

INDIGENOUS GUSII SYSTEM OF ADMINISTRATION OF JUSTICE: WITH
PARTICULAR REFERENCE TO THE PROCEDURE FOLLOWED IN SETTLEMENT
OF LEGAL DISPUTES

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By

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P R E F A C E

Although many accounts have been written on the history of the Gusii and their way of life before the coming of the Europeans, no particular treatment has hitherto been given to the legal process in Gusii during that time. Yet it was the change in the legal process brought about by the British which constituted the greatest administrative change in the area. It was this change more than anything else which explains the early Gusii resistance to British rule. The change was most pronounced in the procedure followed in the administration of justice by the courts. It was because of this reason that I took an interest to try to find out what the indigenous Gusii procedure was.

However, I must say that the writing of a paper such as this presents certain problem the greatest of which is to persuade old people to recollect their memories most of which have lapsed. One therefore sometimes finds oneself, as I did, in a situation where he has to choose between two conflicting versions of the same story. Nevertheless the difficulties did not render it impossible for me to do my research to the best of my ability.

I would like to express here, my very deep gratitude for the untiring and helpful co-operation I have been accorded by my supervisor Mr. David Isabirye who also took the trouble to read this dissertation in its handwritten form. Without his inspiring guidance this paper would not have been a success.

I would also like to thank all those who co-operated with me and in this connection I would like especially to mention Brother Anthony Koning my history teacher at high school, who allowed me to read some of his research materials on pre-colonial Gusii. I would like to thank my brother Mr. John Mogaka whose financial aid I would not have done without.

Finally I would like to thank the lady who typed this paper Mrs. Grace K. Abuga and thus made it ready for presentation.

C O N T E N T S

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	<u>PAGE</u>
Preface	(ii)
Abbreviations	(iv)
Table of Cases	(iv)
Table of Statutes	(iv)
<u>CHAPTER 1: INTRODUCTION</u>	1
1. The General Scope	1
2. Gusii Law and Concept of Justice	2
<u>CHAPTER 2: DISPUTE SETTLEMENT AGENTS</u>	6
1. Head of the Village	7
2. ' <u>Etureti</u> ' Elders	8
<u>CHAPTER 3: PROCEDURE AND PRACTICE</u>	10
1. Divisions in the law for purposes of Procedure	10
2. Invoking the jurisdiction of the arbitrating bodies	11
3. The actual trial process	13
4. Decision Making	17
5. Execution and judgement	20
6. Right of appeal	20
CHAPTER 4: <u>MERITS AND DEMERITS OF GUSII TRADITIONAL PROCEDURE</u>	21
1. Merits	21
2. Demerits	23
CONCLUSION	24
FOOTNOTES	26
BIBIOGRAPHY	28

A B B R E V I A T I O N S

Cap.	Chapter (of the Laws of Kenya)
Kisii/DMCC	District Magistrate Criminal Case (decided at) Kisii
E. A. P. L. R.	East African Protectorate Law Reports
Ed.	Edited
I. A. I.	International African Institute
J. A. L.	Journal of African Law
J. C. L. I. L.	Journal of Comparative Legislation and International Law
KNA	Kenya National Archives
U. P.	University Press

TABLE OF CASES

<u>CASE</u>	<u>PAGE</u>
R. V. Amkeyo	2
Republic v. Marcus Okari	18
Republic v. Nyatuigo Nyambati	16

- 1 -

CHAPTER ONE

INTRODUCTION

1. The General Scope

The task undertaken in this paper is to investigate into the administration of justice and in particular the procedure followed in settlement of legal disputes by a given community of people, namely the Gusii. The latter belong to the Bantu group of African people and presently occupy the highland part of Nyanza Province of Kenya. British administration began in the area in 1907 and MAXON who has recently carried out a research in that part of Kenya has correctly stated that the most significant change that took place in the period 1919 to 1924 occurred in the judicial system of Gusiiland¹. This begs the question What was the system before that time?

The fact of investigation into the traditional procedure for settlement of legal disputes presupposes the existence of law in the traditional system. It is therefore necessary in this introductory chapter to seek to establish whether the Gusii had any law, and if so, what their concept of justice was.

In pre-colonial Gusii Society there was no centralized Government and the judicial system was not organized in the way we know the present system. Gusii dispute settlement processes are to be discoverable only by examination of the more general social roles and relationships and particularly the lineage principle. These social relationships were not without effect on the manner in which a particular decision was reached by the dispute settlement agents which agents I shall have occasion to inquire into before coming to the actual procedure and practice.

Having looked at the procedure followed the question will remain namely, whether or not the traditional system through its institutions did serve adequately as a medium for realization of the purpose for which law was administered among the Gusii people. It is in the light of this that I try in the last chapter of this paper to find out merits and demerits of the traditional system.

