such that they provide the next level in the hierarchy of intra-African dispute resolution forums, from the national courts and tribunals. The difference in jurisdiction would then have to be determined in terms of monetary value as well as geography and or contractual clause on choice of forum. Both the regional and the national courts would then function as courts of first instance depending on the above criteria. So that the African court of justice would work both as the appellate division as well as the review court.

Figure 4. Hierarchy of the regional courts of justice



Cognisant of the fact that ICL is diverse, it would help to always use adjudicators conversant with the uniqueness of the applicable ICL in each given case. So that the judiciary would function more like committees.

For this to be realised there is need to study the ICL more, with a view to develop the African common law in commercial matters, along with the study of integration and harmonisation. This study has established that it is possible to discern and develop a system of ICL and IMADR that applies universally across Africa, and that as home-grown mechanisms, they should facilitate intra-African trade and economic development.

BIBLIOGRAPHY

Literature

Acemoglu *et al* 2001 *American Economic Review*

Acemoglu D *et al* "The Colonial Origins of Comparative Development: An Empirical Investigation" 2001 *American Economic Review* 1369-1401

Ackello-Ogutu and Echessah "Unrecorded Cross-Border Trade"

Ackello-Ogutu C and Echessah P "Unrecorded Cross-Border Trade between Kenya and Uganda" *Technical paper 59* 1997

Ackello-Ogutu *Methodologies for Estimating Informal Cross-border Trade*

Ackello-Ogutu C *Methodologies for Estimating Informal Cross-border Trade in Eastern and Southern Africa: Kenya/Uganda Border, Tanzania and Its Neighbours, Malawi and Its Neighbours, Mozambique and Its Neighbours* (USAID Bureau for Africa Office of sustainable development August 1996)

Adepoju 2001 *International Migration*

Adepoju A "Regional Organizations and Intra-Regional Migration in Sub-Saharan Africa: Challenges and Prospects" 2001 *International Migration* 43-60

Ades and Chua 1997 *Journal of Economic Growth*

Ades A and Chua HB "Thy Neighbor's Curse: Regional Instability and Economic Growth" 1997 *Journal of Economic Growth* 279-304

Adewaye 1986 *Journal of Legal Pluralism and Unofficial law*

Adewaye O "Legal Practice in Ibadan 1904-1960" 1986 *Journal of Legal Pluralism and Unofficial law* 57-76

Afesorgbor and Bergeijk 2014 *SAJE*

Afesorgbor SK and Bergeijk PAG "Measuring Multi-Membership in Economic Integration and Its Trade Impact: A Comparative Study of ECOWAS and SADC" 2014 *SAJE* 518-530

Afolayan "African Historiography"

Afolayan F "African Historiography" In Shillington K *Encyclopaedia of African History* (New York: Fitzroy Dearborn, 2005)

Ajani 1995 *The American Journal of Comparative Law*

Ajani G "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" 1995 *The American Journal of Comparative Law* 93-117

Alam S et al *International Environmental Law*

Alam S et al *International Environmental Law and the Global South*
(Cambridge University Press 2015)

Alexander 2001 *Bond L Rev*

Alexander N "What's Law Got to Do with It-Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions" 2001 *Bond L Rev* 335-363

Alford WP *The More Law*

Alford WP *The More Law, the More...?: Measuring Legal Reform in the People's Republic of China* (Stanford University 2000)

Algero 1999 *Neb L Rev*

Algero MG "In Defence of Forum Shopping: A Realistic Look at Selecting a Venue" 1999 *Neb L Rev* 79-112

Alschuler 1986 *Harvard Law Review*

Alschuler AA "Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases" 1986 *Harvard Law Review* 1808-1859

Alter 2012 *West European Politics*

Alter KJ "The Global Spread of European Style International Courts" 2012 *West European Politics* 135-154

Alter 2006 *Comparative Political Studies*

Alter KJ "Private Litigants and the New International Courts" 2006 *Comparative Political Studies* 22-49

Amidu 1995 *Nordic Journal of African Studies*

Amidu A A "Kiswahili, a Continental Language: How Possible Is It? (Part I)" 1995 *Nordic Journal of African Studies* 50-70

Anker et al (eds) *Women's Roles and Population Trends in the Third World*

Anker R et al (eds) *Women's Roles and Population Trends in the Third World*
(Routledge 2012)

Arnstein 1969 *Journal of the American Institute of Planners*

Arnstein S R "A Ladder of Citizen Participation" 1969 *Journal of the American Institute of Planners* 216-224

Ashton *The Basuto*

Ashton H *The Basuto* (Oxford University Press: New York 1952)

Austin *Lectures on Jurisprudence*

Austin J *Lectures on Jurisprudence: Or, The Philosophy of Positive Law* (J. Murray, 1875)

Avirami 2004 *Yale Law & Policy Review*

Avirami A "A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems" 2004 *Yale Law & Policy Review* 1-68

AU/ECA Report 2014

AU/ECA Conference of Ministers of Finance, Planning and Economic Development *Report of the High Level Panel on Illicit Financial Flows from Africa* 2014

Baderin M 2011 *NIALS Journal of Law and Development*

Baderin M "Law and Development in Africa: towards a New Approach" 2011 *NIALS Journal of Law and Development* 1-48

Bainbridge *South Africa Lesotho and Swaziland*

Bainbridge J *South Africa Lesotho and Swaziland* (Lonely Planet 2010)

Bamodu 1994 *Journal of African Law*

Bamodu B "Transnational Law, Unification and Harmonisation of International Commercial Law in Africa" 1994 *Journal of African Law* 125-143

Banjo 2007 *Africa Development*

Banjo A "*The ECOWAS Court and the Politics of Access to Justice in West Africa*" 2007 *Africa Development* 69-87

Barka, Habiba Ben. "Border posts, checkpoints, and Intra-African trade: challenges and solutions." OPEV Newsletter (2012): 1-18.

Barka, Habiba Ben. "Border posts, checkpoints, and Intra-African trade: challenges and solutions." OPEV Newsletter (2012): 1-18.

Barkan *Beyond Capitalism*

Barkan JD *Beyond Capitalism vs. Socialism in Kenya and Tanzania* (Lynne Rienner Publishers 1994)

Barrett and Barrett *A History of Alternative Dispute Resolution*

Barrett JT and Barrett J *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* (John Wiley & Sons, 2004)

Behar and Edwards "How integrated is SADC?"

Behar A and Edwards L "How integrated is SADC? Trends in intra-regional and extra-regional trade flows and policy" Trends in Intra-Regional and Extra-Regional Trade Flows and Policy World Bank Policy Research Working Paper Series 2011

Benjamin "Assessing South Africa's CCMA"

Benjamin P "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" International Labour Organisation Working Paper No. 47 2013

Bennett *The Application of Customary Law in Southern Africa*

Bennett T W *The Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (Juta Cape Town 1985)

Bennett 2011 *PER*

Bennett T W "Ubuntu: an African Equity" 2011 *PER* 29-61

Benson *The Enterprise of Law*

Benson BL *The Enterprise of Law: Justice without the State* (San Francisco: Pacific Research Institute for Public Policy 1990)

Benson 1990 *The Journal of Liberation Studies*

Benson B "Customary Law with Private means of Resolving Disputes and Dispensing Justice: A Description of a Modern System of Law and Order without State Coercion" 1990 *The Journal of Liberation Studies* 25-42

Berger and Centre for Transnational Law *The Creeping Codification* 2010

Berger PK, and Centre for Transnational Law *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International 2010)

Berkowitz *et al* 2003 *Am J Comp Law*

Berkowitz D, Pistor K and Richard JF "The Transplant Effect" 2003 *Am J Comp Law* 163-203

Besley 1995 *Journal of Political Economy*

Besley T "Property Rights and Business Incentives: Evidence from Ghana" 1995 *Journal of Political Economy* 903-937

Bhamra *Constitutionalism and Pluralism*

Bhamra MK *The Challenges of Justice in Diverse Societies: Constitutionalism and Pluralism* (Ashgate Publishing, Ltd., 2013)

Bhattacharjee *Social Science Research*

Bhattacharjee A *Social Science Research: Principles, Methods, and Practices* (University of South Florida Scholar Commons 2012)

Bickerman 1999 *Disp Resol Mag*

Bickerman J "Great Potential: The New Federal Law Provides Vehicle, If Local Courts want to do More on ADR" 1999 *Disp Resol Mag* 3-4

Bigsten *et al* 2000 *The Journal of Development Studies*

Bigsten A *et al* "Contract Flexibility and Dispute Resolution in African Manufacturing" 2000 *The Journal of Development Studies* 1-37

Black *Black's Law Dictionary*

Black HC *Black's Law Dictionary: with Pronunciations* (West Publishing Co. 1990)

Boaduo 2008 *Journal of Pan African Studies*

Boaduo NA "Africa's Political, Industrial and Economic Development Dilemma in the Contemporary Era of the African Union" 2008 *Journal of Pan African Studies* 93-111

Sorobea Nyachieo Bogonko COLONIAL CHIEFS AND AFRICAN DEVELOPMENT IN KENYA WITH SPECIAL REFERENCE TO SECULAR EDUCATION Sorobea Nyachieo Bogonko *Transafrican Journal of History* Vol. 14 (1985), pp. 1-20 Sorobea Nyachieo Bogonko COLONIAL CHIEFS AND AFRICAN DEVELOPMENT IN KENYA WITH SPECIAL REFERENCE TO SECULAR EDUCATION Sorobea Nyachieo Bogonko *Transafrican Journal of History* Vol. 14 (1985), pp. 1-20

Bond 2010 *Southern California Law Review*

Bond J "Gender, Discourse, and Customary Law in Africa" 2010 *Southern California Law Review* 509-574

Boniface 2013 *PER*

Boniface A E "African-style Mediation and Western-style Divorce and Family Mediation: Reflections for the South African Context" 2013 *PER* 378-401

Bonell 2008 *The American Journal of Comparative Law*

Bonnel MJ "The CISG, European Contract Law and the Development of a World Contract Law" 2008 *The American Journal of Comparative Law* 1-28

Bourguignon 2004 *Poverty, Inequality and Growth*

Bourguignon F "The Poverty-Growth-Inequality Triangle" 2004 *Poverty, Inequality and Growth* 69-111

Braithwaite "Justice Sector Reform in Sub-Saharan Africa"

Braithwaite B "Justice Sector Reform in Sub-Saharan Africa: Strategic Framework and Practical Lessons" Dispute Resolution Centre Kenya 2006

Braithwaite *Meta Regulation of Justice*

Braithwaite J *Meta Regulation of Justice* (Regulatory Institutions Network 2005)

Braithwaite "Meta-Regulation for access to Justice"

Braithwaite J 2003 "Meta-Regulation for Access to Justice" Paper presented to the General Aspects of Law? (GALA) Seminar Series Berkeley. University of California, November

Breman 1976 *Economic and Political Weekly*

Breman J "A Dualistic Labour System? A Critique of the 'Informal Sector' Concept: I: The Informal Sector" 1976 *Economic and Political Weekly* 1870-1876

Bridge 1984 *Canadian Business Law Journal*

Bridge MG "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" 1984 *Canadian Business Law Journal* 385-425

Bridge *The Sale of Goods*

Bridge MG *The Sale of Goods* (Oxford University Press, 1998)

Brooks *Yankee Traders*

Brooks GE *Yankee Traders Old Coasters and African Middle Men: A History of American Legitimate Trade with West Africa in the Nineteenth Century* (Boston University Press 1970)

Brownsword 1996 *Current Legal Problems*

Brownsword R "'Good Faith in Contract' Revisited" 1996 *Current Legal Problems* 111-117

Bruno and Pleskovic (eds) *Annual World Bank Conference on Development Economics*

Bruno M and Pleskovic B (eds) *Annual World Bank Conference on Development economics* (World Bank Publications 1995)

Buckland and McNair *Roman Law and Common Law*

Buckland W W and McNair AD *Roman Law and Common Law: a Comparison in Outline* (CUP Archive 1965)

Burki and Perry "Beyond the Washington Consensus"

Burki SJ, and Perry G. "Beyond the Washington Consensus: Institutions Matter" (*World Bank Publications* 1998)

Burman *Chieftdom Politics and Alien Law*

Burman S *Chieftdom Politics and Alien Law: Basutoland under Cape Rule, 1871-1884* (Macmillan Press London 1981)

Burton 1994 *Hastings Int'l L Rev*

Burton SJ "Combining Conciliation with Arbitration of International Commercial Disputes" 1994 *Hastings Int'l & Comp L Rev* 637-658

Burton 1991 *Global Change, Peace & Security*

Burton J "Conflict Resolution as a Political Philosophy" 1991 *Global Change, Peace & Security* 62-72

Buscaglia and Stephan 2005 *International Review of Law and Economics*

Buscaglia E and Stephan PB "An Empirical Assessment of the Impact of Formal Versus Informal Dispute Resolution on Poverty: A Governance Based Approach" 2005 *International Review of Law and Economics* 89-106

Busch 2007 *International Organization*

Busch ML "Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade" 2007 *International Organization* 735-761

Cave and Williamson "The Regulation of British Broadcasting"

Cave M and Williamson P "The Regulation of British Broadcasting" in Bishop M *et al* (eds) *The Regulatory Challenge* (Oxford University Press 2000)

Cairns 2007 *Tul Eur & Civ L F*

Cairns J "Attitudes to Codification and the Scottish Science of Legislation, 1600-1830" 2007 *Tul Eur & Civ L F* 1-89

Cairns 2013 *Ga J Int'l & Comp L*

Cairns JW "Watson, Walton, and the History of Legal Transplants" 2013 *Ga J Int'l & Comp L* 637-831

Campher *Oxfam's Coffee Campaign*

Campher H *Oxfam's Coffee Campaign: An NGO Perspective (Ethical Sourcing in the Global Food System* 2006)

Cannan (ed) *Adam Smith 1776*

Cannan E (ed) *Adam Smith's "An Enquiry into the Nature and Causes of the Wealth of Nations" 1776* (Methuen & Co., Ltd. London 1976)

Cappelletti 1993 *Modern Law Review*

Cappelletti M "Alternative Dispute Resolution within the Framework of the World-Wide Access-to-Justice Movement" 1993 *Modern Law Review* 282-296

Capulong 2012 *Ohio St J on Disp Res*

Capulong ERC "Mediation and the Neo Colonial Legal Order: Access to Justice and Self Determination in the Philippines" 2012 *Ohio St J on Disp Res* 641-683

Carbonneau 1995-1996 *Tul L Rev*

Carbonneau TE "Arbitral Justice: The Demise of Due Process in American Law" 1995-1996 *Tul L Rev* 1945-1967
Care 2006 *Oxford U Commw LJ*

Care JC "A Green Stick or a Fresh Stick? Locating Customary Penalties in the Post-Colonial Era" 2006 *Oxford U Commw LJ* 27-60

Carfield 2011 *U Colo L Rev*

Carfield M "Participatory Law and Development: Remapping the Locus of Authority" 2011 *U Colo L Rev* 739-959

Carothers (ed) *Promoting the Rule of Law Abroad*

Carothers T (ed) *promoting the Rule of Law Abroad: the Knowledge Problem* (Carnegie Endowment for International Peace 2003)

Carothers T *Promoting the Rule of Law Abroad: In Search of Knowledge*

Carothers T *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace, Washington 2006)

Carothers 1998 *Foreign Affairs*

Carothers T "The Rule of Law Revival" 1998 *Foreign Affairs* 95-106

Casalis *The Basutos*

Casalis E *The Basutos* (James Nisbet & Co. London 1861)

Carton *Blood from Your Children*

Carton B *Blood from Your Children: The Colonial Origins of Generational Conflict in South Africa* (University of Virginia Books, Virginia 2000)

Channock 1978 *African Law Studies*

Channock M "Neo-Colonialism and Customary Law in Malawi" 1978 *African Law Studies* 80-91

Chanock "Agricultural Change and Continuity in Malawi"

Chanock M "Agricultural Change and Continuity in Malawi" in Palmer R and Parsoons N (eds) *The Roots of Rural Poverty in Central and Southern Africa* (London 1977)

Chern *The Commercial Mediator's Handbook*

Chern C *The Commercial Mediator's Handbook* (CRC Press, 2014)

Chiba (ed.) *Asian Indigenous Law*

Chiba M (ed.) *Asian Indigenous Law: In Interaction with Received Law* (Taylor & Francis 1986)

Chinkin C M 1988 *International and Comparative Law Quarterly*

Chinkin C M "The Challenge of Soft Law: Development and Change in International Law" 1988 *International and Comparative Law Quarterly* 850-866

Chivaura "Hunhu/Ubuntu"

Chivaura VG "Hunhu/Ubuntu: A Sustainable Approach to Endogenous Development, Bio-cultural Diversity and Protection of the Environment in Africa." *International Conference, Endogenous Development and Bio-Cultural Diversity. The Interplay of Worldviews, Globalization and Locality* (2006)

Chodosh 1995 *Mich J Int'l L*

Chodosh HE *et al* "Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach" 1995 *Mich J Int'l L* 865-1015

Cristea 2011 *Journal of International Economics*

Cristea AD "Buyer-Seller Relationships in International Trade: Evidence from US States' Exports and Business-Class Travel" 2011 *Journal of International Economics* 207-220

Christie *The Law of Contract*

Christie RH *The Law of Contract in South Africa* (Durban: Butterworth's 2005).

