The Jurisprudential Basis of Traditional Justice Systems as an Enabler of Legal Aid and Access to Justice in Kenya

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ABSTRACT

This paper examines the role of traditional justice mechanisms in enabling access justice and function of Legal Aid towards achieving access to justice to the extent that it is germane. The import of administration of justice denotes the possibility for an individual to bring a claim before a Court for adjudication, nevertheless, at its core, access to justice is premised on the ability of court users to understand the process in which they participate and to be meaningful participants in the justice system. Access to justice catered for only by means of formal justice systems suffers, since the formal systems alone cannot provide adequately for this public good. Therefore, it is not a surprise that alongside formal Court processes, the emerging issue is the place of traditional dispute resolution mechanisms in enhancing access to justice is fast gaining a reawakening. Access to justice cannot remain only an object of formal justice mechanisms. Access to justice in the narrowest sense may mean a guarantee to remedial mechanisms such as access to court or alternative dispute resolution bodies; however, this position is anomalous since the prerequisite for the so-called alternative dispute resolution presupposes a pretentious superficial substitute. Access to justice in the context of alternative dispute resolution mechanisms enables the enforcement of rights in the context of social and cultural milieu. Conversely, access to justice in the broader sense, denotes an engagement with the wider social context of the indigenous governance systems. Extant evidence demonstrates that access to justice is undermined by lack of legal literacy and in most cases indigence. The paper will explore the place of Legal

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Aid in promoting access to justice in its broader connotation, in all judicial and quasi-judicial fora and other fora afforded by traditional systems. This paper will examine access to justice in the context of the Constitution of Kenya 2010 and such Laws as have been enacted to undergird legal aid.

Key Words: Access to justice, alternative dispute resolution, dispute resolution and legal aid.

INTRODUCTION

Access to justice, as a concept in social science, lends itself to a variety of meanings.[1] Generally, however, it has been argued to denote the possibility for the individual to bring a claim before a court and have a court adjudicate it.[2]Access to justice broadly understood however denotes the availability of dispute resolution platforms through which people are enabled to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[3] Access to justice can be gauged by the extent to which people can seek and obtain remedies against grievances through state and non-state mechanisms.[4] In order to enhance access to justice, legal aid measures that include assistance in the resolution of matters through alternative dispute resolution mechanism have been identified as possible panacea to the challenges of access to justice.[5]

Legal aid objectives are stated to include *inter-alia*, the provision of affordable, accessible, sustainable, credible and accountable legal aid services to the poor and equally, the promotion of alternative dispute resolution methods as enablers of access to justice.[6] Legal aid as envisaged under the Legal Aid Act is anchored in strict, formal traditions of government

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1 Francesco Francioni (ed.)., The Development of Access to Justice in Customary Law in Francioni F, *Access to Justice as a Human Right*, Oxford University Press, (OUP 2007) p.64.

2 ibid.

3 United Nations and the Rule of Law, https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed on 15 April 2021.

4 Benjamin van Rooij, Ineke van de Meene, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Co-operation,* (Leiden University Press, 2008) p.15.

5 Legal Aid Act 2016, s2.

6 ibid s3.

bureaucracy as it is to be shepherded by a Legal Aid board[7], which shall be funded from the public coffers.[8] Legal aid has faced significant challenges universally such as massive underfunding and overwhelming workloads in its formalist disposition.[9] The formal orientation of the Legal Aid Act draws from the notion of legal centralism, which claims that law is and should be the law of the state; uniform for all persons, exclusive of all other laws and administered by a single set of institutions.[10]

Whereas countries have put in place laws that anchor legal aid, the actualization of legal aid has been a mirage due to several challenges and these challenges have put paid to the rolling out efforts and therefore legal aid remains largely a concern for charitable organizations.[11]

In the Kenyan context, legal aid under the law is pegged to certain limitations, such as that a case must be sufficiently important, that there must be a reasonable chance of success and that there must be enough funds available.[12]It therefore appears that access to justice through the formalized legal aid structures would still not offer adequate remedial mechanisms for dispute resolution if the dispensation of justice is to be examined through an exclusive formal lens. Therefore, alternative justice mechanisms, especially through traditional justice means can provide much needed succor in platforms for legal aid provision in an affordable, widely and easily accessible manner and to a good number of people within their locality. African legal systems and values can be of utility in advancing the objectives of legal aid, which among others has been stated to be to facilitate access to justice.[13]

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7 ibid s9.

8 ibid s29.

9 Ole Hammerslev, Olaf Halvorsen Rønning, 'Legal Aid in Nordic Countries' in Hammerslev O and Halvorsen Rønning O(eds.), *Outsourcing Legal aid in the Nordic Welfare States*, (Springer International Publishing AG, Cham, 2018) p.2.