2. Gusii Law and Concept of Justice

We ought not to be led to believe that because the colonial Government made provisions for the establishment of native tribunals to administer customary law and later African courts that the colonialists did endeavour to leave customary law intact. In fact the establishment of these can be explained in terms of convenience. The colonial government lacked enough administrators and therefore had no option but to set up tribunals to be run in a manner approximating the traditional methods². The practice of higher courts and even the provisions of certain enactments³ were clear indications that customary law was not placed at par with English law. Decisions such as R. V. Amkeyo⁴ are illustrative of a situation where customary law was not regarded as law. In that case the issue which arose was whether a woman married under customary law was a wife for purposes of giving evidence in a case in which her husband was charged with a criminal offence. Under Section 122 of the Indian Evidence Act⁵ then in force in Kenya a spouse was not a competent witness for the prosecution in a case in which the other spouse was charged with a criminal offence. It was held that a customary marriage does not constitute a marriage for purposes of these provisions. This case did not arise from Gusii specifically but it illustrates the attitude of the colonial judiciary to customary law generally.

It is important to note that besides the fact that the ruling class would love to have their ideas enforced, such an attitude on the part of colonial administrators can also be explained on the basis of their failure to understand the nature of customary law. Admittedly one of the major disagreements among legal philosophers and social anthropologists is in defining the term 'law'. JOHN AUSTIN described law as a rule of conduct imposed and enforced by the sovereign⁶. HOLMES has said; "The prophecies of what the courts do are what I mean by law"⁷. So that given the ^{Austinian} ~~Austinian~~ approach as an adequate definition of term 'law' it appears that Gusii customary practice would not qualify as law. For one thing there was no practice of imposition of rules on the people but all rules emanated from customs of society. These rules were respected by most of the people and there being no centralized government, there was no sovereign who would impose the law on the people.

Moreover law does not always go with the idea of government and Professor LUCY MAIR supports this view in her book Primitive Government⁸. BRYCE has also said:

"Broadly speaking there are in every community two authorities which can make law: the state i.e. the ruling and directing power whatever it may be in which the government of the community resides; and the people i.e. the whole body of the community regarded not as incorporated in the state, but as being merely so many persons who have commercial and social relations with each other Law cannot be always and everywhere the creation of the state, because instances can be adduced where law existed in a community before there was any state."⁹

I will not attempt to define the term 'law' but for purposes of this paper I will adopt LON FULLER'S view that; "Law is the enterprise of subjecting human conduct to the governance of rules with a view to enabling members of that society to realize a good life as perceived by that society".¹⁰ This definition I think is more comprehensive. The object of everyone is to live happily and this can only be attained if one's human dignity is recognized by others to the extent that it can be said that there is a situation of peaceful relations in society. Law then is what makes such a situation possible.

So stated it would be an ethnological misconception and indeed a cardinal error in legal philosophy for anyone to contend that the Gusii had no law and consequently no indigenous system for administration of justice. It would be equally a misconception to say that Gusii law was inferior to that of the British administered by the colonialists although it must be appreciated that the two differed greatly. This is because the two communities did not think alike and their aims and ideas of administration of justice were quite different. Whereas in Gusii the administration of justice was realized by wider social participation that was not the case with the English system. Gusii indigenous administration of justice was aimed at solving the dispute between the parties rather than deciding on its strict legal aspects. Hence in the process of dispute settlement the whole social setting and relationships was taken into consideration.

It is important to understand pre-colonial Gusii social organization if we are to appreciate the difference between the two systems and for a better understanding of the indigenous judicial procedure.

Traditional Gusii society was a segmentary lineage system.

PHILLIP MAYER has defined a lineage principle as follows:-

"..... a group constituted on the lineage principle that is recruited by unilineal agnatic descent and defined by reference to its eponymous founding ancestor".

He states that in this sense a clan would be a lineage of a certain order and I am prepared to agree with him. The clan known in Gusii vernacular as 'egesaku'¹² has remained to be the central unit of Gusii social organization. Clanspeople call themselves 'abaamate'¹³ and there is no intermarrying among themselves. They regard themselves as people of one ancestral father (which in fact they are) and in pre-colonial days co-operated economically in 'amasaga'¹⁴. One main characteristic of a lineage order such as this was that it was some sort of corporate body where all the members worked for the interest of their group. Everyone identified himself or herself with the community and it was recognized that members had mutual obligations. There existed rules which everybody in the community thought it right to obey. Transgressions of any of these rules and especially if it affected the normal social relations brought about a legal dispute. This called for some sort of regulatory process so as to enable members of their society or the injured party to realise a good life as perceived by the traditional society. In this process, as between interests of the parties to the dispute and community interest the latter received more consideration.

The Gusii people made it their goal to maintain good relations within the clan. For this reason the people organized themselves into 'Chitureti' (Singular: 'etureti'). 'Etureti' can literally be translated as people of one hut. We shall see later the origins of 'etureti'. For now I shall simply describe it as a hut of one elder where neighbouring elders frequented by day to share their experiences. It was these elders who became agents for settlement of legal disputes, that is, administrators of justice.

In the administration of justice by these elders justice was seen to be done if and when the 'social equilibrium' to borrow DRIBERG'S words¹⁵ was reinstated within the clan after it had been disturbed by breach of rules. Old people in Gusii today very much disapprove the way justice is administered by our courts. An interview with some of them indicated that they are mostly bitter about the disregard of social relationships between the parties in the decisions that the courts make.