Chua and Ades (Eds) *Regional Instability and Economic Growth*

Chua HB and Ades AF (Eds) *Regional Instability and Economic Growth: Thy Neighbor's Curse* (Yale University, 1993)

Chukwumerije 2009 *Ermory International Law Review*

Chukwumerije O "Rhetoric versus Reality: The Link between the Rule of Law and Economic Development" 2009 *Ermory International Law Review* 383-821

Church and Church 2008 *Fundamina*

Church J and Church J "The Constitutional Imperative And Harmonisation In A Multicultural Society: A South African Perspective On The Development Of Indigenous Law" 2008 *Fundamina* 1-13

Cilliers "In Search of Meaning between Ubuntu and Into"

Cilliers J "In Search of Meaning between Ubuntu and Into: Perspectives on preaching in post-apartheid South Africa" Eighth International Conference of Societas Homiletica, Copenhagen, Denmark 2008.

Clarke 2003 *Am J Comp L*

Clarke DC "Economic Development and the Rights Hypothesis: The China Problem" 2003 *Am J Comp L* 89-111

Clay 1997 *Journal of Law, Economics and Organisation*

Clay K "Trade without Law: Private Order Institutions in Mexican California" 1997 *Journal of Law, Economics and Organisation* 202-231

Clay *Trade, Institutions and Law*

Clay K *Trade, Institutions and Law: The Experience of Mexican California* (All-UC Group in Economic History, 1993)

Cohen *Negotiating Across Cultures*

Cohen R *Negotiating Across Cultures* (Institute of Peace Press US 1997)

Coleman 1980 *ETHICS*

Coleman J "Economics and the Law: A critical Review of the Foundations of the Economic Approach to the Law" 1980 *ETHICS* 649-679

Collins *et al* 1996 *Brookings Papers on Economic Activity*

Collins S *et al* "Economic growth in East Asia: Accumulation versus Assimilation" 1996 *Brookings Papers on Economic Activity* 135-203

Colson "Land Rights"

Colson E "The Impact of the Colonial Period on the Definition of Land Rights" in Turner V (ed.) *Colonialism in Africa: Profiles of Change* (Cambridge 1971)

Cooter and Ulen *Law and Economics*

Cooter R and Ulen T *Law and Economics* (Pearson 1988).

Cooter "The Rule of State Law"

Cooter R "The Rule of State Law and the Rule of Law State: Economics Analysis of the Foundations of Development" *Annual World Bank Conference on Development Economics 1996*

Copeland and Taylor 1994 *The Quarterly Journal of Economics*

Copeland BR and Taylor MS "North-South Trade and the Environment" 1994 *The Quarterly Journal of Economics* 755-787

Crampton 2005 *Hamline J Pub L & Pol'y*

Crampton A "Addressing Questions of Culture and Power in the Globalization of ADR: Lessons from African Influence on American Mediation" 2005 *Hamline J Pub L & Pol'y* 229-357

Crook *et al* "The Law, Legal Institutions and the Protection of Land Rights"

Crook R *et al* "The Law, Legal Institutions and the Protection of Land Rights in Ghana and Côte d'Ivoire: Developing a More Effective and Equitable System" Institute of Development Studies 2007

Cross 2001 *Tex L Rev*

Cross FB "Law and Economic Growth" 2001 *Tex L Rev* 1737-1775

Curtin "Pre-Colonial Trading Networks and Traders"

Curtin P "Pre-Colonial Trading Networks and Traders" in Meillassoux C (ed) *The Development of Indigenous Trade and Markets in West Africa* (Oxford University Press 1971)

Cuskelly *Customs and Constitutions*

Cuskelly K *Customs and Constitutions: State Recognition of Customary Law around the World* (IUCN Bangkok Thailand, 2011)

Dalkilic 2014 *Trade, Law and Development*

Dalkilic E "The Proposed Horizontal Mechanism: An Evaluation in Light of Existing Procedures under the Dispute Settlement Understanding" 2014 *Trade, Law and Development* 383-399

Dam *China as a Test Case*

Dam K W *China as a Test Case: Is the Rule of Law Essential for Economic Growth?* (John M. Olin and Economics Working Dissertation No. 275 2nd Series 2006)

Dam "Institutions, History, and Economic Development"

Dam KW "Institutions, History, and Economic Development" *U Chicago Law & Economics, Online Working Paper* 2006

Dam *The Law Growth Nexus*

Dam K *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press 2007)

Daniels and Radenbaugh *International Business*

Daniels JD and Radenbaugh L *International Business: Environments and Operations* (Addison –Wesley New York 8th ed. 1998)

Davis and Trebilcock 2008 *American Journal of Comparative Law*

Davis EK and Trebilcock MJ "The Relationship between Law and Development: Optimists v Sceptics" 2008 *American Journal of Comparative Law* 895-946

Davis K and Trebilcock MJ What Role Do Legal Institutions Play in Development?

Davis K and Trebilcock MJ What Role Do Legal Institutions Play in Development? (University of Toronto, 1999)

Deidre *Falling through the Cracks*

Deidre C *Falling through the Cracks: Reflections on Customary Law and the Imprisonment of Women in Sudan* (SIHA Kampala 2012)

De Koker 1998 *Journal of Judicial Science*

De Koker J "Male Primogeniture in African Customary Law- are Some more Equal than Others?" 1998 *Journal of Judicial Science* 99-121

De Long *et al* 1993 *National Bureau of Economic Research*

De Long J *et al* "Princes and Merchants: European City Growth before the Industrial Revolution" 1993 *National Bureau of Economic Research* 671-702

De Mel and Tayaratne " Vertical Integration"

De Mel D and Tayaratne S "Vertical Integration of Industries in South Asia" in Rahman SH *et al Regional Integration and Economic Development in South Asia* (Asian Development Bank 2012)

De Melo and Panagariya *New Dimensions*

De Melo J and Panagariya A *New Dimensions in Regional Integration* (Cambridge University Press, 1995.)

De Soto *The Other Path*

De Soto H *The Other Path: The Invisible Revolution in the Third World* (Harper and Row Publishers New York 1988)

Devarajan *et al* (eds) *Aid and Reform in Africa*

Devarajan S *et al* (eds) *Aid and Reform in Africa: Lessons from Ten Case Studies* (World Bank Publications 2001)

De Vera 2004 *Colum J Asian L*

De Vera C "Arbitrating Harmony: Med-Arb and the Confluence of Culture and Rule of Law in the Resolution of international Commercial Disputes in China" 2004 *Colum J Asian L* 149-194

Dewey and Kleimola 1984 *The Slavonic and East European Review*

Dewey and Kleimola "Russian Collective Consciousness: The Kievan Roots" 1984 *The Slavonic and East European Review* 180-191

Dezalay and Garth (eds) *Global Prescriptions*

Dezalay Y and Garth BG (eds) *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press 2002)

Diala 2014 *African Human Rights Law Journal*

Diala AC "Reform of the Customary Law of Inheritance in Nigeria: Lessons from South Africa" (2014) *African Human Rights Law Journal* 633-654

Dicey *Introduction to the Study of the Law*

Dicey AV *Introduction to the Study of the Law of the Constitution* (Palgrave MacMillan UK 1985)

Dickerson 2016 *Law and Contemporary Problems*

Dickerson CM "The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to Its Influence" 2016 *Law and Contemporary Problems* 63-87

Dieng "ADR in Sub-Saharan African Countries"

Dieng A "ADR in Sub-Saharan African Countries" in Ingen-Housz A *ADR in Business: Practice and Issues across Countries and Cultures* (Kluwer Law International BV The Netherlands 2011)

Dinan 2007 *Fordham Int'l LJ*

Dinan D "Fifty Years of European Integration: A Remarkable Achievement" 2007 *Fordham Int'l LJ* 118-1142

Djankov *et al* 2003 *The Quarterly Journal of Economics*

- Djankov *et al* "Courts" 2003 *The Quarterly Journal of Economics* 453-517
- Djankov *et al* 2006 *Economics Letters*
- Djankov S *et al* "Regulation and Growth" 2006 *Economics Letters* 395-401
- Dlagnekova 2009 *Fundamina: A Journal of Legal History*
- Dlagnekova P "The need to Harmonise Trade-related Laws within Countries of the African Union: An Introduction to the Problems Posed by Legal Divergence." 2009 *Fundamina: A Journal of Legal History* 1-37
- THE ROLE OF CHIEFS IN THE ADMINISTRATION OF JUSTICE IN KWAZULU by Charles Robinson
- Mandlenkosi Dlamini B Proc LLB LLD (UZ 158 THE ROLE OF CHIEFS IN THE ADMINISTRATION OF JUSTICE IN KWAZULU by Charles Robinson
- Mandlenkosi Dlamini B Proc LLB LLD (UZ 158
- Dobson 2001 *The World Economy*
- Dobson W "Deeper Integration in East Asia: Regional Institutions and the International Economic System" 2001 *The World Economy* 995-1018
- Doney and Cannon 1997 *The Journal of Marketing*
- Doney PM and Cannon JP "An examination of the nature of trust in buyer-seller relationships" 1997 *The Journal of Marketing* 35-51
- Driberg 1934 *Journal of Comparative Legislation and International Law*
- Driberg JH "The African Conception of Law" 1934 *Journal of Comparative Legislation and International Law* 230-245
- Druzin 2003 *BYU Journal of Public Law*
- Druzin BH "Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law" 2003 *BYU Journal of Public Law* 373-413
- Duffy 2007 *Journal of Modern African Studies*
- Duffy R "Gemstone Mining in Madagascar: Transnational Networks, Criminalisation and Global Integration" 2007 *Journal of Modern African Studies* 185-206
- Dumett 1983 *Comparative Studies in Society and History*

Dumett R E "African Merchants of the Gold Coast, 1860-1905-Dynamics of Indigenous Entrepreneurship" 1983 *Comparative Studies in Society and History* 663-691

Du Plessis 2011 *PER*

Du Plessis "African Indigenous Land Rights in a Private Ownership Paradigm" 2011 *PER* 45-69

Dwight 1989 *Bond L Rev*

Dwight P "Commercial Dispute Resolution in Australia: some trends and misconceptions" *Bond L Rev* 1-35

Dworkin 1980 *J Legal Stud.*

Dworkin R "Is Wealth a Value?" 1980 *J Legal Stud* 191-226

Easterly and Levine 1998 *Journal of African Economies*

Easterly W and Levine R "Troubles with the Neighbours: Africa's Problem, Africa's" 1998 *Journal of African Economies* 120-142

Easterly and Levine 2003 *Journal of Monetary Economics*

Easterly W and Levine R "Tropics, Germs, and Crops: How Endowments Influence Economic Development" 2003 *Journal of Monetary Economics* 3-39

Easterly and Levine 1997 *The Quarterly Journal of Economics*

Easterly W and Levine R "Africa's Growth Tragedy: Policies and Ethnic Divisions" 1997 *The Quarterly Journal of Economics* 1203-1250

Edwards 1986 *Harvard Law Review*

Edwards HT "Alternative Dispute Resolution: Panacea or Anathema?" 1986 *Harvard Law Review* 668-684

Ehiabhi "Rethinking Alternative Dispute Resolution" (UNPUBLISHED)

Ehiabhi SO "Rethinking Alternative Dispute Resolution Mechanism in Post-Colonial Africa: Lessons from Colonial Uromi" (UNPUBLISHED)

Eisele 1991 *Judicature*

Eisele T "The Case against Mandatory Court-Annexed ADR Programs" 1991 *Judicature* 34-40

Ekenke and Ekeopara 2010 *American Journal of Social and Management Sciences*

Ekenke EC and Ekeopara CA "God, Divinities and Spirits in African Traditional Religious Ontology" 2010 *American Journal of Social and Management Sciences* 209-281

Elechi 1996 *International Journal of Comparative and Applied Criminal Justice*

Elechi OO "Doing Justice without the State: The Afikpo (Ehugbo) Nigeria Model of Conflict Resolution" 1996 *International Journal of Comparative and Applied Criminal Justice* 337-355

Elechi "African Indigenous Justice System"

Elechi OO "Human Rights and the African Indigenous Justice System" *18th International Conference of the International Society for the Reform of Criminal Law* (August 8 – 12, Canada 2014)

Ellenberger *History of the Basuto*

Ellenberger DF *History of the Basuto* (Moriya Museum and Archives 1992)

Ellickson *Order without Law*

Ellickson R *Order without Law: How Neighbours Settle Disputes* (Harvard 1991)

Ellias *The Nature of African Customary Law*

Ellias TO *The Nature of African Customary Law* (Manchester University Press 1972)

Ellis *et al Gender and Economic Growth*

Ellis A *et al Gender and Economic Growth in Uganda: Unleashing the Power of Women* (The World Bank eBook 2006)

English 1996 *S Afr J on Hum Rts*

English R "Ubuntu: the Quest for an Indigenous Jurisprudence" 1996 *S Afr J on Hum Rts* 641-648

Eriksen and Fossum (eds) *The European Union's Non-Members*

Eriksen EO and Fossum JE (eds) *The European Union's Non-Members: Independence Under Hegemony?* (Routledge, 2015)

Erikson 2010 *IJPEE*

Erikson TH "The Challenges of Anthropology" 2010 *IJPEE* 194-202

Erlank *Dispute Resolution Clauses*

Erlank W *Enforcement of Multi-Tiered Dispute Resolution Clauses* (LLM University of Stellenbosch 2002)

Ewald 1995 *The American Journal of Comparative Law*

Ewald W "Comparative Jurisprudence (II): the Logic of Legal Transplants" 1995 *The American Journal of Comparative Law* 489-510

Fafchamps 1996 *World Development*

Fafchamps M "The Enforcement of Commercial Contracts in Ghana" 1996 *World Development* 427-448

Fafchamp *Market Institutions in sub-Saharan Africa*

Fafchamp SM *Market institutions in sub-Saharan Africa: Theory and evidence* (MIT Press Books 2004).

Fafchamps *et al Towards a Growth Strategy for Africa*

Fafchamps *Towards a Growth Strategy for Africa* (Centre for the Study of African Economies 2001)

Fafchamps 1999 *Journal of African Economies*

Fafchamps M "Networks, Communities and Markets in sub-Saharan Africa: Implications for Firm Growth and Investment" 1999 *Journal of African Economies* 109-142

Fafchamps 2001 *Community and Market in Economic Development*

Fafchamps "The Role of Business Networks in Market Development in sub-Saharan Africa" 2001 *Community and Market in Economic Development* 186-215

Fafchamps and Minten 2001 *Economic Development and Cultural Change*

Fafchamps M and Minten B "Property Rights in a Flea Market Economy" 2001 *Economic Development and Cultural Change* 229-267

Fafchamps 2001 *Economic Development and Cultural Change*

Fafchamps M "Networks, Communities and Markets in Sub-Saharan Africa: Implications for Firm Growth and Investment" 2001 *Economic Development and Cultural Change* 109-142

Fallers *Law without Precedent*

Fallers LA *Law without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (University of Chicago Press, 1969)

Faris 2008 *De Jure*

Faris J "The Procedural Flexibility of Arbitration" 2008 *De Jure* 504-560

Faris *Theory and Principles of Alternative Dispute Resolution*

Faris JA *Analysis of the Theory and Principles of Alternative Dispute Resolution* (Dissertation University of South Africa 1995)

Farole and Winler (eds) *Making Foreign Direct Investment Work*

Farole T and Winkler D (eds) *Making Foreign Direct Investment Work for Sub-Saharan Africa: Local Spillovers and Competitiveness in Global Value Chains* (World Bank Publications, 2014)

Faundez *The Rule of Law Enterprise*

Faundez J *The Rule of Law Enterprise – Towards a Dialogue between Practitioners and Academics* CSGR (Working Dissertation No. 164/05 Coventry: University of Warwick 2005)

Faundez "Rule of Law"

Faundez J "Rule of Law or Washington Consensus: the Evolution of the World Bank's Approach to Legal and Judicial Reform" in Perry-Kessaris A *Law in the Pursuit of Development* (Routledge London 2010)

Feehily *Commercial Mediation in South Africa*

Feehily XX *The Development of Commercial Mediation in South Africa in view of the Experience in Europe, North America and Australia* (PhD Thesis University of Cape Town 2008)

Ferguson *The West and the Rest*

Ferguson N *Civilization: The West and the Rest* (Penguin 2011)

Ferguson 1980 *British Journal of Law and Society*

Ferguson RB "The Adjudication of Commercial Disputes and the Legal System in Modern England" 1980 *British Journal of Law and Society* 141-157

Fiadjoe 2000 *Caribbean Law Review*

Fiadjoe A "Of Conflicts and Dispute Resolution Processes" 2000 *Caribbean Law Review* 58

Fiadjoe *Alternative Dispute Resolution*

Fiadjoe A *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing Ltd London 2004)

Fiadjoe 2001 *Caribbean Law Bulletin*

Fiadjoe A "The Independence of the Judiciary" 2001 *Caribbean Law Bulletin* 8

Faria 2009 *Unif L Rev*

Faria JAE "Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage" 2009 *Unif L Rev* 5-34

Fenrich *et al* *The Future of African Customary Law*

Fenrich J *et al* *The Future of African Customary Law* (Cambridge University Press 2011)

Fitzpatrick 1984 *Journal of African Law*

Fitzpatrick P "Traditionalism and traditional law" 1984 *Journal of African Law* 20-27

Flood "Globalisation and Law"

Flood J "Globalisation and law" in Banakar B and Travers M (eds) *An Introduction to Law and Social Theory*. (Oxford: Hart 2002)

Foroutan and Pritchett World Bank Publications

Foroutan F and Pritchett L. Intra-sub-Saharan African Trade: Is it too Little? (World Bank Publications 1992)

Foroutan and Pritchett 1993 *Journal of African Economies*

Foroutan F and Pritchett L "Intra-sub-Saharan African Trade: Is it too Little?" 1993 *Journal of African Economies* 74-105

Foroutan *Regional Integration*

Foroutan F "Regional Integration in Sub-Saharan Africa" No. 992. *World Bank Publications* 1992

Forsyth *A Bird that Flies with Two Wings*

Forsyth M *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (ANU E Press, 2009)