10 Thandabantu Nhlapo et al, *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (OUP Southern Africa (Pty) Limited 2014) p.94.

11 Ole Hammerslev, Olaf Halvorsen Rønning, (eds.), *Outsourcing Legal aid in the Nordic Welfare States*, pp.2-3.

12 Legal Aid Act 2016, s36(4).

13 Legal Aid Act 2016.

Justice and African Customary Societies

African laws and African jurisprudence have always faced a barely hidden undercurrent of denial of their potential contribution to jurisprudence.[14] African customary laws have never been treated in a disrespectful manner, and considered as bearing no legal value, especially in the colonial context. The colonialist bore in them an engendered stereotype that the 'natives' were lex nullius: a condescending attitude that the locals had no laws.[15] The colonial experience imposed transplanted western prototypes, mono-legal regulation systems that were thought conducive to 'justice'.[16]

Contrary to the misplaced belief that Africans had no laws, traditionally, many African communities, had laws and legal systems that elevated justice as the first virtue of social institutions, because emphasis was on (building and) restoration of harmonious societal relationships as opposed to reliance on abstract notions of justice that are prevalent in the contemporary world.[17] African societies had vibrant legal cultures, legal culture in this sense denoting relatively stable patterns of legally oriented social behaviour and attitudes.[18] The pharaonic Egyptian civilization for example, can easily be claimed 'to be the cradle of one of the earliest and most spectacular civilizations of antiquity', with a vibrant subsistence economy and vibrant governance structures. [19]

Justice in today's world does not lend itself to a singular definition. However, it is generally understood as a concept imbued with morality. Justice as understood in traditional African societies denoted the will to respect the order of the human world and to recognize in word and deed anything that

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14 Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, (Cambridge University Press 2006) p.380.

15 Supra (n 10), pp.36-37.

16 Supra (n 14), p 61.

17 George Ayitteh, *Indigenous African Institutions*, (Transnational Publishers, Inc., 2006), p.34.

18 David Nelken, 'Legal Culture' in John Smits, *Elgar Encyclopedia of Comparative Law*, (Edward Elgar Publishing Limited, 2006), p.374.

19 Bruce Graham Trigger, *The Rise of Civilization in Egypt* in Desmond Clark (ed.), *Cambridge History of Africa*, (CUP,1982),p.478.

belonged to another.[20] Justice was broadly understood as fair rules in the way they distribute benefits and burdens between a set of claimants.[21]

Questions of justice and good governance arose whenever social institutions and practices affected the distribution of societal values. Thus, justice was the standard/principle by which weight was assigned to other values. It was an organizing concept for good governance.[22] Customary laws, as indicators of societal values in traditional African societies, were conventions and enforceable rules that materialized and were respected spontaneously without formal agreement, as people went about their daily business and in an effort to solve myriad problems that emerged without upsetting the patterns of cooperation on which they heavily depended.[23] Customary rules did not emerge from litigation but rather were a product of practices prompted by the convenience of society and of the individual.[24]The maintenance of peace within most African communities followed four principles; first, settlement of disputes was through deliberation and discussion rather than force; second the correction of wrongdoing was by means of compensation rather than punishment except in serious offences such as murder; third dispute settlement was conducted by means of adjudication and assessment by elders who were considered to be impartial and fourthly, dispute settlement was expected to be fair.[25]

It should be noted that a good number of African societies possessed a diversity of courts, which courts were hierarchically structured to deal with disputes, emphasis being that issues were to be resolved peacefully. The types of courts that could be found in the various African traditional societies included the moot, the family, the ward, the chief's and the king's court, such that disputes involving siblings were to be resolved in a family court while disputes involving members of different clans were to be dealt with in the chief's court.[26] Cosmological factors provided additional reasons for the need for pacific settlement of conflicts, since Africans stressed the

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20 George Ayitteh, *Indigenous African Institutions*, (Transnational Publishers, Inc. 2006) ,p.68.

21 Steve Nwosu., '*The Ethics of Justice and Good Governance in African Traditional Society*', Journal of Democracy and Nature, 2002, p.469.

22 Steve Nwosu., 'The Ethics of Justice and Good Governance in African Traditional Society', (2010), 8(2) Journal of Democracy and Nature, p.469.

23 Supra (n 20).

24 Kofi Quashigah 'Justice in the Traditional African Society within the Modern Constitutional Set-up' (2016) 7(1) Journal of Jurisprudence, p.96.