Thus it may be said that indigenous Gusii law and concept of justice was quite different from what law and justice means to us today. The aims of the Gusii in the traditional system were not the same as the aims of the colonial government or in any case the independent government. It follows from this that the procedure followed in the settlement of legal disputes in traditional Gusii on the one hand, and that followed in the administration of justice by the courts today on the other, have shown a clear line of divergence. It is no surprise that a commission set up in 1934 to inquire into the administration of justice in East Africa¹⁶ found comparatively early in its investigations major defects in the administration of justice. One reason for this was the difference in the conception of justice which existed between the ruling and the ruled although the commission did not bring itself clearly out. I am sure if the investigations had been confined to Gusii the same results could have been reached.

DISPUTE SETTLEMENT AGENTS

We have seen that the Gusii in the traditional system had no centralized government and hence no centralized judicial system. However, there did exist agents for the settlement of legal disputes when they arose and they could arise in a number of situations.

Most legal disputes were concerned with debts. Because of the corporate nature of the lineage principle it was not uncommon for example to find a man whose harvest was not good enough approaching his neighbour for a cow to go and exchange it with food. Usually the promise was to repay the cow after the marriage of the debtor's daughter. If after the marriage of his daughter he did not live up to his promise, that brought about a legal dispute. In the same way debts could be incurred by poor men who had no cattle to use for marriage. A legal dispute could also arise in respect of theft cases. There were cases in which a person stole another's property for example a goat to go and slaughter for his family. This was called 'Ogoita embori obokeiri'. There were also cases of homicide and cases of arson. A Law Panel set up in September, 1950¹⁷ to record customary law as it was in pre-colonial Gusii correctly recognized that legal disputes could arise out of such actions as adultery with a married woman, incest, unnatural offences, sexual intercourse with a girl of tender years, abortion, assault and witch-craft. According to the Panel whose findings was confirmed by many old people I interviewed, there were also legal disputes over inheritance, in divorce cases, over custody of children and return of dowry, replacement of dead stock if the original in any transaction died and over 'emesuto'¹⁸.

At a later time about of the turn of this century land disputes became common in Gusiiland. Prior to this the Gusii owned land communally and in particular the clanspeople but as population increased individuals began to demarcate land for themselves. Thus PHILLIP MAYER notes that for the Gusii land had become 'etugo'¹⁹ meaning that it had become individual property such as cattle were, which could only be used for the benefit of individual families.

It was therefore no surprise that later in 1945 ARTHUR PHILLIPS found as it is indicated in his report²⁰ that Gusii were undoubtedly more litigious and litigation loving people than their neighbours, the Luos. Most of the cases that came to the British established native tribunals dealt with land disputes.

Such were the type of legal disputes that were settled by the dispute settlement agents. There were agents at village level, at clan level and there were agents, especially during the period immediately preceding colonial era, with appellate jurisdiction. I shall first deal with the first two and the last we shall see in a later chapter in connection with the right of appeal.

1. Head Of the Village

This was usually the oldest man in the village. The village consisted of all members of such a man's family and sometimes people called 'abamenyi'. The latter were people who had left their own clans because of problems experienced therein and had come to live in other people's clans. In traditional Gusii such people's interests were protected by those who had allocated land to them. In case of a dispute the 'abamenyi' (Singular: 'Omomenyi') went to the head of the village (i.e. the original owner of land) for settlement. Where the original owner of the land was dead the agent for settlement of legal disputes within the village was his eldest son who had succeeded him as head.

Within the village a dispute could arise over right of women. While living with her husband a woman had the sole right over her granary, cooking utensils and any animal which was bought through the crops she cultivated. If say her husband's younger brother took the animal without her consent this would bring about a legal dispute which would be taken to the village head for settlement. The 'abamenyi' (if any) on the land of the head of the village would be invited and with the oldman sitting as arbitrator the legal dispute would be settled. Sometimes the head of the village would ask the assistance of his eldest son if the latter was married with children.

A legal dispute requiring settlement at village level could also be brought as a result of a boundary disagreement between two brothers or between the sons of the head of the village and the 'Omomenyi'. Here again it was for the head of the village to summon all the adult members of his family and those of the 'Omomenyi' and try to settle the dispute. In this case he could if he wanted invite one of his brothers to assist him. In a case where the dispute was between the head of the village and one of his wives over the property of the wife, the eldest son was not invited to assist but all the brothers of the head of the village met and tried to settle the dispute. It should be noted that all members were bound by the orders of the head of the village and his decision was final and conclusive.

2. 'Etureti' Elders

As LEVINE has said: "Political leadership in pre-colonial Gusii was not vested in one man even at clan level"²¹. The authority to settle disputes between members of the same clan had however come to be vested in the 'Etureti' elders. 'Etureti' is a Gusii venacular name for a hut and it is in this meaning that we discover the origins of this institution of elders. In those days it was usual for an oldman or elder in a given village to put up his hut a few yards away from his wives' houses. In this hut the 'Mzee' (Oldman) used to make fire early every morning and could stay there or thereabouts all day. If such oldman's hut was placed at a strategic place from which the surrounding area was visible, it was not uncommon for other elders from the neighbourhood to come and sit with him outside the hut and share their experiences while watching their herds. This was especially so where the owner of the hut was a wealth man who would provide the others with food during the day. Anybody with a legal dispute from the neighbourhood would take it to these elders who became known as 'etureti' elders. It was from among these elders that the most reputed of them in giving better judgements were recognized. As time went people were approaching them to invite others for purposes of settling disputes. The owner of the hut assumed the name of that 'etureti', so that the council of those elders who sat at his 'etureti' become known as so and so's 'etureti' e.g. 'Mzee Bosire's 'etureti'.