Foster and Prentice 2009 *J Disp Resol*

Foster TN and Prentice S "Promise of Confidentiality in Mediation: Practitioners' Perceptions" 2009 *The J Disp Resol* 163-547

Fox *Longman's Dictionary*

Fox C *Longman Dictionary of Contemporary English* (Pearson Education Limited Edinburg 2003)

Fulton *Commercial Alternative Dispute Resolution*

Fulton M J *Commercial Alternative Dispute Resolution* (Sydney Law Book Company 1989)

Gaitán *Legal Transplants*

Gaitán MPR *The Challenges of Legal Transplants in a Globalized Context* (LLM University of Warwick 2014)

Galanter 1981 *The Journal of Legal Pluralism and Unofficial Law*

Galanter M "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" 1981 *The Journal of Legal Pluralism and Unofficial Law* 1-47

Galanter 1972 *Comparative Studies in Society and History*

Galanter M "The Aborted Restoration of 'Indigenous' Law in India" 1972 *Comparative Studies in Society and History* 53-70

Garoupa and Ogus 2006 *The Journal of Legal Studies*

Garoupa N and Ogus A "A Strategic Interpretation of Legal Transplants" 2006 *The Journal of Legal Studies*

Gatii "*The Variation in the Use of Sub-Regional Integration Courts*"

Gatii JT "The Variation in the Use of Sub-Regional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice" *Law and Contemporary Problems* 2015

Gbenga 1994 *Journal of African Law*

Gbenga B "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" 1994 *Journal of African Law* 125-143

Geiger and Armstrong *The Development of African Private Enterprise*

Geiger T and Armstrong W *The Development of African Private Enterprise* (National Planning Association Washington DC 1964)

Geyer 2010 *PER*

Geyer S "Towards A Clearer Definition and Understanding Of 'Indigenous Community' For The Purposes Of The Intellectual Property Laws Amendment Bill, 2010: An Exploration Of The Concepts 'Indigenous' And 'Traditional'" 2010 *PER* 127-143

Geda and Kebret 2008 *Journal of African Economies*

Geda A and Kebret H "Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA" 2008 *Journal of African Economies* 357-394

Gibson *Willie's Principles of South African Law*

Gibson JTR *Willie's Principles of South African Law* (Kenwyn: Juta and Co. Ltd 1977)

Gibson 2002 *American Journal of Political Science*

Gibson JL "Truth, justice, and reconciliation: Judging the fairness of amnesty in South Africa" 2002 *American Journal of Political Science* 540-556

Gibson and Kelley 1994 *The Manchester School*

Gibson B and Kelley B "A Classical Theory of the Informal Sector" 1994 *The Manchester School* 81-96

Gillman 2009 *Georgetown Journal of International Law*

Gillman E "Legal Transplants in Trade and Investment Agreements" 2009 *Georgetown Journal of International Law* 263-1043

Ginsburg 2000 *Law & Soc'y Rev*

Ginsburg T "Does Law Matter for Economic Development? Evidence From East Asia" 2000 *Law & Soc'y Rev* 829-856

Glencross 2015 *International Affairs*

Glencross A "Why a British referendum on EU membership will not solve the Europe question" 2015 *International Affairs* 303-317

Glenn "Sustainable Diversity in Law"

Glenn P "Sustainable Diversity in Law" in Tamanaha B Z *et al Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012)

Gluckman *Politics, Law and Ritual*

Gluckman M *Politics, Law and Ritual in Tribal Society* (Chicago, Aldine Publishing Company 1965)

Goetz 1998 *Review of African Political Economy*

Goetz AM "Women in Politics & Gender Equity in Policy: South Africa & Uganda" 1998 *Review of African Political Economy* 241-262

Gold 2005 *J Disp Resol*

Gold J A "ADR through a Cultural Lens: How Cultural Values Shape our Disputing Processes" 2005 *J Disp Resol* 289-539

Golub "Beyond Rule of Law Orthodoxy"

Golub S "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative" Carnegie Endowment for International Peace. Democracy and Rule of Law Project 2003

Golub *Non-State Justice Systems*

Golub S *Non-State Justice Systems in Bangladesh and the Philippines* (DFID, January 2003)

Gonidec 1997 *Afr J Int'l & Comp L*

Gonidec FF "Towards a Treatise of African International Law" 1997 *1997 Afr J Int'l & Comp L* 807-821

Goodale 2002 *Law and Social Enquiry*

Goodale M "The Globalisation of Sympathetic Law and its Consequences" 2002 *Law and Social Enquiry* 595-608

Gouden *ADR and Arbitration in Africa*

Gouden *The Summer of Opportunity: ADR and Arbitration in Africa* (Cape Town page 2013)

Gramatikov and Verdonschot "Legal Needs of Vulnerable People"

Gramatikov M and Verdonschot JH "Legal Needs of Vulnerable People: A Study in Azerbaijan, Mali, Rwanda, Egypt and Bangladesh" *Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO 2010)*

Grande 1999 *Journal of African Law*

Grande E "Alternative Dispute Resolution, Africa and the Structure of Law and Power: The Horn in Context" 1999 *Journal of African Law* 63-70

Grant *The African American Slave Trade Barons*

Grant RG *The African American Slave Trade Barons* (Canada 2002)

Greco 2009 *Pepp Disp Resol LJ*

Greco AP "ADR and a Smile: Neo-colonialism and the West's Newest Export in Africa" 2009 *Pepp Disp Resol LJ* 649-676

Greenwash International *Standing in the Way of Sustainable Development*

Greenwash International *How Some Powerful Corporations are standing in the Way of Sustainable Development* (Greenpeace International 2012)

Greif 1993 *The American Economic Review*

Greif A "Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition" 1993 *The American economic review* 525-548

Greif 1989 *The Journal of Economic History*

Greif A "Reputation and coalitions in medieval trade: evidence on the Maghribi traders" 1989 *The Journal of Economic History* 857-882

Gress *From Plato to NATO*

Gress D *From Plato to NATO: The Idea of the West and Its Opponents* (Simon and Schuster, 1998)

Grier 1999 *Public Choice*

Grier RM "Colonial Legacies and Economic Growth" 1999 *Public Choice* 317-335

Griffiths 1986 *Journal of Legal Pluralism and Unofficial law*

Griffiths J "What is Legal Pluralism?" 1986 *Journal of Legal Pluralism and Unofficial law* 1-55

Grimm 1999 *Africa Spectrum*

Grimm S "Institutional Change in the West African Economic and Monetary Union (WAEMU) since 1994: A Fresh Start after the Devaluation Shock?" 1999 *Africa Spectrum* 5-32

Grimm *et al* "European Development Cooperation to 2020"

Grimm S *et al* "European Development Cooperation to 2020: Challenges by new Actors in International Development" *Bonn: European Association of Development Research and Training Institutes EDC 2020 Working Paper 4* 2009

Gueye M *et al* (eds) *Trade, Climate Change and Sustainable Development*

Gueye M *et al* (eds) *Trade, Climate Change and Sustainable Development: Key Issues for Small States, Least Developed Countries and Vulnerable Economies* (Commonwealth Secretariat, 2009)

Han and Choi 2008 *International Journal of Dialogical Science*

Han Gand Choi S "Shimcheong is a Case for the First Person Psychology: A Reply." 2008 *International Journal of Dialogical Science* 255-260

Hachez N and Wouters J *Promoting the Rule of Law*

Hachez N and Wouters J *Promoting the Rule of Law: A Benchmarks Approach* 2013 (Available at SSRN 2258331, 2013 - papers.ssrn.com)

Hafeez *Regulation in Developing Countries*

- Hafeez S *The Efficacy of Regulation in Developing Countries* (UN 2003)
- Haggard and Tiede 2011 *World Development*
- Haggard S and Tiede L "The Rule of Law and Economic Growth: Where are we?" 2011 *World Development* 673-685
- Haggrad S *et al* 2008 *Annu Rev Polit. Sci*
- Haggrad S *et al* "The Rule of Law and Economic Development" 2008 *Annu. Rev Polit Sci* 205-234
- Hailshom *Harlsbury Laws of England*
- Hailshom *Harlsbury Laws of England vol 12* (Butterworths 1976)
- Hale 2015 *European Journal of International Relations*
- Hale T "The Rule of Law in the Global Economy: Explaining Intergovernmental Backing for Private Commercial Tribunals" 2015 *European Journal of International Relations* 483-512
- Hammergren "With Friends Like These"
- Hammergren L "With Friends Like These: Can Multilateral Development Banks Promote Institutional Development to Strengthen the Rule of Law?" in Perry-Kassar A *Law in the Pursuit of Development: Principles into Practice?* (Routledge 2010)
- Hammergren L "Institutional Development"
- Hammergren L "Institutional Development" in Perry-Kassar A *Law in the Pursuit of Development: Principles into Practice* (Routledge 2010)
- Hampshire *Justice is Conflict*
- Hampshire S *Justice is Conflict* (Princeton University Press, 2000)
- Hamutyineyi *Shona Proverbial Lore and Wisdom*
- Hamutyineyi M *Tsumo-Tsumo: Shona Proverbial Lore and Wisdom* (Mambo Press 1987)
- Harding 2004 *Oxford U Commw LJ*
- Harding A "The 'Westminster Model' Constitution Overseas: Transplantation, Adaptation and Development" 2004 *Oxford U Commw LJ* 143-166
- Harper "Customary Justice"
- Harper E "Customary Justice: From Program Design to Impact Evaluation" *IDLO* (Rome Italy 2011)

Harrison 1996 *Journal of Development Economics*

Harrison A "Openness and Growth: A Time-Series, Cross-Country Analysis for Developing Countries" 1996 *Journal of development Economics*

Hart 1973 *The Journal of Modern African Studies*

Hart K "Informal Income Opportunities and Urban Employment in Ghana" 1973 *The Journal of Modern African Studies* 61-89

Hartkamp 1994 *European Review of Private Law*

Hartkamp A "The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law" 1994 *European Review of Private Law* 341-357

Hartzenberg *Regional integration in Africa*

Hartzenberg T *Regional integration in Africa* (World Trade Organization (WTO) (Economic Research and Statistics Division, 2011)

Havenga *et al Commercial Law*

Havenga M *et al General Principles of Commercial Law* (Juta & Co. 2008)

Hay and Shleifer 1998 *American Economic Review*

Hay JR and Shleifer A "Private Enforcement of Public laws: A Theory of Legal Reform" 1998 *American Economic Review* 398-403

Hedley *et al* 2000 *Europe-Asia Studies*

Hendley K *et al* "Law, Relationships and Private Enforcement: Transactional Strategies of Russian Enterprises" 2000 *Europe-Asia Studies* 627-656

Heeden 2005 *The Justice System Journal*

Heeden T "Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others" 2005 *The Justice System Journal* 273-291

Heiseler 1979 *Economic Development and Cultural Change*

Heiseler H "Two Causal Models of African Economic Conduct: A Comment" 1979 *Economic Development and Cultural Change* 161-170

Henseler 2003-2004 *Penn St L Rev* 165-295

Henseler D "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping our Legal System" 2003-2004 *Penn St L Rev* 165-295

Himonga, Taylor and Pope 2013 *PER1-61*

Himonga C, Taylor M and Pope A "Reflections on Judicial Views of uBuntu"2013 *PER* 1-61

Hinz "The Ascertainment of Customary law"

Hinz MO "The Ascertainment of Customary law: What is it and What is it for" in World Bank *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (George Washington University 2009)

Hobbes "Leviathan"

Hobbes T "Leviathan" in Curley E (ed) *Leviathan* (Hackett Publishing 1994)

Ranger "The Invention of Tradition"

Ranger "The Invention of Tradition" in Hobsbawn E and Ranger T *The Invention of Tradition* (Cambridge 2004)

Hohe 2003 *Conflict, Security & Development*

Hohe T "Justice without Judiciary in East Timor" 2003 *Conflict, Security & Development* 335-357

Holleman 1973 *Law and Society Review*

Holleman J T "Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform" 1973 *Law and Society Review* 585-609

Holmes *The Common Law*

Holmes OW *The Common Law* (Harvard University Press 2009)

Hourani 1962 *Phronesis*

Hourani GF "Thrasymachus' Definition of Justice in Plato's" Republic"" 1962 *Phronesis*

Hrynyshyn 2002 *Studies in Political Economy*

Hrynyshyn D "Technology and Globalization" 2002 *Studies in Political Economy* 83-104

Huang 2007 *Modern China* 163-194

Huang PCC "Whither Chinese Law?" 2007 *Modern China* 163-194

Hugh, Brian Ashwell. Traditional leadership in South Africa: a critical evaluation of the

constitutional

recognition of customary law and traditional leadership. Diss. University of the Western Cape, 2004. 52 Hugh, Brian Ashwell. Traditional leadership in South Africa: a critical evaluation of the

constitutional

recognition of customary law and traditional leadership. Diss. University of the Western Cape, 2004. 52

Huntington 1993 *Foreign Affairs*

Huntington SP "The Clash of Civilizations?" 1993 *Foreign Affairs* 22-49

Ignazio *et al Club Ohada China Conference* (Macau 27 November 2007)

Ignazio *et al* "A Non-African to and as a Resource for Sino- African Business Relations" *Club Ohada China Conference* (Macau 27 November 2007)

Ingleby 1993 *Modern Law Review*

Ingleby R "Court Sponsored Mediation: The Case against Mandatory Participation" 1993 *Modern Law Review* 441-451

Ikome 2004 *From LPA to Nepad*

Ikome FN *From The Lagos Plan Of Action (Lpa) To The New Partnership For Africa's Development (Nepad): The Political Economy Of African Regional Initiatives*. Diss. (PhD Thesis University of the Witwatersrand 2004)

Inkumbi "The Future is intra- African Trade"

Inkumbi M "The Future is intra- African Trade: Martin Inkumbi discusses the Development Importance of Intra-African Trade" *Namibia Economist* Windhoek Namibia (August 2 2013)

International Council on Human Rights Policy *Beyond Voluntarism*

International Council on Human Rights Policy *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Switzerland February 2002)

International Trade Centre "Africa's Trade Potential"

International Trade Centre "Africa's Trade Potential Export Opportunities in Growth Markets" 2012

Isser, Berg and Porter 2014 *Just Development*

Isser D Berg L and Porter D "Four Cardinal Questions (and answers of a sort) Toward Just Development in FCS" 2014 *Just Development* 1-4

Izor 2013 *Asian JM*

Izor S "Selling Mediation in the East: Is there an Asian Way?" 2013 *Asian JM* 1-3

Jacobs (Review) Meuwese M, *Brothers in Arms, Partners in Trade*

Jacobs J (Review) Meuwese M, *Brothers in Arms, Partners in Trade: Dutch-Indigenous Alliances in the Atlantic World, 1595-1674* (University of St Andrews 2002)

Jayasuriya "*Analysis of Legal Institutions*"

Jayasuriya K "Introduction: A Framework for the Analysis of Legal Institutions in East Asia", in Jayasuriya K (ed) *Law, Capitalism and Power in Asia* (Routledge London 1999)

Jewsiwicki and Mudimbe 1993 *History Theory*

Jewsiwicki B and Mudimbe VY "Africa's Memoirs and Contemporary History of Africa" 1993 *History Theory* 1-11

John K et al 2008 *The Journal of Finance*

John K et al "Corporate Governance and Risk-Taking." 2008 *The Journal of Finance* 1679-1728

Johnson et al 2002 *Journal of Law, Economics and Organisation*

Johnson L et al "Courts and Relational Contracts" 2002 *Journal of Law, Economics and Organisation* 221-277

Joireman 2001 *J of Modern African Studies*

Joireman SF "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" 2001 *J of Modern African Studies* 571-596

Jonas 2013 *African Human Rights Law Journal*

Jonas O "Gender equality in Botswana: The case of Mmusi and Others v Ramantele and Others" 2013 *African Human Rights Law Journal* 1-15

Jovanovic 2008 *International Economics*

Jovanovic MN "Does Globalisation Make Sense?" 2008 *International Economics* 47-80

Juma 2007 *Lesotho Law Journal*

Juma L "Institutions of 'African' Law and Justice Administration in Kenya" 2007 *Lesotho Law Journal* 1-40

Juma 2001 *Thomas L Rev*

Juma L "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes" 2001 *Thomas L Rev* 459-859

Kalenga "SADC Trade Protocol"

Kalenga P "Implementation of the SADC Trade Protocol: A Preliminary Review" in Hansohm D *et al* (eds) *Monitoring Regional Integration in Southern Africa Yearbook* (NEPRU 2004)

Kali 1999 *Journal of Law, Economics and Organisation*

Kali R "Endogenous Business Networks" 1999 *Journal of Law, Economics and Organisation* 615-636

Kane M *et al* "Reassessing Customary Law Systems"

Kane MJ *et al* "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor" New Frontiers of Social Policy Arusha Conference December 2005

Kaphangawani *African Conception of a Person*

Kaphangawani D *African Conception of a Person* (Blackwell 2006)

Kaptouom "The West African Economic and Monetary Union"

Kaptouom PC "The West African Economic and Monetary Union: Past and Present of an Exceptional North-South-South-Integration" *Diskussionsbeiträge des Fachbereichs Wirtschaftswissenschaft der Freien Universität Berlin*, 2007

Karla and Stiglitz 2004 *The American Economic Review*

Karla H and Stiglitz JE "After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies" 2004 *The American Economic Review* 753-763

Kartz 1993 *J Disp Resol*

Kartz LV "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" 1993 *J Disp Resol* 1-55

Kauzya "Political Decentralization in Africa"

Kauzya JM "Political Decentralization in Africa: Experiences of Uganda, Rwanda and South Africa" in Cheema GS and Rondinelli D *Decentralizing Governance: Emerging Concepts and Practices* (Brookings Institution Press, 2007)