25 Supra *(*n 20), p.72.

26 Supra (n 20), p.72.

maintenance of order and harmony in the universe which consisted of the sky, the earth and the world.[27] Order and harmony in the universe necessitated the maintenance of corresponding conditions within the community such that among the Gikuyu of Kenya for example, elders considered as their primary duty the prevention of intra and inter lineage strife as well as the prevention from resorting to supernatural powers and hostilities.[28]

In essence, law and justice in the pre-colonial African communitarian settings rejected the notion of *homo homini lupus* (a man is a wolf to another man), where law as a social construct operated within the context of an African worldview that emphasized the survival and interests of the entire community, a sense of cooperation and interdependence as well as collective responsibility, as opposed to the liberal (western) oriented position that glorified individual interests above all else.

African Legal History

Contrary to what has been popular fad, law and legal systems did exist in traditional African societies. African laws (indigenous or chthonic law) applied to a particular community, tribe or ethnic groups because the ethical basis of the principles of their law is indigenous to that particular group. Indeed the argument was that indigenous African societies were without law.[29] Africans treated chthonic laws as an extension of morality and in that sense, morality and law are fully complementary. Law was inter-linked with the socio-cultural environment. African legal systems bore elements of similarity to ingredients of any other legal system in the world, that is legal systems have been claimed to be bonafide if they have procedures, principles, institutions and techniques. [30]

Pre-colonial law in Africa operated in a community setting, which must be understood from the standpoint that government and the processes of law and dispute-settlement were mostly confined within a community of limited area and population lent a distinctive character to African law. The judge was not a remote member of an official order, but the man in the next hut,

27 ibid.
28 ibid.
29 Supra (n 10), p.36.
30 Supra (n 14), p. 83.

rendering justice according to the conventions or mores of the community.[31] Laws were significantly integrated in the society, flexible and dynamic.[32] Rules of law were seldom visible to the casual observer as they were not codified but nonetheless formed part and parcel of the fabric of local tradition.[33]During the colonial period, legal systems were characterized by legal pluralism, legal pluralism being the recognition of two or more legal systems or normative orders and where the traditional legal system had to grapple with imported, largely positivist legal systems of the colonial powers.[34] The colonial interference caused a bifurcation of law into what was termed as customary law (law associated with the various tribes, communities or ethnic groups) and state law (law associated with the colonial administration). The law applicable in colonial Africa modelled on western systems and very obviously reflected the legal ideas of the colonizing nation in question.[35] In the colonial period, there were, generally speaking, two types of courts: those applying customary law exclusively and those applying only the "modern" law.[36] This duality has been questioned ever since African countries gained their independence.

The post-colonial period saw cross-roads emerge, whereby the colonial legal system had to co-exist with the traditional legal dispute settlement mechanisms that remained resilient. The post-colonial period has seen the dominance of Eurocentric transplants of law dominate African (autochthonous law) as means of continued marginalization of everything African.[37] In these plural legal systems, customary laws exist side by side with the introduced "modern" laws; the expectations within the two different legal spheres often create conflicting situations where justice is interpreted in accordance with different and often conflicting conceptions of values.[38]The conflict between sedimented western legal values and autochthonous legal norms was evidenced by the dilemma faced by judges sitting in the Supreme Court of India in the case of ***Rattan Lal v. Vardesh Chander****,* which pronounced itself thus with regards to conflicting legal norms:

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31 ibid*,* p.437.
32 ibid*,* p.405*.*
33 ibid, p.406.
34 Supra (n 20), p.96.
35 Supra (n 14), p.448.
36 Supra (n 14), p.453.
37 Supra (n 14), p.453.
38 Supra *(*n 14), p.96.

> *We have to Part Company with the precedents of the British-Indian period tying our non-statutory areas of law to vintage English law, christening it 'justice, equity and good conscience'. After all, conscience is the finer texture of norms woven from the ethos and life-style of a community and since British and Indian ways of life vary so much the validity of an Anglophilic bias in Bharat's justice, equity and good conscience is questionable today. The great values that bind law to life spell out the text of justice, equity and good conscience and Cardozo has crystallized the concept thus: 'Life casts the mould of conduct which will someday become fixed as law'. Free India has to find its conscience in our rugged realities – and no more in alien legal thought. In a larger sense, the insignia of creativity in law, as in life, is freedom from subtle alien bondage, not a silent spring nor a hothouse flower.*[39]

Colonial Impact on African Law and Legal Systems

The colonial impact on African law and traditional legal systems must be examined in the context of the entire colonial period, which is largely blamed for under developing Africa.[40] Africa was drained of her resources as colonialism was largely an extractive adventure,[41] and with regard to indigenous institutions that included customary legal systems were significantly altered.[42] Colonialism claimed to have a civilization intendment, civilization being the rule of law in the context of legal order.[43] The colonial courts were intended neither just as sites where disputes would be settled nor simply as testimony to effective imperial control; rather, they were to shine as beacons of Western civilization.[44] The intention that western legal transplants assume hegemonic supremacy over traditional laws and systems must be seen from the prism of state centralization in the colonial

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39 Rattan Lal v. Vardesh Chander (1976) 2 SCC 103, at pp. 114–15, per Krishna Iyer J

40 See generally Walter Rodney, *How Europe Underdeveloped Africa*, (Bogle-L'Ouverture Publications, London and Tanzanian Publishing House 1973).