This meant that Bosire as in this example would always act as the chairman of that council of elders whenever it met and it was to this particular elder that a complainant who intended to bring an action against another would first present his case.

The composition of the council of elders involved in the arbitration at any given time depended on the seriousness of the dispute in question. In disputes involving homicide the composition would be greater drawing elders from the whole clan than petty disputes such as those concerned with debts. However, this should not be understood to mean that all oldmen of the clan heard the case. Only the most reputed from different 'chitureti' (plural of 'etureti') could be invited to hear the case while all the others listened and could only give an opinion if permitted.

Jurisdiction of the 'etureti' elders extended only to a limited area of the clan whose inhabitants became known as people of one 'etureti'. In respect of subject matter all legal disputes arising within the sub-clan would be presented and be heard by these elders.

The 'etureti' elders received no remuneration for the services they rendered to the people and this again is explained by the desire of everyone in the community to see to it that good social relations were maintained at all times. So much was this desire that the elders sometimes intervened without their jurisdiction having been invoked where a dispute had resulted in fighting between members of their community.

It can therefore be said that even in the absence of a centralized government there existed agents for the administration of justice. The elders knew Gusii law as it was and as it had been and in the process of settlement of disputes they entertained wider social participation. Everybody respected them because of their wisdom to settle disputes.

CHAPTER THREE

PROCEDURE AND PRACTICE

1. Divisions in the Law for purposes of procedure

Following the English classification of offences into criminal and civil, the colonial rulers introduced into Gusii methods of trial of offenders against the law whereby the procedure followed in criminal cases was different from that which was followed in civil cases. These methods are still maintained in present day Kenya where the procedure to be followed in criminal cases is contained in the Criminal Procedure Code²² and that to be followed in civil cases is contained in the Civil Procedure Code²³. Traditional Gusii did not have these different methods and theirs in many respects was different from any of the above. To understand how the Gusii used their indigenous institutions for purposes of procedure it is important to investigate into the distinctions (if any) which they made among offences.

I submit that there is no evidence in Gusii today that points to the existence of the distinction between criminal and civil offences at any one time. We have seen that the traditional Gusii attached great importance to the maintenance of social relations in society and their law as reflected in their procedure was geared towards the achievement of this. The distinction today as introduced by the colonial rulers is on the basis that crimes are offences that injure the community whereas delicts are those offences that injure the individual. However, in Gusii all offences were wrongs requiring compensation and reconciliation to maintain the social relations in society. Every offence was the community's concern and classification of Gusii cases into English categories was therefore inappropriate. Under the lineage system the life of the individual was so interwoven with the community that there would not have been an offence injuring the individual without affecting the society and more specifically the people within the clan ('abaamate'). A dispute concerning the repayment of a debt for example was as much an offence as a dispute arising out of theft insofar as each strained the social relations upon which the existence of the corporate whole depended.

It may therefore be said that there was no distinction between offences which were crimes and offences which were civil. It follows from this that the procedure followed in traditional Gusii in the trial of offenders was not based on any of these two categories. It is with this view in mind that I proceed to examine the details of Gusii procedure.

2. Invoking the jurisdiction of arbitrating bodies

There were few stages that preceded the hearing of a case by the elders. Most of the components of what is known as the pleadings today as for example the defence and the rejoinder were not there. The injured party ('Omosoeri') just went to the most acclaimed elder in his part of the clan and requested for a hearing of his case which was followed by subsequent summoning of the defendant to attend the elders' court on a given date. In instigating a stage in the whole process the plaintiff explained all that had happened as between him and the defendant ('Omosoerwa'). The elder could if he found no merits in the accusation to necessitate a court hearing advise the complainant to go back and try to settle the matter with the defendant. If on the other hand the elder felt that this was a matter that should be brought into public for settlement he fixed a hearing date and invited other elders as well as the people from the neighbourhood to attend. It was also the duty of that particular elder to summon the defendant to attend court. The venue was usually a given place under a big shade beside a path used by many people ('enchera engendi') chosen as a strategic place where as many people as possible would attend. Such a venue was also chosen so that in case of divided opinion among the elders the opinions of passers-by would be sought. If the defendant failed to turn up on the hearing date the case was adjourned and he was again asked to attend. But in most cases defendants did not fail to attend the hearing of their cases and this was mainly due to the respect accorded to the elders and also due to the fear that the community would regard them as bad people. Therefore there was no ex parte hearing of cases in Gusii traditional system.

It should be noted that the foregoing was the procedure in all cases where the offender was identified. Where the offender was not identified like for instance where a person had set another person's house on fire and there was no eye witness, a process of detection was undertaken after the matter had been reported to the 'etureti' elders. In the case of arson as in this example the Gusii had the 'amaera' oath. The complainant would on instruction of the elders mix some of the ashes of the burnt building with water or traditional beer and give it openly to all people living in the neighbourhood to sip on the sight of the burnt building. Whoever refused to take the oath was regarded as the offender and would thereby be ordered by the elders to pay compensation for the damages. There is ample evidence that this always worked because the offender feared that if he took oath it would bring about death or some other calamity to his household. In other cases the elders threatened to curse whoever committed the offence and taking into account the degree to which the elders' curse was feared, the threat was enough to induce the offender to show up. He was then tried. The curse ('Okoramera') was an appeal made to the high God ('Engoro') to punish the alleged offender and it was believed that the high god would always heed to such an appeal.

another method of detection was for the complainant especially in cases of theft to threaten to invite a witchdoctor ('Omonyamosira') who by his magical undertakings ('Orokenga') would cause the death of the offender. Again this would so much worry the offender that he would bring himself up and accept responsibility. The traditional Gusii's strong belief in magical and supernatural powers made this method of identification possible.