Kawai and Wignaraja "ASEAN+ 3 or ASEAN+ 6"

Kawai M and Wignaraja G "ASEAN+ 3 or ASEAN+ 6: Which way Forward?"
ADB Institute Discussion Papers 2007

Kayizzi-Mugerwa S *Reforming Africa's Institutions*

Kayizzi-Mugerwa S *Reforming Africa's Institutions: Ownership, Incentives and Capabilities* (United Nations University Press 2003)

Keevy 2009 *Journal for Judicial Science*

Keevy I "Ubuntu versus the Core Values of the South African Constitution"
2009 *Journal for Judicial Science* 19-58

Kelly *The Rhythm of Life*

Kelly M *The Rhythm of Life: Living Every Day with Passion and Purpose*
(Simon and Schuster, 2004)

Kenneth 1980 *American Journal of Economics and Sociology*

Kenneth DA "Altruism and Economic Behaviour: II: Private Charity and Public Policy" 1980 *American Journal of Economics and Sociology* 337-352

Kiestra *The Impact of the European Convention on Human Rights*

Kiestra LR *The Impact of the European Convention on Human Rights on Private International Law* (Springer 2014)

Kiplagat 1995 *North-western Journal of International Law and Business*

Kiplagat PK "Dispute Recognition and Dispute Settlement in Integration Process: The COMESA Experience" 1995 *North-western Journal of International Law and Business* 437-698

Kirsti "Rule of Law Reform"

Kirsti S "Rule of Law Reform in Post-Conflict Countries: Operations Initiatives and Lessons Learnt" *Social Development Papers* 2006

Kleinfeld R *Advancing the Rule of Law Abroad*

Kleinfeld R *Advancing the Rule of Law Abroad: Next Generation Reform*
(Carnegie Endowment for International Peace 2012)

Klug *Constituting Democracy*

Klug H *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press 2000)

Knack and Keefer 1995 *Economics & Politics*

Knack S and Keefer P "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures" 1995 *Economics & Politics* 207-227

Koh 1996 *International and Comparative Law Quarterly*

Koh PMC "Foreign Judgments in ASEAN—a Proposal" 1996 *International and Comparative Law Quarterly* 844-860

Kohlhagen *ADR*

Kohlhagen D *Alternative Dispute Resolution (ADR) and Mediation: The Experience of French Speaking Countries* (17 and 18 April at the EACC Addis Ababa UNKNOWN)

Kohlhagen 2005 *State Law*

Kohlhagen D *State Law and Local Law in Sub-Saharan Africa Centre* (Francais d'Etudes Ethiopiennes 2005)

Koo and Zhao 2011 *Common Law World Review*

Koo AKC and Zhao Y "The Development of Legal Protection for Mediation Confidentiality in Hong Kong" 2011 *Common Law World Review* 263-277

Koyana 2013 *Speculum Juris*

Koyana DS "The Indigenous Constitutional System in a Changing South Africa" 2013 *Speculum Juris* 66-101

Koyana 1997 *Consultus*

Koyana DS "Customary Law and the Role of the Customary Courts Today" 1997 *Consultus* 126-128

Kranton 1996 *The American Economic Review*

Kranton RE "Reciprocal Exchange: A Self-sustaining System" 1996 *The American Economic Review* 830-851

Kuhlmann *East Africa Legal Guide*

Kuhlmann K *East Africa Legal Guide* (ANDE 2014)

Kwesi 1986 *Journal of American Folklore*

Kwesi Y "Proverb Rhetoric and African Judicial Processes: The Untold Story" 1986 *Journal of American Folklore* 280-303

Lando and Beale (eds) *European Contract Law*

Lando O and Beale HG *The Principles of European Contract Law* (Kluwer Law International 2000)

Lavoie *Economics*

Lavoie D *Economics and Hermeneutics* (Routledge London 1991)

Lazzarini et al 2004 *Journal of Law, Economics and Organisation*

Lazzarini SG et al "Order with Some Law: Complementarity versus Substitution of Formal and Informal Arrangements" 2004 *Journal of Law, Economics and Organisation* 261-298

Legrand 1996 *International Comparative Law Quarterly*

Legrand P "European Legal Systems are not Converging" 1996 *International Comparative Law Quarterly* 52-81

Lerm 2012 *De Rebus- SA Attorneys Journal*

Lerm H "Two Heads are better than One - Assessors in High Court Civil Cases" 2012 *De Rebus- SA Attorneys Journal* 22-24

LeRoy and Feuille 2002 *UCLA L Rev*

LeRoy MH and Feuille P "When is Cost an Unlawful Barrier to Alternative Dispute Resolution-The Ever-Green Tree of Mandatory Employment Arbitration" 2002 *UCLA L Rev* 142-547

Lesser and Moisé-Leeman *Informal Cross-Border Trade*

Lesser C and Moisé-Leeman E *Informal Cross-Border Trade and Trade Facilitation Reform in Sub-Saharan Africa* (OECD Paris 2009)

Levi-Faur 2005 *International Organization*

Levi-Faur D "The Political Economy of Legal Globalization: Juridification, Adversarial Legalism, and Responsive Regulation. A Comment" 2005 *International Organization*

Levine 1999 *Journal of Intermediation*

Levine R "Law, Finance, and Economic Growth" 1999 *Journal of Intermediation* 451-462

Levine 1998 *Journal of Money, Credit and Banking*

Levine R "The Legal Environment, Banks, and Long-run Economic Growth" 1998 *Journal of Money, Credit and Banking* 596-613

Lewis "After the Negotiations"

Lewis JD "After the Negotiations: Assessing the Impact of Free Trade Agreements in Southern Africa" *The World Bank* 1999

Lindsey *Law Reform*

Lindsey T *Law Reform in Developing and Transitional States* (Taylor & Francis 2007)

Lingonge *The Church as the Family of God*

Lingonge LE *The Church as the Family of God* (USA 2004)

Lockwood 2006 *Journal of Transnational Law and Policy*

Lockwood JM "Recent Developments" 2006 *Journal of Transnational Law and Policy* 341-345

Longan 1994 *Neb L Rev*

Longan PE "Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators" 1994 *Neb L Rev* 712-953

Longman Dictionary of Contemporary English

Longman Dictionary of Contemporary English (2003)

Louw "Ubuntu"

Louw DJ "Ubuntu: An African Assessment of the Religious Other" Annual Meeting of the American Academy of Religion, San Francisco USA conclusions 22-25 Nov 1997

Mabille 1906 *Journal of the Royal African Society* 351-376

Mabille HE "The Basuto of Basutoland" 1906 *Journal of the Royal African Society* 351-376

Macamo *Unrecorded Cross-Border Trade*

Macamo JL *Estimates of Unrecorded Cross-Border Trade between Mozambique and her Neighbours* (Office of Sustainable Development, Bureau for Africa, USAID Washington DC 1999)

MacGaffey *Entrepreneurs and Parasites*

MacGaffey J *Entrepreneurs and Parasites* (Cambridge University Press, 2014)

MacKay Halsbury's *Laws of England*

MacKay Halsbury's *Laws of England* (4thed 1975)

Mackie *et al The ADR Practice Guide*

Mackie K *et al The ADR Practice Guide: Commercial Dispute Resolution* (Tottel Publishing West Sussex 2007)

MacGinty 2008 *Cooperation and Conflict: Journal of the Nordic International Studies Association*

MacGinty R "Indigenous Peace-Making versus the Liberal Peace" 2008 *Cooperation and Conflict Journal of the Nordic International Studies Association* 139-163

Macmillam "*Development*"

Macmillam F "Development, Cultural Self-determination and the World Trade Organisation" in Perry-Kessaris (ed) *Law in the Pursuit of Development: Principles into Practice?* (Routledge London 2010)

Macneil 1986 *Stanford Law Review*

Macneil RW "Contract in China: Law, Practice, and Dispute Resolution" 1986 *Stanford Law Review* 303-397

Madden 2006 *London Law Review*

Madden MS "Paths of Western Law after Justinian" 2006 *London Law Review* 369-433.

Madsen et al 2016 *Law and Contemp Probs*

Madsen MR "How Context Shapes the Authority of International Courts" 2016 *Law and Contemp Probs* 1-36

Mahao 2007 *SPECULUM JURIS*

Mahao N "Colonial Rule and the Transformation of Chieftaincy in Southern Africa: A Case Study on Lesotho" 2007 *SPECULUM JURIS* 206-220

Mahao 2010 *XLIII CILSA*

Mahao N "O se re ho morwa 'morwa towel' African Jurisprudence Exhumed" 2010 *XLIII CILSA* 317-337

Mahoney 2001 *The Journal of Legal Studies*

Mahoney PG "The Common Law and Economic Growth: Hayek might be Right" 2001 *The Journal of Legal Studies* 503-525

Maine *Ancient Law*

Maine HS *Ancient Law, its Connection with the Early History of Society and its Relation to Modern Ideas* (J. Murray, 1906)

Maine "From Status to Contract"

Maine MH "From Status to Contract" in Aubert V (ed) *Sociology of Law* (Penguin 1969)

Malahlela *Should South Africa Ratify the CISG*

Malahlela CPM *Should South Africa Ratify the United Nations Convention on Contracts for the International Sale of Goods? (Theses University of Pretoria Theses 2014)*

Maloy 2005-2006 QLR

Maloy "Forum Shopping-What's Wrong with That?" 2005-2006 QLR 25-62

Mamdani *Citizen and Subject*

Mamdani M *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996)_

Mandova and Wasosa 2013 *International Journal of Asian Social Science*

Mandova E and Wasosa W "The Role Of Proverbs In The Shona Judicial System with Special Reference to Nhangochi Dzokusuma Nyaya Padare" 2013 *International Journal of Asian Social Science* 369-376

Mansfield and Reinhardt 2003 *International organization*

Mansfield ED and Reinhardt E "Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements" 2003 *International organization* 829-862

Marasinghe "Traditional Conceptions of Human Rights in Africa"

Marasinghe L "Traditional Conceptions of Human Rights in Africa" in Welch EC and Meltzer RI (eds) *Human Rights and Development in Africa* (Albany: State University of New York Press 1984)

Masten and Prüfer 2014 *The Journal of Legal Studies*

Masten SE and Prüfer J "On the Evolution of Collective Enforcement Institutions: Communities and Courts" 2014 *The Journal of Legal Studies* 359-400

Matinyenya *South Africa's Non-Ratification of the CISG*

Matinyenya P *South Africa's Non-Ratification of the United Nations Convention on Contracts for the International Sale of Goods (CISG), Wisdom or Folly, Considering the Effect of the Status quo on International Trade* (Theses University of Western Cape 2011)

Mattias 2004 *Ariz J Int'l & Comp L*

Mattias A "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law-The Saami People's Perspective" 2004 *Ariz J Int'l & Comp L* 63-112

Mattli *Regional Integration*

Mattli W *The Logic of Regional Integration: Europe and Beyond* (Cambridge University Press, Cambridge 1999)

Mayeda 2006 *McGill Law Journal*

Mayeda G "Appreciate the Difference: Different Domestic Norms in Law and Development Reform: Lessons from China and Japan" 2006 *McGill Law Journal* 547-598

Mazrui *Africa's International Relations*

Mazrui A *Africa's International Relations: the Diplomacy of Dependency and Change* (London Heinemann 1977)

Mbigi *In Search of the African Business Renaissance*

Mbigi L *In Search of the African Business Renaissance* (Knowledge Resources (Pty) Ltd 2000)

McAdams 1997 *Michigan Law Review*

McAdams "The Origin Development and Regulation of Norms" 1997 *Michigan Law Review* 338-433

McClintock 1992 *Social Text*

McClintock A "The Angel of Progress: Pitfalls of the Term "Post-Colonialism"" 1992 *Social Text* 84-98

McConaughay 2000 *Virginia Journal of International Law*

McConaughay P "Re-thinking the Role of Law and Contracts in East-West Commercial Relations" 2000 *Virginia Journal of International Law* 427-941

McGivern 1996 *International Legal Materials*

McGivern BP "Asia-Pacific Economic Cooperation Forum: Dispute Mediation Experts Group Reports on Voluntary Consultative Dispute Resolution" 1996 *International Legal Materials* 1102-1110

McMichael "The New Colonialism"

McMichael P "The New Colonialism: Global Regulation and the Restructuring of the Interstate System" in DA Smith and J Borocz eds *A New World Order? Global Transformations in the Late Twentieth Century* 1995)

McMillan and Woodruff 2000 *Michigan Law Review*

McMillan J and Woodruff C "Private Order under Dysfunctional Public Order" 2000 *Michigan Law Review* 2421-2458

Meagher "The Hidden Economy"

Meagher K "The Hidden Economy: Informal and Parallel Trade in North Western Uganda" in Griffon M *Economie des Filières en Régions Chaudes; Formation des Prix et Echanges Agricoles* (actes du Xème séminaire d'économie et de sociologie 1989)

Meagher 1990 *Review of African Political Economy*

Meagher K "The Hidden Economy: Informal and Parallel Trade in North-Western Uganda" 1990 *Review of African Political Economy* 64-83

Meagher and Mohammed-Bello *Passing the Buck* 1996

Meagher K and Mohammed-Bello Y *Passing the Buck: Structural Adjustment and the Nigerian Urban Informal Sector* (United Nations Research Institute for Social Development, 1996)

Meagher 2001 "Throwing out the Baby to Keep the Bathwater"

Meagher K "Throwing out the Baby to Keep the Bathwater" in Nordic Africa Institute *Regionalism and Regional Integration in Africa: A Debate on Current Aspects and Issues* (Nordic Africa Institute 2001)

Mears 2000 *Oregon Law Review*

Mears TL "Norms, Legitimacy and Law Enforcement" 2000 *Oregon Law Review* 391 417

Meillasoux C *The Development of Indigenous Trade and Markets*

Meillasoux C *The Development of Indigenous Trade and Markets in West Africa* (Oxford University Press Oxford 1971)

Melantzuk *International Law*

Melantzuk P *Ackhurst's Modern Introduction to International Law* (Routledge 2002)

Menkel-Meadow 2003 *J Disp Resol*

Menkel-Meadow C "Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts" 2003 *J Disp Resol* 319-352

Menkel-Meadow 2000 *Ohio St J Disp Resol*

Menkel-Meadow C "Mothers and Fathers of Invention: The Intellectual Founders of ADR." 2000 *Ohio St J Disp Resol* 1-37

Menkel-Meadow 2004 *J Legal Educ*

Menkel-Meadow C "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context" 2004 *J Legal Educ* 7-29

Menski *Comparative Law in a Global Context*

Menski WF *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge 2006)

Merry 1988 *Law and Society Review*

Merry SE "Legal Pluralism" 1988 *Law and Society Review* 869-896

Messenger 1959 *Southwestern Journal of Anthropology*

Messenger J C "The Role of Proverbs in a Nigerian Judicial System" 1959 *Southwestern Journal of Anthropology* 64-73

Messick "Alternative Dispute Resolution"

Messick RE "*Alternative Dispute Resolution - When It Works, When It Doesn't*" (World Bank 2005)

Messick 1991 *The World Bank Research Observer*

Messick RE "Judicial Reform and Economic Development: A Survey of the Issues" 1991 *The World Bank Research Observer* 117-136

Meuwese *Brothers in Arms*

Meuwese M *Brothers in Arms, Partners in Trade: Dutch Indigenous Alliances in the Atlantic World 1595-1674* (Brill 2011)

Miles 2004 *African Development Law for Development Review*

Miles J "Customary and Islamic Law and its Development in Africa" 2004 *African Development Law for Development Review* 99-154

Milgrom and North 1990 *Economics & Politics*

Milgrom PR and North DC "The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs" 1990 *Economics & Politics* 1-23

Milhaupt and Pistor *Law & Capitalism*

Milhaupt CJ and Pistor K *Law & Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008)

Mirus and Rylska 2001 *Western Centre for Economic Research* 1-18

Mirus R and Rylska N "Economic Integration: Free Trade Areas vs. Customs Unions" 2001 *Western Centre for Economic Research* 1-18

Mistry 2000 *African Affairs*

Mistry PS "Africa's Record of Regional Co-operation and Integration" 2000 *African Affairs* 553-573

Mo *International Commercial Law*

Mo J *International Commercial Law* 3rd ed (LexisNexis Butterworths Australia 2003)

Mokyr *The Oxford Encyclopaedia of Economic History*

Mokyr J *The Oxford Encyclopaedia of Economic History* (Oxford University Press, 2003)

Montecinos 1996 *Studies in Comparative International Development*

Montecinos V "Ceremonial regionalism, institutions and integration in the Americas" 1996 *Studies in Comparative International Development* 110-123

Moodley 1994 *CILSA XXVII*

Moodley S "Mediation- the Increasing Necessity of Incorporating Cultural Values and Systems of Empowerment" 1994 *CILSA XXVII* 44-51

Moore *Law as Process*

Moore SF *Law as Process* (Routledge and Kegan Paul 2003)

Moore "*Customary*" *Law on Kilimanjaro, 1880-1980*

Moore SF *Social Facts and Fabrications "Customary" Law on Kilimanjaro, 1880-1980* (CUP Archive 1986)

Greg Moran et al. 2009 CHIEFTAINSHIP AND LOCAL GOVERNANCE IN LESOTHO Local

Governance and Non-state actors Support Programme (LGNSP) Local Governance and Non-State Actors Support Programme (LGNSP) Report Greg Moran et al. 2009 CHIEFTAINSHIP AND LOCAL GOVERNANCE IN LESOTHO Local

Governance and Non-state actors Support Programme (LGNSP) Local Governance and Non-State Actors Support Programme (LGNSP) Report