41 Supra (n 17), p.459.

42 The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems)*, (Judiciary of Kenya, 2020), xiv

43 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, New Jersey, 1996, p.109.

44 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* (Princeton University Press, 1996), p.109.

era. Law in the atmosphere of statecraft assumes a constitutive dimension.[45] In the constitutive dimensions the state includes a cascade of legally-dispensed authorizations; this is what gives the state its empirical and conceptual unity. [46] Therefore, the superimposition of western laws over African laws and legal systems was a power and control dynamic that fit within the whole colonial scheme of pillage and subjugation.

The nefarious effects of the colonial adventure on African traditional law and legal systems are well documented. There were at least three authority centres that strived for supremacy over the defining content of customary laws: the central state, the officials of the local state (the chiefs), and a range of non-state interests.[47] The claims of the central state always carried the day as it (the central state) set the limits of customary laws through the use of the so called 'repugnancy clause'.[48] The repugnancy doctrine as a tool for legocentralization was used to transform African Customary laws in the image of the colonial power, requiring the non-enforceability of African customary law if they were deemed 'repugnant to justice and morality.'[49] The repugnancy test was in part intended to elevate African societies closer to the level of British civilization,[50] a scheme that was aimed at social engineering. The colonial administrators were clear eyed in understanding that customary law was a way to shape society and those changes in society and in law were intimately interconnected.[51] The strife for control over the courts and the use of conceptual tools such as the repugnancy clause, generated in an environment in which there was a vicious struggle to seize control over the law generally was an exercise by the colonial administrators at fending off any perceived threats to their coercive control

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45 George O'Donnell, *Democracy, Agency, and the State: Theory with Comparative Intent*, (Oxford University Press, 2010), p.119.

46 ibid

47 Supra (n 43), p.115.

48 ibid

49 Supra (n 42), p.2. **See also Judicature *Act***, Chapter 8 Laws of Kenya, s3(2). The said section states that,' *The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay*.'

50 Brett Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60], (1999) Journal of African History, 40 (3), Cambridge University Press, p.415.

51 ibid p.415.

generally and specifically, over law and over the bodies that applied it.[52] The inevitable outcome of state centralization with regard to judicial functions and the use of control conceptual tools such as the repugnancy doctrine meant that Africans were denied the meaningful usage of their traditional cultural heritage as 'traditional Africans perceived themselves as tied in with everything around them, applying culture-specific holistic, chthonic perspectives as a fertile conceptual base for the production of innumerable legal systems.'[53]

The Future of Stifled African Dispute Resolution Mechanisms in Enhancing Access to Justice: A Re-think of Legal Aid Formalism

The Kenyan legal system is a reflection of the colonial past. The manner in which it operates today, which is steeped in adversarial and procedural rigours as well as being costly is a reflection of the colonial legacy. Access to justice therefore remains a mirage for a considerable majority of Kenyans owing to the historical structural nature of the formal judicial process. The formal judicial process is characterized by a single and nationally funded structure that has resulted in among other challenges, case backlog,[54] with some cases taking years before they are resolved. Other concerns that have been identified as characteristic of the formal dispute resolution system include negative perceptions about the formal justice system, with the resultant effect being that few people resolve their disputes through the formal court system.[55]

Legal Aid as structured under the Legal Aid Act is aimed at operating within the current formal judicial structures. For example, a court is saddled with the duty of informing the National Legal Aid Service to provide legal aid to the accused person who is facing a criminal trial.[56] Whereas the Legal Aid Act envisages the promotion of alternative dispute resolution methods in order to enhance access to justice in accordance with the Constitution, alternative dispute resolution is said to be capable of being offered by an employee of the National Legal Aid Service or a person or institution with

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52 ibid p.416.

53 Supra (n 14), p.381.

54 **See generally** Judiciary of Kenya, *State of The Judiciary and The Administration of Justice Annual Report 2018 -2019,* Judiciary of Kenya, 2019.