It may seem that the procedure followed in respect of identification of offenders was primitive and based on superstition rather than reality. However, we ought to bear in mind that the procedure brought about the desired results just the same as modern police investigation does. Offenders did show up and they were tried before the 'etureti' elders.

3. The actual trial process

(a) Opening of the case

On the hearing date the court usually met in the afternoon when most of the morning's work like working in the garden was over. Each elder came with his traditional stool ('ekenindo') and sat beside the elder who had convened the court and who presided over the meeting. The other people also sat facing the elders but always women on their own side distinct from where the men were seated. When there were enough people the chairman asked whether the parties and their witnesses were present. If the parties to the dispute and all their witnesses or at least some of them were present then the elder would in summary form tell his audience what the dispute was about. He would also inform the court of any relevant fact related to the dispute for example whether the parties had always been in dispute over other matters not in issue. This was important for the elders to know before the parties adduced their evidence because it revealed the parties' sensitiveness to pick up quarrels with one another even over simple matters. Hence in such a case the elders would be aware of the likelihood of the parties adducing over-exaggerated evidence.

(b) Adducing evidence

The complainant was given the first opportunity to state his case and he said all that he had without interruption. Then the defendant put up his defence or admitted the facts as stated by the plaintiff as the case would be. After these two and in the case where the defendant had denied the allegations of the plaintiff, the witnesses of the parties would give evidence. However, in most cases the evidence of witnesses was nothing more than a restatement of what the party who had called them as witnesses had said.

It is important to note that in their evidence the parties were allowed to relate many other things which were not directly relevant to the facts in issue. There were no such limitations as rules of admissibility and relevancy. For example hearsay was unknown and in most cases past misunderstandings between the parties or their families were related to the elders as evidence. There is one likely explanation for this.

Taking into account the kind of social relationship in which the members of the community cherished, the Gusii people saw no harm in adducing of evidence touching on other matters of social relationship which might have been the starting point of the dispute. If a party had to be prevented from relating all these matters he would have felt that he had been badly treated and therefore that justice had not been done.

After the parties and their witnesses had adduced evidence without cross-examination of one party by the other the case was open to the public for discussion. At this stage there was cross-examination. A member of the public would if he wished ask any question to try to get any ideas as to the background of the dispute or the truthfulness of any statement made by either party. It is mainly because of this stage that the traditional Gusii procedure has been seen as having lacked formality.

The procedure also did not include such technicalities as burden of proof and the concept of reasonable doubt. Each party to the dispute had to state his case to the best of his ability and try to show the elders, in the case of the plaintiff that he had been wronged or in the case of the defendant that the allegations were unfounded. The reason why the parties could not ask each other questions in court was that they had become socially separated by the conflict and it was thought to be improper for them to exchange words when their conflict was being settled. Hence the Gusii saying; 'Banchanigwa tibana koiranerania' (parties to the dispute should not exchange words in court). Such an exchange of words would perhaps have aroused tempers and thereby made the process of dispute settlement difficult.

(c) Representation

It is interesting to note that in traditional Gusii there was some form of representation. At the stage where the case was open to the public a man's agemates and close friends would use that opportunity to give their opinions in favour of their man. Also in some cases where a man was the type that would not speak in public he asked his brother to state his case on his behalf. However, it should be noted that this was in very exceptional cases because as ARTHUR PHILLIPS had to confirm later;

Where the woman had given birth as a result of the alleged adultery the oath took the form of placing the unweaned child on the ground and the woman would step over it denying the charge. Other oaths included the 'Orosonga' oath which involved the eating of a dead animal's flesh when its deliberate and unlawful killing was suspected; and the 'ritati' oath which consisted of drinking water mixed with the earth taken from a dead man's grave when witchcraft was suspected.

The Gusii regarded oath taking as a serious thing and once it was administered the elders did not proceed to give judgement but adjourned to await the effect of the oath. It might have been that the oath never took effect but these were the beliefs of the Gusii people and did help in the settlement of disputes. One only took oath when he was very sure that he was telling the truth. The oath was never taken as a show of credibility of evidence about to be adduced as it is done today when a witness gives evidence on oath. I must state that what is being done in our courts today does not instigate the same fears as the traditional Gusii oaths did, and this I confirmed in a recent court observation in Gusii. Gusii people who come to court like to swear castigating themselves and stating that some sort of supernatural power punish them if they tell lies. Such was the case in Republic V Nyataigo Nyambati²⁵ where the accused swore that lightning strike him if he told lies before the court. Later he was properly sworn. The point I want to make here is that some people in Gusii still attach great importance to customary oaths and being sworn in court in the way it is done does not carry any impact to these people.

Because of the seriousness with which the oath was regarded young people who were not mature enough to appreciate the effect of the oath were not allowed to take oath. There was also no administration of oath in disputes involving closely related persons and in disputes concerning inheritance and bride price.