Morgan 2010 *Golden Gate University Law Review*

Morgan AE "ADR: In Search of the Emperor's New Clothes" 2010 *Golden Gate University Law Review* 350-360

Mosito 2014/15 *SADC Law Journal*

Mosito KE "The Role of Traditional Authorities in Land Allocation and Management in Lesotho" 2014/15 *SADC Law Journal* 68-80

Motala 1989 *Hastings International and Comparative Law Review*

Motala Z "Human Rights in Africa: a Cultural, Ideological, and Legal Examination" 1989 *Hastings International and Comparative Law Review* 373-410

Mouloul *Understanding OHADA*

Mouloul A "Understanding the Organization for the Harmonization of Business Laws in Africa (OHADA)" *OHADA* 2009

Mowart 1992 *CILSA XXV*

Mowart JG "Alternative Dispute Resolution: Some Points to Ponder" 1992 *CILSA XXV* 44-58

Mowatt 1989 *SALJ*

Mowatt JT "Mediation and Chinese Legal Theory" 1989 *SALJ* 349-357

Mulaudzi 2009 *Lusotopie*

Mulaudzi C "New regionalism in Southern Africa? Between South African hegemony and globalisation Le nouveau régionalisme en Afrique australe? Entre hégémonie sud-africaine et globalisation O novo regionalismo na África austral? Entre hegemonia sul-africana e globalização" 2009 *Lusotopie* 47-65

Munalula 2014/2015 *SADC Law Journal*

Munalula MM "Seeking a Gender Equitable Customary System of Distributive Justice: The Case of the Lozi of Western Zambia" 2014/2015 *SADC Law Journal* 81-95

Murray *et al* Schmitthoff's Export Trade

Murray C *et al* Schmitthoff's Export Trade (Sweet & Maxwell 2007)

Mwangi *et al* "Intra-African Trade in Context"

Mwangi SK *et al* "Introduction: Intra-African Trade in Context" in Africa Growth Initiative *Accelerating Growth through Improved Intra-Africa Trade* (Brookings 2012)

Mwenda *Paradigms of Alternative Dispute Resolution*

Mwenda WS *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia* (LLD Theses UNISA 2006)

'Nyane 2014 *Lesotho Law Journal*

'Nyane H "Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho" 2014 *Lesotho Law Journal* 59-86

Nader and Grande 2002 *Law and Social Enquiry*

Nader L and Grande E Current Illusions and Delusions about Conflict Management-In Africa and Elsewhere 2002 *Law and Social Enquiry* 573-591

Nader *The Life of the Law*

Nader L *The Life of the Law: Anthropological Projects* (University of California Press 2002

Nader 2006 *Anthropology News*

Nader L "Human Rights and Moral Imperialism: A Double-Edged Story" 2006 *Anthropology News*

Nader 1999 *ASIL*

Nader L "The Globalisation of Law: ADR as 'Soft' Technology" 1999 *ASIL Proceedings* 304-311

Nafziger *Inequality in Africa*

Nafziger EW *Inequality in Africa: Political Elites, Proletariat, Peasants and the Poor* (CUP Archive, 1988)

Nathan 1998 *Track Two: Constructive Approaches to Community and Political Conflict*

Nathan L "'When Push comes to Shove': The Failure of International Mediation in African Civil Wars" 1998 *Track Two: Constructive Approaches to Community and Political Conflict* 1-23

Ndulo 1993 *International and Comparative Law Quarterly*

Ndulo M "Harmonisation of Trade Laws in the African Economic Community" 1993 *International and Comparative Law Quarterly* 101-118

Ndulo 2011 *Indiana Journal of Global Legal Studies*

Ndulo M "African Customary Law, Customs, and Women's Rights" 2011 *Indiana Journal of Global Legal Studies* 87-120

Newby-Rose *Fanakalo as a Trade Language*

Newby-Rose H *Fanakalo as a Trade Language in Kwazulu-Natal*. (Dissertation University of Stellenbosch, 2011)

Newton *"The Dialectics of Law and Development"*

Newton S "The Dialectics of Law and Development" in Trubek DM and Santos A (eds) *The New Law and Economic Development* (Cambridge, Cambridge University Press 2006)

Ngaraj "Human Rights, Legal Pluralism and Conflict"

Ngaraj VK "Human Rights, Legal Pluralism and Conflict: Challenges and Possibilities- Some Reflections" in The World Bank *Customary Justice and Legal Pluralism in Post Conflict and Fragile Societies* (George Washington University 2009)

Ngugi 2006 *Cardozo J Int'l & Comp L*

Ngugi JM "World Bank and the Ideology of Reform and Development in International Economic Development Discourse, The" 2006 *Cardozo J Int'l & Comp L* 313-345

Njinkeu and Fosso "Intra-African trade"

Njinkeu D and Fosso BP "Intra-African Trade and Regional Integration" Prepared for the ADB/AERC International Conference on Accelerating Africa's Development Five Years into the Twenty-first Century: Tunis. 2006

Nkendah "The Informal Cross-Border Trade"

Nkendah R "The Informal Cross-Border Trade of Agricultural Commodities between Cameroon and its CEMAC's Neighbours" NSF/AERC/IGC Conference Mombasa Kenya 2010

Nkrumah *Neo-colonialism*

Nkrumah K *Neo-Colonialism: The Last Stage of Imperialism* (London: Nelson, 1965)

Nolan-Haley and Annor-Ohene 2014 *Harvard Negotiation Law Review Online, forthcoming*

Nolan-Haley JM and Annor-Ohene JK "Procedural Justice Beyond Borders: Mediation in Ghana" 2014 *Harvard Negotiation Law Review Online, forthcoming*

Nolan-Haley and Annor-Ohene "Procedural Justice"

Nolan-Haley J and James Annor-Ohene K (Rev.) "Procedural Justice Beyond Borders: Mediation in Ghana" Visiting Foreign Scholar And Research Program, Fordham University School Of Law 2014

North *Institutions*

North DC *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990)

Nussbaum 2003 *Reflections*

Nussbaum B "Ubuntu: Reflections of a South African on our common humanity" 2003 *Reflections* 21-26.

Nyamu-Musembi "*Non-State*" *Justice Systems*

Nyamu-Musembi C *Review of Experience in Engaging with "Non-State" Justice Systems in East Africa* (Governance Division, DFID, February 2003)

Nyerere "Ujamaa"

Nyerere J "Ujamaa the basis of African socialism' in Nyerere, *Ujamaa : essays on socialism* (Dar es Salaam: OUP, 1968)

Nzegwu *Family Matters*

Nzegwu NU *Family Matters: Feminist Concepts in African Philosophy of Culture* (SUNY Press 2012)

O'Brien *et al* "Poverty and Social Exclusion in North and South" *IDS Working Paper 55* (1997)

O'Brien D *et al* "Poverty and Social Exclusion in North and South" *IDS Working Paper 55* (1997)

Ochonu "The Wangara Trading Network"

Ochonu ME "The Wangara Trading Network in Precolonial West Africa: An Early Example of Africans Investing in Africa" in McNamee T *et al Africans Investing in Africa: Understanding Business and Trade, Sector by Sector* (Palgrave Macmillan UK 2015)

Ofosu-Amaah 2002 *Law and Business Review of the Americas*

Ofosu-Amaah P "Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience" 2002 *Law and Business Review of the Americas* 555-685

Oliver "A European Union without the United Kingdom"

Oliver T "A European Union without the United Kingdom: the Geopolitics of a British Exit from the EU" (LSE IDEAS February 2016).

Onuoha *The Elements of African Socialism*

Onuoha B *The Elements of African Socialism* (Andre Deautch Ltd London 1965)

Onwe 2013 *Journal of Economics and Development Studies*

Onwe OJ "Role of the Informal Sector in Development of the Nigerian Economy: Output and Employment Approach" 2013 *Journal of Economics and Development Studies* 60-74

Olufemi *How Colonialism Pre-empted Modernity in Africa*

Olufemi T *How Colonialism Pre-empted Modernity in Africa* (Indiana University Press 2009)

Omogbe *Philosophy of Law*

Omogbe J I *Philosophy of Law: An Introduction to Philosophical Jurisprudence* (Joja Educational Research and Publishers Limited 1994)

Onyango *African Customary Law*

Onyango P *African Customary Law: An Introduction* (Law Africa Publishing 2014)

Oomen *Chiefs in South Africa*

Oomen B *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (University of KwaZulu-Natal Press 2005)

Oppong 2010 *American Journal of Comparative Law*

Oppong RF "Private International Law Scholarship in Africa (1884-2009)- A Selected Bibliography" 2010 *American Journal of Comparative Law* 319-342

Oppong *Economic Integration in Africa*

Oppong *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011)

Oppong and Niro 2014 *Journal of International Dispute Settlement*

Oppong RF and Niro LC "Enforcing Judgments of International Courts in National Courts" 2014 *Journal of International Dispute Settlement* 344-371

Oppong 2006 *TSAR*

Oppong F "Private International Law and the African Economic Community: A Plea for Greater Attention" 2006 *TSAR* 911-928

Oppong 2007 *American Journal of Comparative Law*

Oppong RF "Private International Law in Africa: The Past Present, and Future" 2007 *American Journal of comparative Law* 677-719

Orbach 2012 *Yale Journal on Regulation Online*

Orbach B "What is Regulation?" 2012 *Yale Journal on Regulation Online* 1-57

Osagie *Economic Development*

Osagie *Economic Development in Esan in the Colonial Period* (PhD Theses University of Benin 2007)

Palacio (ed) *The World Bank Legal Review*

Palacio A (ed) *The World Bank Legal Review: Law, Equity, and Development* (Martinus Nijhoff Publishers 2003)

Palanithurai *Dynamics of New Panchayati Raj System in India*

Palanithurai G *Dynamics of New Panchayati Raj System in India: Panchayati Raj and Multi-level Planning* (Concept Publishing Company 2002)

Paleker 2003 *ADR Bulletin*

Paleker "Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa" 2003 *ADR Bulletin* 47-50

Palmer and Poulter *The Legal System of Lesotho*

Palmer VV and Poulter SM *The legal system of Lesotho* (Michie Company, 1972)

Parker 1992 *Defence Counsel Journal*

Parker BR "What can be Done to Enforce Mediation Agreements" 1992 *Defence Counsel Journal* 322-339

Parrot 2007 *Fordham Law Review*

Parrot M "Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution" 2007 *Fordham Law Review* 2685-2743

Paquin 2008 *Transna'l L & Contemp Probs*

Paquin J "Cross-Cultural Business Law Transplants: The Neglected Issue of the Fit" 2008 *Transna'l L & Contemp Probs* 331-359

Parisi 2000 *Encyclopaedia of Law and Economics*

Parisi F "Spontaneous Emergence of Law: Customary Law" 2000 *Encyclopaedia of Law and Economics* 603-630

Paton *The Land and the People of South Africa*

Paton J *The Land and the People of South Africa* (J.P. Lippincott 1990)

Peberdy *Regional Integration, Poverty and South Africa's Migration Policy*

Peberdy S "Hurdles to Trade? South Africa's Immigration Policy and Informal Sector Cross-border Traders in the SADC" *Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy* Pretoria 2002

Peckman 1984-1985 *Rutgers L Rev*

Peckman RF "Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution" 1984-1985 *Rutgers L Rev* 253-277

Pedersen "Tanzania's Land Law Reform"

Pedersen RH "Tanzania's Land Law Reform; the Implementation Challenge" DIIS Working Paper-Danish Institute for International Studies 2010/37 (2010).

Peerenboom *China's Long March*

Peerenboom R *China's Long March Toward Rule of Law* (Cambridge University Press, 2002)

Perlman and Nelson 1983 *Int'l Law*

Perlman L and Nelson SC "New Approaches to the Resolution of International Commercial Disputes" 1983 *Int'l Law* 215-255

Petersmann 2006 *U Pa J Int'l Econ L*

Petersmann E "Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade" 2006 *U Pa J Int'l Econ L* 273-366

Petersmann 2014 *Trade, Law and Development*

Petersmann EU "'Fragmentation' and 'Judicialization' of International Law as Dialectic Strategies for Reforming International Economic Law" 2014 *Trade, Law and Development* 209-255

Pimentel 2010 *Hague Journal on the Rule of Law*

Pimentel D "Rule of Law Reform without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in Southern Sudan" 2010 *Hague Journal on the Rule of Law* 1-28

Ping and Yan Tan *International Academic Worksop on Social Science*

Ping H and Yan Tan "The Comparison of Chinese and American Interpersonal Relationships" *International Academic Worksop on Social Science* (2013)

Pistor 2002 *Am J Comp L*

Pistor C "The Standardisation of Law and its Effect on Developing Economies" 2002 *Am J Com L* 97-130

Pistor and Wellons *Role of Law and Legal Institutions*

Pistor K and Wellons PA *Role of Law and Legal Institutions in Asian Economic Development 1960-1995: Executive Summary* (Asian Development Bank, 1996)

Platteau 1994 *The Journal of Development Studies*

Platteau JP "Behind the Market Stage: Where Real Societies Exist-Part II" The Role of Moral Norms" 1994 *The Journal of Development Studies* 753-817

Polinsky *Law and Economics*

Polinsky AM *An Introduction to Law and Economics* (3rd ed. Aspen Publishers 2003)

Poole 2010 *UC Santa Cruz, Mimeo*

Poole J "Business Travel as an Input to International Trade" 2010 *UC Santa Cruz, Mimeo* 1-57

Porat 2000 *Michigan Law Review*

Porat A "Enforcing Contracts in Dysfunctional Legal Systems: The Close Relationship between Public and Private Orders: A Reply to McMillan and Woodruff" 2000 *Michigan Law Review* 2459-2480

Posin 2003 *Fordham Journal of Corporate and Financial Law*

Posin DQ "Mediating International Business Disputes" 2003 *Fordham Journal of Corporate and Financial Law* 449-474

Poulter *Legal Dualism in Lesotho*

Poulter SM *Legal Dualism in Lesotho: A Study of the Choice of Law Question in Family Matters* (Morija Sesuto Book Depot, Lesotho 1981)

Pound 1908 *Harvard Law Review*

Pound R "Common Law and Legislation" 1908 *Harvard Law Review* 383-407

Posner 1998 *World Bank Res Observer*

Posner R "Creating a Legal Framework for Economic Development" 1998 *World Bank Res Observer* 1-11

Prosner 1986 *U Chi L Rev*

Prosner RA "The Summary Jury Trial and other Methods of Alternative Dispute Resolution: Some Cautionary Observations" 1986 *U Chi L Rev* 366-393

Pryles 1990 *Australian Dispute Resolution Journal*

Pryles M "Dispute Resolution Clauses in Contracts" 1990 *Australian Dispute Resolution Journal* 116-124

Rabinovich-Einy and Tsur 2010 *Vermont Law Review*

Rabinovich-Einy O and Tsur R "The Case for Greater Formality in ADR: Drawing on the Lessons of Ben-Ami's Private Arbitration Statement" 2010 *Vermont Law Review* 529-975

Rabinovich-Einy 2002 *Virginia Journal of Law and Technology*

Rabinovich-Einy O "Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age" 2002 *Virginia Journal of Law and Technology* 1-55

Ramose *African Philosophy Through ubuntu*

Ramose P *African Philosophy Through ubuntu* (Mond Books Publishers Harare)

Ramose "African Customary Law"

Ramose MB "The King as Memory and Symbol of African Customary Law" in Hinz, MO and Patemann HK *The Shade of New Leaves: Governance in Traditional Authority; a Southern African Perspective* (LIT Verlag Münster, 2006)

Rautenbach "Exploring the Contribution of *uBuntu*"

Rautenbach C "Exploring the Contribution of *uBuntu* in Constitutional Adjudication – Towards the indigenisation of Constitutionalism in South Africa?" (Publication Forthcoming in 2016)

Rautenbach 2016 *AHRLJ*

Rautenbach C "A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana" 2016 *AHRLJ* 145-174

Rautenbach 2008 *EJCL*

Rautenbach C "South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition" 2008 *EJCL* 1-14

Raz 1979 *The Authority of Law*

Raz J *The Authority of Law, Essays on Law and Morality* (Oxford University Press 1979)

Re 1960 *Fordham L Rev*

Re ED "Roman Contribution to the Common Law, The" 1960 *Fordham L Rev* 447-494.