55 The Judiciary of Kenya, *Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems*), Judiciary of Kenya,9

56 Supra (n 13), s43.

expertise in the area of alternative dispute resolution that is engaged by the National Legal Aid Service specifically to conduct an alternative dispute resolution programme.[57] Another aspect of formalism in the context of legal aid is that anyone desirous of legal aid assistance must formally apply in writing for consideration.[58] African traditional dispute resolution mechanisms are implied to denote informal means of dispute resolution mechanisms by definition in the Legal Aid Act.[59] African traditional dispute settlement methods cannot be accommodated in the manner prescribed in the Legal Aid Act, which is under conditions of strict formalism. The Legal Aid Act has to be substantially amended to appreciate the nature of African traditional dispute mechanisms. The interlinkage between formal legal processes and African traditional dispute resolution methods is provided by the Judiciary's policy document, the Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems) which calls for the formal recognition of Alternative Justice Systems as the first step in animating them.[60]

Animation of African Traditional Justice mechanisms as part of a wider rubric called Alternative Justice Systems must be done, with a mental frame adjusted for a paradigm shift. Traditional dispute resolution mechanisms must be dealt with outside the confines of the straightjacketing of formal judicial processes and its rigours as platforms for access to justice. In mainstreaming traditional justice methods as avenues for offering legal aid as means of broadening access to justice, traditional dispute methods must be incorporated as a meaningful constitutive dimension of the state, as a bonafide cascade of legally-dispensed authorizations in an endeavor to give the state its empirical and conceptual unity.[61] It means that traditional dispute resolution methods must be accepted and mainstreamed as an acceptable and inextricable aspect of socio-cultural life. Traditional African dispute resolution mechanisms should also be incorporated as means for dispute settlement for the reason of their tenacity.

Traditional methods of dispute resolution continue to be used today and mainstreaming their use only validates what already exists. Most importantly, it should be part of our conscience awakening as a people to re-connect with our heritage, which fell prey to the vagaries of colonialism. The

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57 Supra (n 13), s39.
58 Supra (n 13), s40.
59 Supra (n 13), s2
60 Supra (n 55), p.91
61 Supra (n 45), p.119.

erasing, the destruction of African cultural heritage, our historical conscience was part of the techniques of colonization, which period was marked with enslavement and debasement of our people.[62] Therefore, in recognizing traditional dispute mechanisms as meaningful, mainstream and acceptable aspects of our culture, we recognize that the dominant positivist and statist assumptions about law has never existed in isolation from other perspectives and that law is embedded and linked to our societal values.[63]

Legal aid is aimed at the indigent people of Kenya as the reality for the poor majority in Kenya is that is that justice is not accessible to them on an equitable basis.[64] Improving access to justice through the medium of legal aid can benefit from traditional dispute resolution mechanisms but only if legal aid and the law anchoring it discards the rigidity of formalism and embraces traditional dispute methods in their chthonic sense.

CONCLUSION

The noble desire to have legal aid as an enabler of access to justice is laudable. However, legal aid objectives will be a struggle to achieve if they are pursued through purely formalist means, a bequeathed heritage of colonial legal transplants.

African dispute resolution mechanisms can offer respite to the challenges facing legal aid and formal judicial processes generally, such as prohibitive costs and case backlog but only if incorporated into legal aid mechanisms while respecting the chthonic and inherent characteristics of traditional African law and legal systems in their reverse forms.

Understanding how African dispute resolution mechanisms operate is key to incorporation of traditional dispute methods as meaningful contributors to legal aid. Appreciating law as an intricate societal concern must be internalised in light of our unique anthropological placing as a civilization. Unless one is intimately familiar with the ontological commitments of a culture, it is often difficult to appreciate or otherwise understand those commitments. Perhaps through comparing salient aspects of Western and traditional African conceptions of personhood, we can realize a more

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62 Cheikh A. Diop, Yaa-Lengi Meema Ngemi (trs), *Civilization or Barbarism: An Authentic Anthropology*, (3rd ed), (Lawrence Hill Books Publishing 1991), p.212.

63 Supra (n 14), p.85.

64 Kituo cha Sheria http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/; accessed on 19 November 2020.

informed perspective on the foundations for the associated ontological commitments within traditional African culture.[65]

Further, it cannot be gainsaid that legal literacy stands in the way of access to justice even through the formal court systems *ipso facto,* it is incumbent upon all stakeholders in the justice systems to deploy Legal Aid as a tool to enable the disadvantaged segments of the society.

[65] Lee Brown, Understanding and Ontology' in Traditional African Thought in Lee Brown(ed), *African Philosophy New and Traditional Perspectives,* (OUP, Oxford, 2004), p.160.