4. Decision Making

(a) Judgement by agreement

After the case had been discussed by the public the task left to the 'etureti' elders was to make their decision. They would ask questions so as to get a clear idea of the background of the case and also to clarify certain facts. The process also involved weighing the evidence adduced in the light of cultural values and norms. The elders would discuss among themselves what factors to take into account and would not hesitate to take judicial notice of anything that fell in their knowledge which they considered relevant. It is said that in most cases the elders had to widen their inquiry to cover actions of the parties over a long period of time.

The chairman of the elders would then suggest a settlement which was actually their decision. The next stage was a crucial one where both the parties to the dispute and 'etureti' elders had to play a great part. It is important to note that the decision of the elders constituted a judgement by agreement rather than a judgement by decree. Each of the parties to the dispute had to concede to the decision of the elders if the whole process was to be considered successful. In giving their decision the elders took into consideration the effect that decision would have on the future relationship of the parties. If the decision was such that it would only serve to strain even more the social relationship between the parties then the elders had not attained their goal which was normalizing strained relationships in society.

However, it should be noted that whether or not the parties conceded to the decision of the elders depended very much upon whether their respective supporters had accepted it. Sometimes a party to the dispute might have wished not to accept the settlement but if the settlement appealed to his friends and close relatives he would be induced by them to accept it. In the lineage system such as traditional Gusii was, it was almost inconceivable that a man would decide to go against the advice of his mates and relatives for fear that they would withdraw their support for him in the future.

In any case because the settlement was the result of long negotiations and bargaining which gave the parties opportunity to disclose all that the dispute was about, they were always prepared to accept the decision of the elders. It has also been said that in disputes involving closely related persons the parties were prepared to concede more readily to the elders' decision.

(b) Purposes of judgement

(i) Reconciliation

One of the purposes of having a dispute brought before the 'etureti' elders was to have the latter solve the conflict between the parties by making a mutually acceptable decision. The elders were all the time during the process of dispute settlement aware of this purpose and that is why they sometimes deviated from the facts in issue to inquire into the background of the dispute. They were always keen to prevent a situation arising out of the dispute which would threaten the unity of the community. The essence the Gusii traditional system was that after the 'etureti' elders had weighed the evidence adduced in the light of customary values and rules including the merits of the case in question, they had to have the parties reconciled. The need to reconcile the parties was particularly important because the people were related through the lineage principle, a relationship which in the opinion of everyone in society was worth preserving.

Gusii customary law did not seek to confer absolute rights on an individual as the present British oriented system does. Even today some people in Gusii hold that the traditional system was a more effective method of solving disputes. Thus in one recent case of Republic V Marcus Okari²⁶ an assault case where the magistrate successfully made an effort to have the complainant and the accused reconciled, the two men went home satisfied that the dispute had been settled once and for all. Had the case ended in the accused being imprisoned I am sure the relationship between the two would have been even more strained. So that by reconciling the parties the 'etureti' elders achieved the aim of maintaining peaceful and harmonious relations within society.

(ii) Compensation

The fact that reconciliation was an important feature did not mean that the 'etureti' elders did not point out the breaches of customary legal rules by one of the parties. Where the defendant was found to be in breach of legal norms the elders ordered him to compensate the plaintiff. Compensation also facilitated the process of reconciliation and was found in every case whether it was homicide or simple theft because the Gusii did not distinguish between crimes and civil offences. Because of the nature of the lineage principle the idea was to compensate not only the plaintiff but also his close relatives in such a way as to leave the plaintiff in no worse position than he was before. The relatives of the defendant helped him to pay compensation.

Compensation was always in the form of domestic animals and the number payable varied according to the seriousness of the offence. For rapping a married woman compensation was two goats which were used for purification. If the rape victim was a married woman who was still in her father's home then compensation payable was one heifer and two goats. In cases of adultery the defendant if found guilty paid one goat or one sheep for purification. It appears the Gusii distinguished between murder ('Ogoita Omonto maiso marore') and manslaughter ('Ogoita omonto mosiabano'). For murder if the deceased was a close relative there was no compensation but if he belonged to a clan that intermarries with the murder's clan then compensation was twelve heads of cattle. In theft cases if the theft was done from a relative the defendant was ordered to pay twice as much but if from another clan the thief was detained by that other clan until his relatives paid twelve head of cattle. There was no compensation for assault except where the complainant received surgical operation²⁷ as a result of the injuries inflicted on him. In such a case the accused was called upon to pay all the fees that the surgical doctor had demanded.

However, it may be said that not every case required compensation. For instance the punishment for a case involving incest with mother was deportation.

5. Execution of judgement

The Gusii did not have a body such as the police for execution of decisions made by the 'etureti' elders. But it has been said that in any case such a body was unnecessary. Taking into account that the decision of the elders was one by agreement rather than decree there was no need for enforcement agents. The defendant would always honour the opinion of the elders and pay compensation. After judgement was entered there was always the presumption that the plaintiff had leave to attach the compensation awarded to him without interference from the defendant.