Resnik 1989 *U Pa Rev*

Resnik J "The Domain of Courts" 1989 *U Pa Rev* 2219-2230

Richman 2004 *Columbia Law Review*

Richman BD "Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering" 2004 *Columbia Law Review* 2328-2368

Riddell 1992 *The Journal of Modern African Studies*

Riddell JB "Things Fall Apart Again: Structural Adjustment Programmes in sub-Saharan Africa" 1992 *The Journal of Modern African Studies* 53-68

Rockel S *Caravan Porters of the Nyika*

Rockel S *Caravan Porters of the Nyika. Labour, Culture, and Society in nineteenth Century Tanzania*. PhD thesis, University of Toronto 1997

Rodney *How Europe Underdeveloped Africa*

Rodney W *How Europe Underdeveloped Africa* (Washington, D.C.: Howard University Press 1981)

Rodrik *et al* 2004 *Journal of Economic Growth*

Rodrik D *et al* "Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development" 2004 *Journal of Economic Growth* 131-165

Romano C *et al* (eds) *International Adjudication*

Romano C *et al* (eds) *The Oxford Handbook of International Adjudication* (Oxford University Press 2013)

Rose 1996 *Africa Notes*

Rose LL "Are Alternative Dispute Resolution (ADR) Programs Suitable for Africa?" 1996 *Africa Notes* 3-7

Rossouw *Harmonisation*

Rossouw M "The Harmonisation of Rules on the Recognition and Enforcement of Foreign Judgments in the Southern African Customs Union" (Dissertation University of the Western Cape 2013)

Rostow *The Stages of Economic Development*

Rostow WW *The Stages of Economic Development: A Non-Communist Manifesto* (Cambridge University Press 1990)

Roy *Traditional Customary Laws*

Roy RD *Traditional Customary Laws and Indigenous Peoples in Asia* Minority Rights Group International 2005

Rwodzi *Linguistic Challenges*

Rwodzi C *Linguistic Challenges Faced by Foreign Migrant Workers and Informal Traders in Gauteng* (Thesis Doctor of Literature and Philosophy UNISA 2011)

Rycroft 2014 *South African Law Journal*

Rycroft A "What should the Consequences be of an Unreasonable Refusal to Participate in ADR?" 2014 *South African Law Journal* 778-786

Sachs and Warner 1997 *Journal of African economies*

Sachs JD and Warner AM "Sources of Slow Growth in African Economies" 1997 *Journal of African economies* 335-376

Saegusa and Dierkes 2005 *J Japan L*

Saegusa M and Dierkes J "Integrating Alternative Dispute Resolution into Japanese Legal Education" 2005 *J Japan L* 101-114

Santiso 2001 *Geo Public Pol'y Rev*

Santiso C "World Bank and good governance: good governance and aid effectiveness: the World Bank and conditionality" 2001 *Geo Public Pol'y Rev* 1-22

Sarantakos *Social Research*

Sarantakos S *Social research* (South Melbourne: Macmillan 1993)

Sassen "Economic Globalisation"

Sassen S "Economic Globalisation: A New Geography, Composition, and Institutional Framework" in Brecher J *et al* (eds) *Global Visions: Beyond the New World Order* (Black Rose Book Ltd 1993)

Şaul 2004 *American Anthropologist*

Şaul M "Money in Colonial Transition: Cowries and Francs in West Africa" 2004 *American Anthropologist* 71-84

Saurombe 2009 *Journal of International Commercial Law and Technology* 100-106

Saurombe A "Regional Integration Agenda for SADC Caught in the Winds of Change Problems and Prospect" 2009 *Journal of International Commercial Law and Technology* 100-106

Scalia 1988 *U Cinn L Rev*

Scalia A "Originalism: The Lesser Evil" 1988 *U Cinn L Rev* 9-13

Scalia 1989 *The University of Chicago Law Review*

Scalia A "The Rule of Law as a Law of Rules" 1989 *The University of Chicago Law Review* 1175-1188

Schmitthoff 1968 *The International and Comparative Law Quarterly*

Schmitthoff C "The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions" 1968 *The International and Comparative Law Quarterly* 551-570

Schmitthoff *Schmitthoff's Select Essays on International Trade Law*

Schmitthoff CM *Schmitthoff's Select Essays on International Trade Law* (BRILL, 1988)

Schrama 2011 *Utrecht L Rev*

Schrama W "How to Carry out Interdisciplinary Legal Research-Some Experiences with an Interdisciplinary Research Method" 2011 *Utrecht L Rev* 147-162

Scutt 1988 *Women's Studies Int Forum*

Scutt JA "The Privatisation of Justice: Power Differentials, inequality, and the Palliative of Counselling and Mediation" 1988 *Women's Studies Int Forum* 503-520

Sebenius 2002 *Harvard Business Review*

Sebenius JK "The Hidden Challenge of Cross-border Negotiations" 2002 *Harvard Business Review* 76-85

Secher 2004 *The UNSWLJ*

Secher U "Reception of Land Law into the Australian Colonies Post-Mabo: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore" 2004 *The UNSWLJ* 703-735

Sempasa 1992 *International and Comparative Law Quarterly*

Sempasa S L "Obstacles to International Commercial Arbitration in African Countries" 1992 *International and Comparative Law Quarterly* 387-413

Sen 2006 *The World Bank Legal Review*

Sen A "What is the Role of Legal and Judicial Reform in the Development Process?" 2006 *The World Bank Legal Review* 21-42

Sender 1999 *Journal of Economic Perspectives*

Sender J "Africa's Economic Performance: Limitations of the Current Consensus" 1999 *Journal of Economic Perspectives* 89-114

Sheehy 2005 *Nw J Int'l L & Bus*

Sheehy B "Fundamentally Conflicting Views of the Rule of Law in China and the West & (and) Implications for Commercial Disputes" 2005 *Nw J Int'l L & Bus* 225-266

Sheneberger and van Stam 2011 *Economics and Finance Review*

Sheneberger K and van Stam G "Relatio: An Examination of the Relational Dimension of Resource Allocation" 2011 *Economics and Finance Review* 26-33

Sherman 1992-1993 *SMU Law Review*

Sherman E "Court Mandated Alternative Dispute Resolution: What Form of Participation should be Required" 1992-1993 *SMU Law Review* 2079-2112

Shihata *The World Bank Legal Papers*

Shihata IFI *The World Bank Legal Papers* (Martinus Nijhoff Publishers 2000)

Shinwari *Understanding the Informal Justice System*

Shinwari NA *Understanding the Informal Justice System: Opportunities and Possibilities for Legal Pluralism in Pakistan*(CAMP 2015)

Shutte *Philosophy for Africa*

Shutte A *Philosophy for Africa* (UCT Press Rondebosch 1993)

Siddiqi "*Customary Justice*"

Siddiqi B "Customary Justice and Legal Pluralism Through the Lens of Development Economics" in *Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* 2009 United States Institute of Peace, George Washington University and the World Bank, Washington, DC

Sissons 1998 *Oceania*

Sissons J "The Traditionalisation of the Maori Meeting House" 1998 *Oceania* 36-46

Sloth-Nielsen and Gallinetti 2011 *PER*

Sloth-Nielsen J and Gallinetti J ""Just say sorry?" Ubuntu, Africanisation and the child justice system in the Child Justice Act 75 of 2008" 2011 *PER* 63-90

Smith 1983 *Educational Research*

Smith JK "Quantitative v Qualitative Research: An Attempt to Classify the Issue" 1983 *Educational Research* 6-13

Smith *The Mabilles in Basutoland*

Smith EW *The Mabilles in Basutoland* (Hodder and Stoughton, 1939)

Snyder 1981 *Journal of Legal Pluralism and Unofficial Law*

Snyder FG "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal" 1981 *Journal of Legal Pluralism and Unofficial Law* 49-90

Sousa 2006 *Law & Society Review*

Sousa SB "The Heterogeneous State and Legal Pluralism in Mozambique" 2006 *Law & Society Review* 39-76

Ssenyonjo 2007 *Journal of African Law*

Ssenyonjo M "Culture and the Human Rights of Women in Africa: Between Light and Shadow" 2007 *Journal of African Law* 39-67

Staniland *The Lions of Dagbon*

Staniland M *The Lions of Dagbon: Political Change in Northern Ghana* (Cambridge, 1975)

Starr and Collier 1987 *Current Anthropology*

Starr J and Collier JF "Historical Studies of Legal Change" 1987 *Current Anthropology* 367-372

Steffek *Mediation in the European Union: An Introduction*

Steffek F *Mediation in the European Union: An Introduction* (LLM (Cambridge June 2011))

Sternlight 2006 *DePaul Law Review*

Sternlight JR "Is Alternative Dispute Resolution Consistent with the Rule of Law?" 2006 *DePaul Law Review* 569-592

Stipanowich 2004 *Journal of Empirical Legal Studies*

Stipanowich TJ "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution'" 2004 *Journal of Empirical Legal Studies* 843-912

Stringham *Anarchy and the Law*

Stringham EP *Anarchy and the Law: The Political Economy of Choice* (Transaction Publishers, 2011)

Stromberg 2006 *Loyola of Los Angeles Law Review*

Stromberg W "Avoiding the Full Court Press: International Commercial Arbitration and Another Global Alternative Dispute Resolution Processes" 2006 *Loyola of Los Angeles Law Review* 1337-1406

Stromseth J *et al Can Might make Rights*

Stromseth J *et al Can Might make Rights: Building the Rule of Law after Military Interventions* (Cambridge University Press 2006)

Sundström *The Exchange Economy of Pre-colonial Tropical Africa*

Sundström L *The Exchange Economy of Pre-colonial Tropical Africa* (C. Hurst 1974)

Taiwo 2008 *Journal for Juridical Science*

Taiwo, E. A. "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions-Some Lessons for Nigeria" 2008 *Journal for Juridical Science* 89-115

Tamahana 1995 *Am J Int'l L*

Tamahana B "The Lessons of Law and Development Studies" 1995 *Am J Int'l L* 470-486

Tanase 2001 *Adapting Legal Cultures*

Tanase T "The Empty Space of the Modern in Japanese Law Discourse" 2001 *Adapting Legal Cultures* 187-198

Taylor "Rule-of-Law Assistance Discourse and Practice"

Taylor VL "Rule of Law Assistance Discourse and Practice: Japanese Inflections" in Perry-Kassar A *Law in Pursuit of Development: Principles into Practice* (Routledge New York 2010)

Taylor "Africa's Place in International Relations"

Taylor I "Africa's Place in International Relations, Domestic Politics, Global Linkages" in Carbone M (ed) *European Union in Africa: Incoherent Policies, Asymmetrical Policies, Declining Relevance?* (Oxford University Press 2013)

The Citizen

The Citizen (Gauteng) (May 13, 2015)

The Observer

The Observer July 8, 1951

Thiongo *Petals of Blood*

Thiongo N *Petals of Blood* (Penguin Books New York 1977)

Thompson 2004 *Ohio State Journal on Dispute Resolution*

Thompson PN "Enforcing Rights Generated in Court-Connected Mediation-Tension between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice" 2004 *Ohio State Journal on Dispute Resolution* 508-572

Tiewul and Tsegah 1975 *International and Comparative Law Quarterly*

Tiewul S A and Tsegah FA "Arbitration and the Settlement of Commercial : A Selective Survey of African Practice" 1975 *International and Comparative Law Quarterly* 319-418

Titeca and De Herdt 2010 *Africa*

Titeca K and De Herdt T "Regulation, Cross-Border Trade and Practical Norms in West Nile, North-Western Uganda" 2010 *Africa* 573-594

Tlali *Sustainable Development*

Tlali D *Sustainable Development in International Law: An Analysis of key Enviro-Economic Instruments* (PULP 2007)

Tobias 2012 *West European Politics*

Tobias "Spurred Emulation: The EU and Regional Integration in Mercosur and SADC" 2012 *West European Politics* 155-173

Tobin *Why Living Law Matters*

Tobin B *Indigenous Peoples, Customary Law and Human Rights—Why Living Law Matters* (Routledge, 2014)

Tobin and Taylor "Across the Great Divide"

Tobin, B. and Taylor, E. "Across the Great Divide: A Case Study of Complementarity and Conflict between Customary Law and TK Protection Legislation in Peru" Initiative for the Prevention of Biopiracy Research Documents, Year IV, No. 11. Lima: Sociedad Peruana de Derecho Ambiental 2009

Tobin *Why Customary Law Matters*

Tobin BM *Why Customary Law Matters: The Role of Customary Law in the Protection of Indigenous Peoples' Human Rights* (Dissertation National University of Ireland Galway 2011)

Todaro and Smith *Economic Development*

Todaro MP and Smith SC *Economic Development* (Person Education Ltd England 2009)

Toope 2003 *McGill Law Journal*

Toope S "Legal and Judicial Reform through Development Assistance: Some Lessons" 2003 *McGill Law Journal* 357-417

Touval 1966 *International Affairs (Royal Institute of International Affairs 1944)*

Touval S "Africa's Frontiers: Reactions to a Colonial Legacy" 1966 *International Affairs (Royal Institute of International Affairs 1944)* 641-654

Trebilcock and Daniels *Rule of Law Reform and Development*

Trebilcock MJ and Daniels RJ *Rule of law reform and development: Charting the fragile path of progress* (Edward Elgar Publishing 2009)

Trebilcock and Leng 2006 *Virginia Law Review*

Trebilcock M and Leng J "The Role of Formal Contract Law and Enforcement in Economic Development" 2006 *Virginia Law Review* 1517-1580

Triandis *et al* 1984 *Journal of Personality and Social Psychology*

Triandis HC *et al* "Simpatia as a Cultural Script of Hispanics" 1984 *Journal of Personality and Social Psychology* 1363-1375

Tripp 2004 *African Studies Quarterly*

Tripp AM "Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda" 2004 *African Studies Quarterly* 1-19

Trollip *Alternative Dispute Resolution*

Trollip AT *Alternative Dispute Resolution* (Butterworth's Professional Publishers Durban 1991)

Trubek "*The Rule of Law in Development Assistance*"

Trubek DM "The Rule of Law in Development Assistance: Past, Present, and Future" in Trubek DM and Santos A (eds) *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press London 2006)

Trubek 1972 *Wis L Rev*

Trubek D M "Max Weber on Law and the Rise of Capitalism" 1972 *Wis. L. Rev* 720-753

Trubek and Galanter 1974 *Wis L Rev*

Trubek DM and Galanter M "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" 1974 *Wis L Rev* 1062-1080

Tshuma 2000 *Social & Legal Studies*

Tshuma L "Hierarchies and Government versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation" 2000 *Social & Legal Studies* 115-142

Tur 1978 *The Philosophical Quarterly*

Tur R H S "What is Jurisprudence?" 1978 *The Philosophical Quarterly* 149-161

Turner *et al Rule of Law in China* 2000

Turner KG *et al The Limits of the Rule of Law in China* (University of Washington Press 2000)

Twinning *Customary Law*

Twinning W *The Place of Customary Law in National Legal Systems of East Africa* (Chicago 1964)

Umbreit 1997 *Mediation Quarterly*

Umbreit MS "Humanistic Mediation: A Transformative Journey of Peacemaking" 1997 *Mediation Quarterly* 201-213

UNCTAD "Boosting Intra-African Trade"

UNCTAD "Boosting Intra-African Trade in the Context of Development Regionalism" Economic Development in Africa Report United Nations 2013

Unger *Law in Modern Society*

Unger RM *Law in Modern Society: Towards a Criticism of Social Theory* (The Free Press, New York 1977)

Uttamchandani and Menezes *More than just Words*

Uttamchandani M and Menezes A *More than Just Words: How the Africa Round Table (ART) is enabling Meaningful reforms across Africa* Report No. 84346 World Bank. IFC Smart Lessons Brief (Washington DC World Bank Group 2013)

Uwazie 2011 "Alternative Dispute Resolution in Africa"

Uwazie EE "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability Africa" Centre for Strategic Studies 2011

Uweru 2008 *African Research Review*

Uweru BC "Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism" 2008 *African Research Review* 286-295

Van den Berghe *South Africa: A Study in Conflict*

Van den Berghe L *South Africa: A Study in Conflict* (University of California Press 1967)

Van der Merwe *et al Contract*

Van der Merwe S *et al Contract: General Principles* (Cape Town: Juta and Company 2003).

Van der Muur *ASEAN Economic Community*

Van der Muur W *The Legal Nature of the ASEAN Economic Community* (Master's Thesis Public International Law, University of Amsterdam 2015)

Van Hoecke and Warrington 1998 *The International and Comparative Law Quarterly*

Van Hoecke M and Warrington M "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" 1998 *The International and Comparative Law Quarterly* 495-536

Van Niekerk 1998 *CILSA*

Van Niekerk GJ "A Common Law for Southern Africa: Roman Law or Indigenous African Law" 1998 *CILSA* 158-173

Van Niekerk 2011 *De Jure*

Van Niekerk GJ "Orality in African Customary and Roman Law of Contract: A Comparative Perspective" 2011 *De Jure* 364-380

Van Niekerk and Schulze *The South African Law of International Trade*

Van Niekerk JP and Schulze WG *The South African Law of International Trade* (Saga Legal Publications CC Pretoria 2006)

Vidmar 1992 *Psychological Science*

Vidmar N "Procedural Justice and Alternative Dispute Resolution" 1992 *Psychological Science* 224-228

Wallerstein 1988 *Canadian Journal of African Studies*

Wallerstein I "A Comment on Epistemology: What is Africa?" 1988 *Canadian Journal of African Studies* 331-333

Walther 2015 *The Journal of Development Studies*

Walther OJ "Business, Brokers and Borders: The Structure of West African Trade Networks" 2015 *The Journal of Development Studies* 603-620

Wang "Codification in East Asia"

Wang WY (ed) "Codification in East Asia: Selected Papers" *2nd IACL Thematic Conference* 2014

Wanis-St John 2000 *Harv Negot L Rev*

Wanis-St John A "Implementing ADR in Transitioning States: Lessons Learned from Practice" 2000 *Harv Negot L Rev* 339-399

Watkins 1963 *The Canadian Journal of Economics and Political Science*

Watkins MH "A Staple Theory of Economic Growth" 1963 *The Canadian Journal of Economics and Political Science* 141-158

Watson 1978 *The International and Comparative Law Quarterly*

Watson A "Two-Tier Law: A New Approach to Law-Making" 1978 *The International and Comparative Law Quarterly* 552-575

Watson *Legal Transplants*

Watson A *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974)

Watson 1995 *The American Journal of Comparative Law*

Watson A "From Legal Transplants to legal Formats" 1995 *The American Journal of Comparative Law* 468-478

Welsh 2001 *Wash U Q* 7

Welsh N A "Making Deals in Court-Connected Mediation: What's Justice Got to do with it?" 2001 *Wash U Q* 788-861

Whittaker "The Policy Setting: Crisis and Consensus"

Whittaker JS "The Policy Setting: Crisis and Consensus" in Berg RJ and Whitaker JS (eds) *Strategies for African development: A Study for the Committee on African Development Strategies* (Univ of California Press 1986)

Widner 2001 *American Journal of International Law*

Widner J "Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the African Case" 2001 *American Journal of International Law* 64-75