6. Right of appeal

Towards the close of the 19th century an appeal system had been developed in Gusii through the medium of 'egesaku' elders. These were elders who had become popular for their wisdom in deciding cases in a wider area than the clan. 'Egesaku' in fact represents a group of clans and hence these elders also took up the extra jurisdiction of deciding land cases between clans. But in most cases their work was to act as an appeal court for cases coming from the 'etureti' elders. So it came to be a saying in Gusii to the effect that whenever the 'etureti' elders could not decide a case satisfactorily it could be taken to the experts in legal matters ('Kina giasinya tureti tunya Ebera na keoro omwabo').

Decisions passed by the 'egesaku' elders were final and conclusive. It should however be noted that during this period some part of Gusii namely Bogetutu had developed the institution of a paramount chief ('Omokumi') whose jurisdiction extended over a wide area, the equivalent of what is now designated as a location. In this part of Gusii it was the 'Omokumi' who acted as the highest appeal court.

CHAPTER FOUR

MERITS AND DEMERITS OF GUSII TRADITIONAL PROCEDURE

The attempt here is not to make the English oriented procedure the standard measure and then try to evaluate Gusii customary procedure with regard to conformity or non-conformity with it. Neither is it intended to be shown that the traditional procedure was better than the present procedure because the goodness of a procedure will very much depend on the purpose for which it is meant to serve. For the Gusii the purpose was to ensure harmonious relations between the disputing parties whereas the main concern of our system today is to enforce rights irrespective of consequences to the future relations of the parties. The merits and demerits are viewed in the light of how the indigenous procedure did fulfil or fell short of fulfilling the essential purpose for which it was meant. In so doing however it is irresistible to point out the advantages and disadvantages the Gusii procedure had over the present procedure and vice versa.

1. Merits

The beauty of the indigenous procedure was found in the fact that the decision made was a consensus of many people present during the hearing of the case including the elders, the experts of Gusii law. This ensured against any malpractices and bias brought about by the nature human tendency to judge in accordance with the impression created on one person by one party. Hence it can be said that the traditional procedure ensured that the machinery of justice was brought to the people. In this connection it may be said that at the stage where the case was open to the public for discussion the most eloquent speakers could point to as many issues involved in the case as there were and then give their opinions in accordance with customary law. In the eyes of people from the western world or those influenced by western procedural ideas this stage might seem to have been the most informal in nature only characteristic of underdeveloped and primitive legal systems. But it was in line with the very nature of indigenous system of administration of justice necessitated by the existence of the lineage principle.

Ordinary people in Gusii today find the modern procedure complicated and very demanding. In the first place the courts are situated in the district headquarters and at some three other centres. Whereas it is appreciated that the courts cannot be built in every area, the fact is that people do not have easy access to these courts. The presence of traditional legal settlement agents in the clans provided a more accessible medium for settlement of disputes. Secondly it is felt that there are very many stages to be undergone before the hearing of a case comes up. All those stages that constitute the pleadings were not part of the indigenous procedure. Besides, the pleadings have to be in writing and particularly in English which causes a lot of hardship to the people most of whom are illiterate. Thirdly, because of the requirement that only certain courts have the jurisdiction to deal with certain cases, the illiterate population find it a problem to determine which courts to take their cases. It is not uncommon to find a person trying to file a case in a court which has no jurisdiction to deal with the subject matter of the case. The traditional procedure did not have such complications and therefore appears to have been the appropriate machinery for settlement of disputes having regard to the people to whom it was meant to apply.

The Gusii system by entertaining no ex parte judgement gave each party to the dispute the opportunity to be heard and in this sense extended even further the important principle of natural justice namely, that nobody should be condemned unheard. In the present procedure so long as the court does not deny one the chance to be heard it is provided that the court can proceed ex parte.

The fact of the family level being a stage for settlement of legal disputes within the family meant that many incumbent disputes were settled privately as a family matter. This saved the family from disintegration and risk of having to lose face before other neighbours at the time when highest regard was paid to good neighbourly relations.

In the traditional Gusii system the process of litigation took place in an atmosphere in which the parties felt at ease as contrasted to our courts today. The elders and all others who had come to hear the dispute were familiar to the parties and so were the rules of procedure and the legal norms applied.

In our foreign imitated system litigation takes place in a court which is very unfamiliar to the parties and is not therefore conducive to the finding of the truth. Parties do not mind telling lies before the court because after they leave the courtroom they may never see the magistrate or the judge again. This was not the case in the traditional system where the elders were members of the community from which the parties came. Cross-examination of the parties by members of the public in court in the traditional system did not mean embarrassing the witnesses or using all sorts of tactics to hide the truth as it is sometimes done by advocates today.

Perhaps the greatest merit of the indigenous procedure was its reconciliation principle. By making reconciliation of the parties the cardinal aim of almost all dispute settlements, the system ensured stability in society. To add to this merit was the principle of compensation which apart from making reconciliation possible was equitable in the sense that it left the injured party in most cases at no worse position than he was before the commission of the offence.

2. Demerits

Indigenous Gusii procedure is however not free from criticism. The belief in supernatural powers that would react to punish the offender after oath taking cannot be said to have been a very effective way of bringing out the truth in a dispute. The highly acclaimed principle of reconciliation was never effected after the administration of an oath and the emotional and magico-religious beliefs involved. This can be seen as one aspect in which indigenous procedure failed to bring about the desired results, namely administration of justice.