Williams 2011 *Indiana Journal of Global Legal Studies*

Williams SH "Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption" 2011 *Indiana Journal of Global Legal Studies* 65-85

Wilks "Asante Policy Towards the Hausa Trade"

Wilks J "Asante Policy Towards the Hausa Trade in the Nineteenth Century in Meillassoux C (ed) *The Development of Indigenous Trade and Markets in West Africa* (Oxford University Press 1971)

Wise 1990 *The American Journal of Comparative Law*

Wise EM "The Transplant of Legal Patterns" 1990 *The American Journal of Comparative Law* 1-22

Wojkowska *Doing Justice*

Wojkowska E "Doing Justice: How Informal Justice Systems can Contribute" (*Doing Justice* December 2006)

Wolski *Legal Skills*

Wolski B *Legal Skills: A Practical Guide for Students* (Law Book Co 2006)

Kenfield "Taking the 'A' Out Of 'ADR'"

Kenfield "Taking the 'A' Out Of 'ADR'" (Brief) Law Society of Western Australia October 1988

Wondolleck J *et al* 1996 *Sociological Perspectives*

Wondolleck J *et al* "Teetering at the Top of the Ladder: The Experience of Citizen Group Participants in Alternative Dispute Resolution Processes" 1996 *Sociological Perspectives* 249-262

Woon "The Asean Charter"

Woon W "The Asean Charter Dispute Settlement Mechanisms" in Manalo RG and Woon WCM *The Making of the ASEAN Charter* (World Scientific 2009)

World Bank

World Bank "Rule of Law as a Goal of Development Policy" (2015)

World Bank

World Bank The World Bank Legal Review: Law, Equity, and Development. World Bank, (2006)

World Bank

World Bank World Bank World Development Report (1996, 1997, 2002, 2003)

World Bank

World Bank: "Doing Business in 2004: Understanding Regulation"

Yance 2014 *Peppendine Dispute Resolution Law Journal*

Yance S "Blending the Law, the Individual and Traditional Values to Create an Effective ADR System: A Study on the ADR Processes in Rwanda and Nicaragua." 2014 *Peppendine Dispute Resolution Law Journal* 311-375

Yeats "Some Empirical Evidence"

Yeats AJ "What can be Expected from African Regional Trade Arrangements?: Some Empirical Evidence" (November 1998)

Yeung *Securing Compliance*

Yeung K *Securing Compliance: A Principled Approach* (Bloomsbury Publishing 2004)

Yiridoe 1995 *Nordic Journal of African Studies*

Yiridoe EMMANUEL "Economic and Sociocultural Aspects of Cowrie Currency of the Dagaaba of North-western Ghana Aspects" 1995 *Nordic Journal of African Studies* 17-32

Young 1989 *Cic Just Q*

Young 319 "Neighbour Dispute Mediation: Theory and Practice" 1989 *Cic Just Q* 319-328

Zenger *et al* 2002 *Advances in Strategic Management*

Zenger TR *et al* "Informal and formal organization in new institutional economics" 2002 *Advances in Strategic Management* 277-305

Zimmerman and Baumler *Current Challenges*

Zimmerman A and Baumler J *Current Challenges Facing the African Court on Human and Peoples' Rights* (KAS International Reports 2010).

Zweigert and Kotz *Introduction to Comparative Law*

Zweigert K and Kotz H *Introduction to Comparative Law* (Oxford, 1987)

Legislation

Angola

Constitution of the Republic of Angola 2010

AU

Protocol on The Statute of The African Court of Justice and Human Rights 2008

The OAU Cultural Charter for Africa 1976

Union, African, and Sub-Subject. "Treaty Establishing the African Economic Community" Abuja, Nigeria (1991).

Union, African "Protocol to the treaty establishing the African Economic Community Relating to the Pan African Parliament" Adopted by the 5 (2008).

Bangladesh

Constitution of the People's Republic of Bangladesh 1972

EU

Council Regulation (EC) No 44/2001 of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012, 16/01/2001 P. 0001 – 0023.

Unfair Terms in Consumer Contracts, SI 1994 No 3159, implementing the EU Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993 (OJ L95, 21 April 1993, 29).

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters

REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Ghana

Alternative Dispute Resolution Act 798 of 2010

Alternative Dispute Resolution Act 2010

Arbitration, Conciliation and Mediation Act 1999

India

Constitution of India 1949

Kenya

The Constitution of Kenya 2010

Lesotho

Companies Act 71 of 2008

Criminal Procedure and Evidence Act No 12 1981

High Court (Mediation) Rules 2011

The General Law Proclamation (2B of 1884)

Subordinate Courts Act 1938

The Constitution of Lesotho 1993

Malaysia

Constitution of Malaysia 1957

Nigeria

Native Courts Proclamation 1900 (as amended in 1991)

The Constitution of the Federal Republic of Nigeria 2010

Philippines

Philippine Indigenous Peoples Rights Act 1997

Ruanda

Mediation Committee Act

The Constitution of the Republic of Ruanda 2003

SADC

SADC Protocol on Trade 1996

Senegal

Civil and Commercial Obligations Code 1968

Criminal Code Procedure (Law 99-88)

Organic Law N°02/2015/OI.Of16/07/2015 Modifying and Complementing Organic Law N°02/2010/OI.Of 09/06/2010 on The Organisation, Jurisdiction, Competence And Functioning of the Mediation Committee

South Africa

Certain Civil Cases Act 1991 (SPCA)

Child Justice Act 75 of 2008

Consumer Protection Act 68 of 2008

Customs and Excise Act 91 of 1964 (DAR/33)

Electronic Communications and Transactions Act 25 of 2002

Estate Agencies Affairs Act 112 of 1976

Human Rights Commission Act 54 of 1994

Income Tax Act 58 of 1962

Labour Relations Act 1995

Magistrate Court Act 32 of 1944

National Credit Act 34 of 2005

National Land Transport Act 5 of 2009

National Land Transport Transition Act 22 of 2000

National Ports Act 12 of 2005

Tax Administration Act 28 of 2011

The Constitution of the Republic of South Africa 1996

Uniform Rules of Court: Rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court of South Africa [as at 26 June 2009] - See more at:
<http://www.justice.gov.za/legislation/rules/rules.htm#sthash.rXTx4bk6.dpuf>

Tanzania

Local Customary Law Declaration 1961

UN and Other

Draft Declaration on Rights and Duties of States 1949

United Nations Declaration on the Rights of Indigenous Peoples 2007

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement Of Investment Disputes, Washington 1965

Uganda

Arbitration and Conciliation Act 2000

The Constitution of the Republic of Uganda 1995

UK

The Contracts (Rights of Third Parties) Act 1999 (CRTPA)

List of cases

Australia

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1

Botswana

Mmusi v Ramantele (MAHLB-000836-10) [2012] BWHC 1

R V Khani (CTHFT-000083-09) [2010] BWHC 439 (9 November 2010)
www.botswanalii.org

Ramantele v Mmusi (CACGB-104-12) [2013] BWCA 1

ECOWAS

Afolabi Oladjide v. Nigeria ECW/CCJ/JUD/01/04 www.courtecowas.org

EU

Alassini v Telecom Italia SpA [2010] EUECJ C-317/08, C-317/08, [2010] ECR I-221,
[2010] 3 CMLR 17

Kenya

Okunda v Republic 1970 E Afr. L. Rep. 453 (Kenya)

Lesotho

Attorney General of Lesotho v 'Mopa (2002) AHRLR 91 (LeCA 2002)

Bereng Griffith v. 'Mantsebo Seeiso Grzffiths (1926-53) HCTLR 50

Boloko v Lehlaka 1974-75 LLR 1

Khathang Baitsoke v Maseru City Council CONST/C/1/2004)(www.leslii.gov.ls)

Lepule v Lepule CIV/APN/193/13 www.leslii.gov.ls

Lesetla v Matsoso C OF A (CIV) NO.27/2001 (www.leslii.gov.ls)

Lesotho Wholesalers and Catering Workers Union v Metcash Trading Limited
(CIV/APN/38/99 SAFLII)

Limo v LNGI [2013] LSHC 82 www.leslii.gov.ls

Mabena v Letsoalo 1998 (2) SA 1068 (T) at 1074-1075

Mokoena v Mokoena (CIV/APN/216/2005)

Senate Gabasheane Masupha v The Senior Resident Magistrate for the Subordinate Court of Berea [2013] LSHC 9.

Selikane v Lesotho Telecommunications Corporation (CIV/APN/448/98) LESLII (Lesotho)

Thabo Fuma v The Commander LDF CONST/8/2011 www.leslii.gov.ls (19th April 2016)

Nigeria

Aribisala v Ogunyemi [2005] 6 NWLR (Pt 921) 212

Owoseni v Faloye [2005] 14 NWLR (Pt 946) 719, 740 (Nigeria)

South Africa

Alexkor Ltd v Richtersveld Community (CCT19/03) [2003] ZACC 18

Bangindawo v Head of the Nyanda Regional Authority and Hlanthalala v Head of the Western Transvaal Regional Authority (1998) 3 SA 212

Bayer South Africa v Frost 1991 (4) SA 559

Best v Samuel Fox and Co. Ltd (1952) 2 TLR 246

Bhe v Khayelitsha Magistrate CCT 49/03 [2004] ZACC 17

Conradie v Rossouw 1919 AD 279

Coutts & Co. v Ford 1997 (1) ZLR 440 6

Dikoko v Mokhatla 2006 (6) SA 235 (CC)

Everfresh Market Virginia Pty Ltd v Shoprite Checkers Pty Ltd 2012 (1) SA 256

Ex parte: PJLG In re: PJLG [2013] 4 All SA 41 (ECG) (RSA)

Goodwin Stable Trust v Duohex (Pty) Ltd [1996] 2 All SA 558 (C)

Gumede v President of the Republic of South Africa 2009 (3) BCLR 243 (CC) (South Africa)

Hamann v Moolman 1968 (4) SA 348

Kent v Transvaalsche Bank 1907 TS 765

Le Roux v Dey 2011 (3) SA 274 (CC)

Minister of Justice v Ntuli 1987 (6) BCLR 677

Moolman v Border Technikon [1997] 12 BLLR 1648 (CCMA)

Nonkululeko Bhe v Magistrate Khayalitsha CCT/ 49/03

S v Makwanyane 1995 (6) BCLR 665 (CC)

South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC)

Shibi v Sithole CCT 50/03 [2004] ZACC 18 (safflii)

Siziba v Mseni (1894) 15 NLR 237

State v Makwanyane and M Mchunui CCT/N3/94

Tongoane v National Minister of Agriculture and Land Affairs 2010 6 SA 214 (CC)

University of Stellenbosch Legal Aid Clinic v Minister of Justice And Correctional Services (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015)

Van Breda and others v Jacobs 1921 AD 330

UK

Dunnet v Railtrack Plc [2002] EWCA Civ.302

Earl of Malmesbury v Strutt and Parker [2008] EWCH 424 (QB)

Highwayman (Everet v. Williams, Ex. 1725, 9 L.Q. Rev. 197)

New Windsor Corpn v Mellor [1975] ALL ER 44.

Oyekan v. Adele [1957] 2 All E.R. 785

Tanistry (1608), *Davis* 28, 80 E.R.

Tijani v. Secretary, Southern Nigeria[1921] 2 A.C. 399

USA

Behring Sea Fur Seals arbitration between Britain and the United States 1898

Marbury v Madison 5 US 137, 2L Ed. 60, 2 L. Ed. 2d 60 (1803)

Trail Smelter case United States v Canada Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941)

Zimbabwe

Herbst v Surti 1990 [2] ZLR 269

Internet Sources

Adjabeng 2010 www.effectius.com

Adjabeng SM *Using ADR* 2010 www.effectius.com/ accessed 21 June 2016

Adjabeng 2007 <http://www.mediate.com/articles/adjabengs3.cfm>.

Adjabeng SM *Alternative Dispute Resolution in Ghana* 2007
<http://www.mediate.com/articles/adjabengs3.cfm> accessed 21 June 2016

Africa ADR <http://www.africaadr.com>

Africa ADR <http://www.africaadr.com>

African Centre for the Constructive Resolution of Disputes (ACCORD)
<http://www.accord.org.za>

African Centre for the Constructive Resolution of Disputes (ACCORD)
<http://www.accord.org.za>

Africa Growth Initiative 2012 www.brookings.edu

Africa Growth Initiative 2012 "Accelerating Growth through Improved Intra-African Trade." www.brookings.edu accessed 22 April 2016

African Union "Action Plan for Boosting Intra-African Trade"
http://pages.au.int/sites/default/files/CFTA%20Action%20Plan%20TI6174%20_E%20Original.pdf accessed 17 September 2016

African Union "Action Plan for Boosting Intra-African Trade" Addis Ababa, Ethiopia 2012
http://pages.au.int/sites/default/files/CFTA%20Action%20Plan%20TI6174%20_E%20Original.pdf

AfriMAP, OSIWA and IDG 2007 *Ghana Justice Sector and the Rule of Law*

AfriMAP, OSIWA and IDG *Ghana Justice Sector and the Rule of Law*
http://www.afriMAP.org/english/images/report/AfriMAP_Ghana%2520JusticedD.pdf accessed 21 June 2016

Alter 2012 <https://www.researchgate.net>

Alter 2012 *The Global Spread of European Style International Courts*
<https://www.researchgate.net> accessed 2 February 2016

ANON 2011 www.bizcommunity.com/Article/410/87/61613.html

ANON *Africa must do business with itself* - Standard Bank economist 2011
www.bizcommunity.com/Article/410/87/61613.html accessed 8 January 2015

ANON.UNKNOWN

<https://www.un.org/development/desa/indigenouspeoples/about-us.html>

ANON. UNKNOWN *Indigenous at the UN*

<https://www.un.org/development/desa/indigenouspeoples/about-us.html>

accessed 21 June 2016

APEC UNKNOWN www.apec.com/publications

APEC *APEC at a Glance* UNKNOWN www.apec.com/publications accessed
21 June 2016

ASEANUNKNOWN

http://www.miti.gov.my/miti/resources/ASEAN_Integration_Report_20151

ASEAN UNKNOWN "ASEAN Integration Report 2015"

http://www.miti.gov.my/miti/resources/ASEAN_Integration_Report_20151

accessed 18 September 2016

Brainch 2003 info.worldbank.org/etools/docs/library/108479/brainch_paper.pdf

Brainch B *ADR/Customary Law* 2003

info.worldbank.org/etools/docs/library/108479/brainch_paper.pdf accessed 21

June 2016

Cape Chamber of Commerce and Industry UNKNOWN <http://capetownchamber.com>

Cape Chamber of Commerce and Industry UNKNOWN

<http://capetownchamber.com> accessed 18 September 2016

Cardone *et al* UNKNOWN <https://www.wpi.edu/Pubs/>

Cardone *et al* UNKNOWN *The Implications of Globalisation on the*

Sustainability of Society <https://www.wpi.edu/Pubs/> accessed 21 June 2016

Chamber Trade Sweden UNKNOWN <http://chambertradesweden.se>

Chamber Trade Sweden *ADR and Arbitration Conference Flings Open the*

Doors of Trade with Africa UNKNOWN <http://chambertradesweden.se>

accessed 21 June 2016

Chamber Trade Sweden UNKNOWN <http://chambertradesweden.se>

Chamber Trade Sweden *From Cape to Addis Enabling Economic*

Development in Africa through ADR UNKNOWN <http://chambertradesweden.se>

accessed 21 June 2016

Chen 2007 www.un.org/esa/desa/papers

Chen MA 2007 *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* www.un.org/esa/desa/papers/ accessed 19 April 2016

CIMA www.cima-afrique.org/

CIMA www.cima-afrique.org/ accessed 18 September 2016

Collins English Dictionary 2014 <http://www.thefreedictionary.com/indigenous>.

Collins English Dictionary 2014 <http://www.thefreedictionary.com/indigenous>. accessed 18 September 2016

Davies and Prado UNKNOWN www.iilj.org

Davies KE and Prado MM UNKNOWN *Law, Regulation, and Development* www.iilj.org/courses/documents/KevinDavisandMarianaPrado.pdf accessed 21 June 2016

Dispute Resolution Centre <http://www.disputeresolutionkenya.org/>

Dispute Resolution Centre UNKNOWN <http://www.disputeresolutionkenya.org/> accessed 18 September 2016

ECOWAS UNKNOWN www.ecowas.int/achievements-of-ecowas-at-40

ECOWAS UNKNOWN "Achievements of Ecowas at 40" www.ecowas.int/achievements-of-ecowas-at-40

ECOWAS UNKNOWN <http://www.courtecowas.org/>

ECOWAS UNKNOWN <http://www.courtecowas.org/>

Ezekwesili 2010 "Can Africa Trade with Africa" www.worldbankgroup.org

Ezekwesili O 2010 "Can Africa trade with Africa?" www.worldbankgroup.org accessed 7 January 2015

Fair Trade 2016 "Changing Trade, Changing Lives: 2016-2020 Fair Trade Global Strategy" <http://www.fairtrade.net/>

Fair Trade 2016 "Changing Trade, Changing Lives: 2016-2020 Fair Trade Global Strategy" <http://www.fairtrade.net/> accessed 8 September 2016

Faundez 2000 "Legal Reform in Developing and Transition Countries" https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/

Faundez J "Legal Reform in Developing and Transition Countries: Making Haste Slowly." 2000 *Law, Social Justice and Global Development* https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/faundez/ accessed 12 April 2015

Friel and Toms UNKNOWN www.brownrudnick.com/.../

Friel S and Toms C UNKNOWN *African Union (AU) and Regional Economic Communities (RECs) in Africa* www.brownrudnick.com/ accessed 4 January 2016

Gerxhani UNKNOWN www.ifwea.org/@Bin/217843/Gerxhani.pdf

Gerxhani K *The Informal Sector in Developed and Less Developed Countries: A Literature Survey* UNKNOWN www.ifwea.org/@Bin/217843/Gerxhani.pdf accessed 18 September 2016

Gonzales 2015 www.worldbankgroup.org.

Gonzalez A *Deepening African Integration: Intra-Africa Trade for Development and Poverty Reduction* 2015 www.worldbankgroup.org. accessed 21 June 2016

Holmes *The Common Law* (eBook)

Holmes *The Common Law* (eBook)

ICC UNKNOWN <http://www.iccwbo.org/about-icc/policy-commissions/>

ICC UNKNOWN "Policy Commissions" <http://www.iccwbo.org/about-icc/policy-commissions/> accessed 18 September 2016

Ipp 1998 www.sabar.co.za

Ipp D *Case Management and Court-Annexed Alternative Dispute Resolution, the Hoexter Commission: New Rule 37A* 1998 www.sabar.co.za/law-journals accessed 21 June 2016

Joint Study Group Report DATE UNKNOWN www.mofa.go.jp/region/asia-paci/singapore/econo_b.html

Joint Study Group Report *Japan-Singapore Economic Agreement for a New Age Partnership* - UNKNOWN www.mofa.go.jp/region/asia-paci/singapore/econo_b.html accessed 18 September 2016

Ka 2013 www.victoria.ac.nz/law/.../05%20Ka.p

Ka J 2013 *Introduction to PACL* www.victoria.ac.nz/law/.../05%20Ka accessed 21 June 2016

Kagame P 2015 <http://www.gov.rw>

Kagame P 2015 *Intra-Africa Investment is Key to Africa's Growth* <http://www.gov.rw> accessed 30 April 2015

Karuhanga 2016 www.newtimes .co.nr

Karuhanga 2016 "What does Brexit mean for East African Community?" www.newtimes .co.nr accessed 28 June 2016

Kehinde UNKNOWN www.ainablankson.com

Kehinde A UNKNOWN *The Multi-Door Concept in Nigeria: The Journey So Far* www.ainablankson.com accessed 21 April 2016

Koyana UNKNOWN <http://www.saflii.org>

Koyana DS *The Indigenous Constitutional System in a Changing South Africa* 16-17 <http://www.saflii.org> accessed 3 August 2015

Limparangsi 2006 www.aseanlawassociation.org/9GAdocs/

Limparangsi S 2006 *Alternative Dispute Resolution in Asean: A Comparative Thai Perspective* www.aseanlawassociation.org/9GAdocs/ accessed 18 September 2016

Logan C 2017 <http://afrobarometer.org>

Logan C 2017 "Poorer People in Africa face Higher Hurdles to Access to Justice" <http://afrobarometer.org> Accessed 2nd June 2017.

Longo and Sekkat UNKNOWN www.elsevier.com/locate/worlddev

Longo R and Sekkat K www.elsevier.com/locate/worlddev accessed 4 April 2013

Lupoi 2014 www.academia.edu/.../Facing_the_Crisis_New_Italian_Provisions_to_ke

Lupoi MA "Facing the Crisis: New Italian Provisions to keep Disputes out of the Courtroom (or take them out of it)" 2014 www.academia.edu/.../Facing_the_Crisis_New_Italian_Provisions_to_ke accessed 4 February 2016

Michira 2015 <http://www.standardmedia.co.ke/business/article/2000185638/kenya-ghana-push-for-african-trade-market>

Michira M 2015 <http://www.standardmedia.co.ke/business/article/2000185638/kenya-ghana-push-for-african-trade-market> accessed 30 January 2016

Muigua UNKNOWN [Muigua-caselap.uonbi.ac.ke](http://muigua-caselap.uonbi.ac.ke)

Muigua K "Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya" UNKNOWN K [Muigua-caselap.uonbi.ac.ke](http://muigua-caselap.uonbi.ac.ke) accessed 18 September 2016

Muigua 2014 www.ciarbkenya.org

Muigua K 2014 *Court Annexed ADR in the Kenyan Context* www.ciarbkenya.org accessed 30 January 2016

Nabudere "Ubuntu Philosophy"2005 <http://www.grandslacs.net/doc/3621.pdf>

Nabudere DW "Ubuntu Philosophy: Memory and Reconciliation"
<http://www.grandslacs.net/doc/3621.pdf> accessed 18 September 2016

Nallari 2010 www.worldbankgroup.org

Nallari R *Re-Thinking Economic Policy: An Overview* 2010
www.worldbankgroup.org accessed 7 January 2015

New Partnership for Africa's Development www.nepad.org

New Partnership for Africa's Development www.nepad.org accessed 18 September 2016

Nkiruka UNKNOWN www.dundee.ac.uk/cepmlp/gateway/files.php

Nkiruka M *The CISG and NIGERIA: Is There a Meeting Point?* UNKNOWN
www.dundee.ac.uk/cepmlp/gateway/files.php accessed 21 June 2016

Omondi 2010 <http://www.businessdailyafrica.com/Corporate-News/-/539550/1066764/-/vba0ay/-/index.html>

Omondi G *Comesa Ministers to Rule on Kenya's Export Disputes* 2010
<http://www.businessdailyafrica.com/Corporate-News/-/539550/1066764/-/vba0ay/-/index.html> (Date of use 24th August 2015)

Oxfarm UNKNOWN "Ethical Trading"
<https://www.oxfam.org.au/explore/trade/fairtrade-coffee-campaign> accessed 8 September 2016

Oxfarm UNKNOWN "Ethical Trading"
<https://www.oxfam.org.au/explore/trade/fairtrade-coffee-campaign> 8 September 2016

PANA UNKNOWN www.panapress.com/

PANA *Zambia Zimbabwe Trade Dispute Taken to COMESA Summit*
UNKNOWN www.panapress.com/Zambia-Zimbabwe-Trade-Dispute-Taken-to-COMESA-Summit accessed 24 August 2015

Pict UNKNOWN <http://www.pict-pcti.org/courts/OHADA.html>

Pict UNKNOWN "OHADA Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa"
<http://www.pict-pcti.org/courts/OHADA.html> accessed 18 September 2016

Quinn 2013 <http://www.theguardian.com>

Quinn *Is there any Space in the Development Debate for African Experts?*
2013 <http://www.theguardian.com> accessed 11 March 2016

Rooke "Why Fair Trade should be at the Heart of all Food Consumption" 2013
<http://www.divinechocolate.com>

Rooke "Why Fair Trade should be at the Heart of all Food Consumption" 2013
<http://www.divinechocolate.com> accessed 18 September 2016

Sachs *et al* 1995 *Economic Reform* www.jstor.org/stable/2534573

Sach JD *et al* *Economic Reform and the Process of Global Integration* 1995
Brookings Papers on Economic Activity www.jstor.org/stable/2534573
accessed 21 June 2016

Scharf *et al* 2002 *Access to Justice for the Poor of Malawi?*
<http://www.gsdr.org/docs/open/SSAJ99.pdf>

Scharf W *et al* *Access to Justice for the Poor of Malawi? An Appraisal of
Access to Justice Provided to the Poor of Malawi by the Lower Subordinate
Courts and the Customary Justice Forums* 2002
<http://www.gsdr.org/docs/open/SSAJ99.pdf> accessed 4 November 2015

Steffek 2012 <https://e-justice.europa.eu/>

Steffek *Mediation in the European Union: An Introduction* 2012 <https://e-justice.europa.eu/> accessed 21 June 2016

Stephenson 2005 www.worldbank.org

Stephenson M 2005 *Rule of Law as a Goal of Development Policy*
www.worldbank.org accessed 28 October 2015

The Arbitration Foundation of Southern Africa (AFSA) UNKNOWN ,
<http://www.arbitration.co.za/pages/default.aspx>

The Arbitration Foundation of Southern Africa (AFSA) UNKNOWN ,
"Introduction to AFSA" <http://www.arbitration.co.za/pages/default.aspx>
accessed 18 September 2016

The Cairo Regional Centre for International Commercial Arbitration,
<http://www.crcica.org>

The Cairo Regional Centre for International Commercial Arbitration,
<http://www.crcica.org>

The Ghana Arbitration Centre <http://www.ghanaarbitration.org>

The Ghana Arbitration Centre <http://www.ghanaarbitration.org>

The Working Group on Mediation

www.gov.hk/en/residents/government/publication/.../Mediation.pdf

The Working Group on Mediation

www.gov.hk/en/residents/government/publication/.../Mediation.pdf accessed
18 September 2016

Transparency International 2014 <https://www.transparency.org/cpi>

Transparency International 2014 "The 2014 Corruption Perceptions Index"
<https://www.transparency.org/cpi>.

Uneca DATE UNKNOWN www.uneca.org/oria/pages/http://www.uneca.org/pages/cti-on-plan-boosting-intra-africa-trade

Uneca DATE UNKNOWN "Action Plan for Boosting Intra-African Trade
<http://www.uneca.org/pages/action-plan-boosting-intra-africa-trade> accessed
18 September 2016

Wang 2014 www.worldbankgroup.org

Wang X *Racing to a Competitive Economy: China Pursues High GDP, Low Carbon Growth* 2014 www.worldbankgroup.org accessed 7 January 2015

WIPO 2013 www.wipo.int

WIPO *Customary Law, Traditional Knowledge And Intellectual Property: An Outline Of The Issues* 2013 www.wipo.int accessed 30 January 2016

World Bank Group Archives UNKNOWN
siteresources.worldbank.org/EXTARCHIVES/

World Bank Group Archives *World Bank Group Historical Chronology*
UNKNOWN siteresources.worldbank.org/EXTARCHIVES/ accessed 30
January 2016

World Economic Forum 2016 <https://t.co/WwMKqIUv0Z>

World Economic Forum 2016 "Africa Needs to Trade with Itself – Here's How"
<https://t.co/WwMKqIUv0Z>

Zamfir 2015
[www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA\(2015\)551306_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA(2015)551306_EN.pdf)

Zamfir I *Economic integration under the African Union* 2015
[www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA\(2015\)551306_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/.../EPRS_ATA(2015)551306_EN.pdf)... accessed 12 September 2016

Scriptures

Deuteronomy 5:5

Exodus 19: 9; 20: 19; 24:1-2; 34: 27-28;

Leviticus 26:46

Luke 6:31

Matthew 7: 12

Journal Abbreviations

AHRLJ	African Human Rights Law Journal
Am J Comp L	American Journal of Comparative Law
Ann Rev Polit Sci	Annual Review of Political Science
Ariz J Int'l & Comp L	Arizona Journal of International and Comparative Law
CILSA	Comparative and International law Journal of Southern Africa
EJCL	Electronic Journal of Comparative Law
Fordham Int'l LJ	Fordham International Law Journal
Ga J Int'l & Comp L	Georgia Journal of International and Comparative
Geo Public Pol'y Rev	Georgetown Public Policy Review
Hamline J Pub L & Pol'y	Hamline Journal of Public Law and Policy
Harv Negot L Rev	Harvard Negotiation Law Review
IJPEE	International Journal of Pluralism and Economics Education
Int'l Law	The International Lawyer
J Disp Resol	Journal of Dispute Resolution
J Japan L	Journal of Japanese Law
J of Modern African Studies	Journal of Modern African Studies
JAL	Journal of African Law
Mich J Int'l L	Michigan Journal of International Law
Neb L Rev	Nebraska Law Review
Nw J Int'l L & Bus	North-western Journal of International Law and Business
Oxford U Commw LJ	Oxford University Commonwealth Law Journal
Penn St L Rev	Penn State Law Review
Pepp Disp Resol LJ	Pepperdine Dispute Resolution Law Journal
PER	Potchefstroom Electronic Law Journal

Rutgers L Rev	Rutgers Law Review
SAJE	South African Journal of Economics
S Afr J on Hum Rts	South African Journal on Human Rights
SALJ	South African Law Journal
SMU Law Review	Southern Methodist University Law Review
Thomas L Rev	Thomas Law Review
Transna'l L & Contemp Probs	Transnational Law and Contemporary Problems
TSAR	Journal of South African Law
Tul Eur & Civ L F	Tulane European and Civil Law Forum
Tul L Rev	Tulane Law Review
U Colo L Rev	University of Colorado Law Review
Unif L Rev	Uniform Law Review
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U Chi L Rev	University of Chicago Law Review
U PA REV	University of Pennsylvania Law Review
UCLA L Rev	UCLA Law Review
UNSWLJ	University of South Wales Law Journal
Utrecht L Rev	Utrecht Law Review
Wis L Rev	Wisconsin Law Review

LIST OF FIGURES

Figure 1 hierarchy of chiefs authority



Figure 2 Intra-African FDI

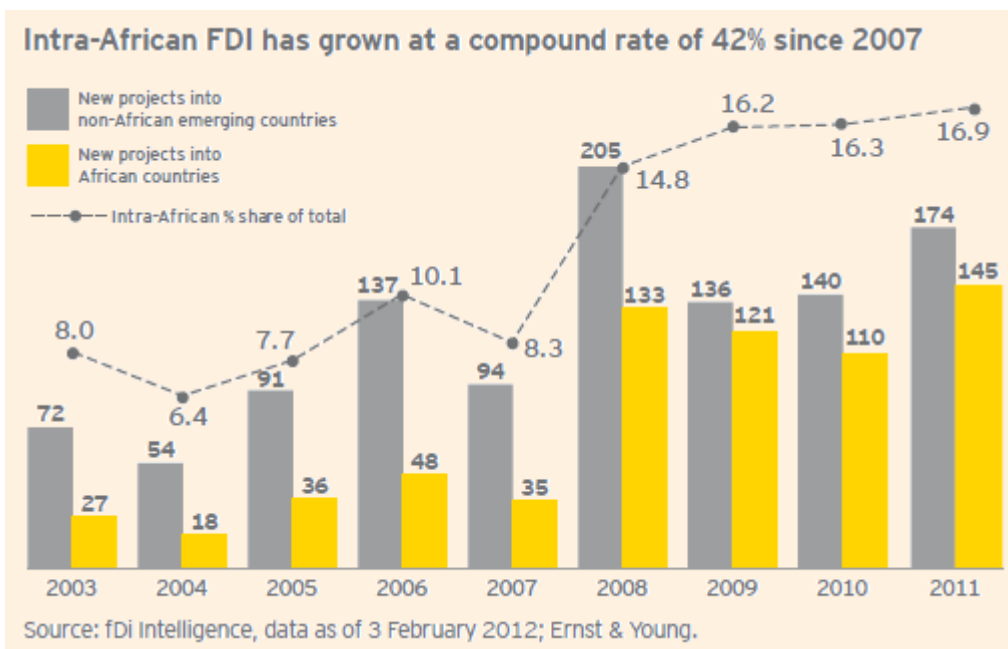


Figure 3 Multiple RTA Membership of SSA Countries

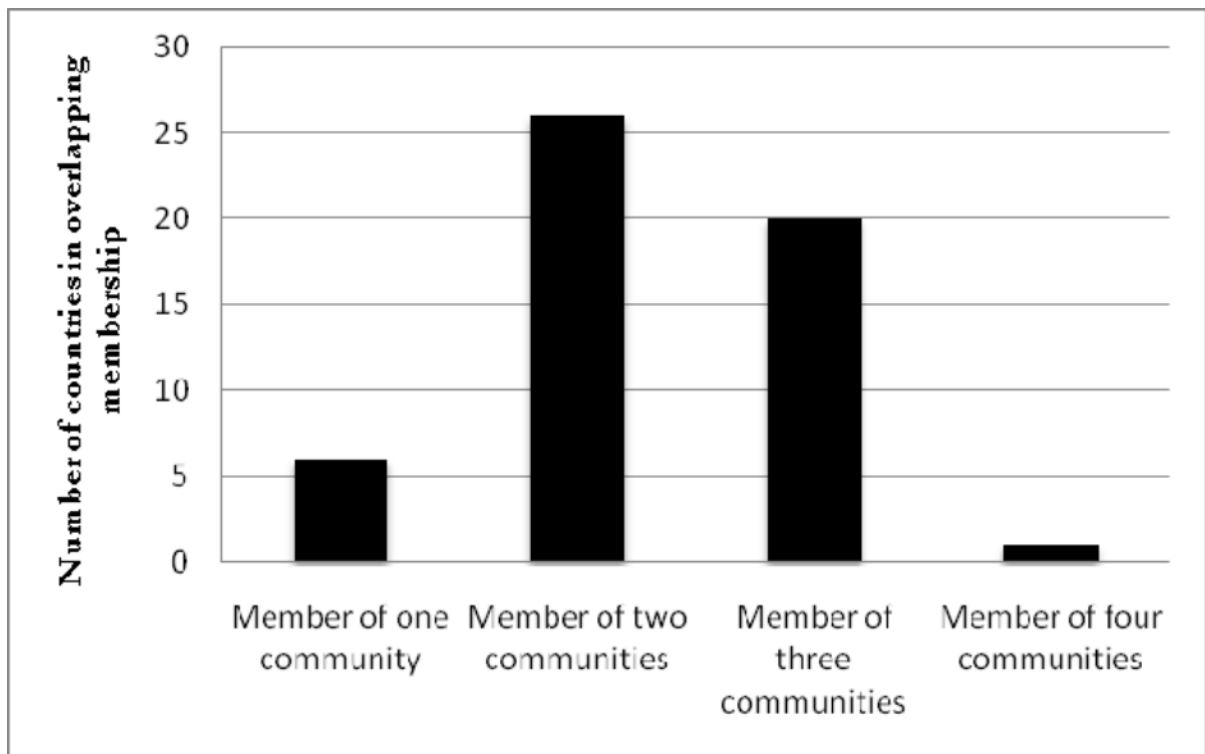


Figure 4 Hierarchy of the Regional Courts of Justice