Some people also hold the opinion that since the elders decided on merits of each individual case and laid more emphasis on the relationship of the parties in their decision making, Gusii law was unpredictable. The charge here against indigenous procedure is that law has to be certain so that the administrators can know what law to be applied in given situations. However, this was rather a problem of having the law written than deciding on merits of each case.

As a whole it may be said that advantages of indigenous procedure outweigh its disadvantages.

C O N C L U S I O N

The purpose of this paper has been to find out whether indigenous Gusii had a procedure peculiar to them for the settlement of legal disputes and therefore a system of administration of justice. This fact can now be considered proved. The 'etureti' elders served as agents for the settlement of legal disputes and they applied Gusii customary law which was accepted by all in the traditional system. The fact that people were organized in lineage orders ensured the respect for these elders and made possible the whole process of settlement of disputes.

The quality of justice administered by the indigenous Gusii bodies cannot be said to have been any worse than that which is administered by our courts today. Apart from the fact that the elders were experts in Gusii law the procedure followed ensured that rules of natural justice were observed and in the end reconciliation meant that the parties had agreed that justice had been done. The purpose for which settlement of legal disputes was meant was thus achieved and before any innovations people were living together harmoniously.

However, like any system the indigenous Gusii system was not without shortcomings and loopholes. But this did not mean that its abolition was the only alternative and in any case the system that was introduced to replace it was not the best and devoid of any shortcomings. Professor J.L. BRIERLY once chairman of International Law at Oxford has said that English law never having had occasion for a thorough overhaul has retained many archaic forms and terms sometimes with new significance which justifies their survival and sometimes with nothing but a verable age to commend them²⁸. We cannot therefore acclaim the present procedure, a direct consequence of English law at the expense of condemning the indigenous Gusii procedure just because it was different from the present one. It would have been expected that independent Kenya after abolishing the African Courts system²⁹ would have proceeded with an enactment requiring the application of indigenous law and procedure or at least a compromise between indigenous law on the one hand and English law on the other.

However, the legislative reform of 1967³⁰ brought about neither of these expectations. We still have the same repugnancy clause in section 3(2) of the Judicature Act³¹ by which colonial rulers frustrated customary law. But insofar as the common people in Gusii are concerned, to retain the goodwill and co-operation of their neighbours, the traditional system or some similar institution will have an important part to play. The traditional system served to express and maintain the Gusii community value of good neighbourliness and as this value has not changed it is felt and correctly so that within its normal bounds, the traditional procedure was worth protecting and encouraging.

It does not suffice to brand Gusii indigenous procedure as primitive because a people's conception of law and justice and the procedure they adopt to uphold that law is a reflection of the social needs of those people. There was a connection between Gusii judicial system and their social needs and any procedure however polished that had to be introduced to replace the traditional procedure ought to have responded to the social needs of the people. It is of course appreciated that social needs do change but it cannot be said that Gusii social needs have drastically changed. I found no evidence among the ordinary people in Gusii to that effect.

It can therefore be said that we have deviated from a process of administration of justice as portrayed in the Gusii procedure which was appropriate with regard to the people to whom justice was administered. In a nutshell, Gusii procedure was a desirable thing and if there were to be any reforms in the future in our judicial system I will only be too glad to recommend the application with modifications of the traditional procedure.

1. British Rule in Gusiiland (1907-1963), Ph.D Syracuse 1971 (see particularly chapter 3)
2. The tribunals were set under the Native Tribunals Ordinance No.39 of 1930
3. See the repugnancy clause in Article 7(a) of the 1921 Kenya Colony Order in Council
4. (1917) B.A.P.L.R. 14
5. Act No. 1 of 1872 of India. This Act which applied to Kenya until its replacement in 1963 by the Kenya Evidence Act No.46 of 1963 (cap.80 of the Laws of Kenya) generally reproduced English Common law.
6. The Province of Jurisprudence Determined (by) Ed. by Hart. (This quotation was taken from a handout given LLB 111 jurisprudence students of the University of Nairobi)
7. Holmes Reader (Ed. by Marke Julius), New York, Oceana publications, 1955
8. Primitive Government, Baltimore, Penguin Books 1964 at page 36
9. Studies in History and Jurisprudence (1901) Volume 2 at page 44 (This quotation was taken from a handout given to LLB 111 jurisprudence students of University of Nairobi)
10. The Morality of Law, Yale U.P., New Haven, 1969 at page 96
11. Lineage Principle in Gusii Society, Oxford U.P., 1949 at page 5
12. 'Egesaku' was in some section of Gusiilarger than what is today taken to be a clan
13. 'Abaamate' (Singular: 'Omoamate') literally translated it means neighbour but this term did not connote only immediate neighbour. The 'abaamate' had one thing in common which was the claim of descent from one ancestral father.
14. 'Amasaga' (Singular: 'Risaga'). Until recently many people in Gusiil took part in this type of economic co-operation. It consisted mainly in working for each other in turns. This may be seen as desire on the part of Gusiil people to retain their traditional values despite their subjection to colonialism and its values.
15. African Conception of Law in volume 16 J.C.L.J.L.
16. Commission of Inquiry into the Administration of Justice in Criminal cases in Kenya, Uganda and Tanganyika, Cmd 4623 (1934): Report, Paragraph 18.

17. Minutes of South Nyanza Law Panel (Kisii) Section
NA/KSI/DC/5/1. Note that Gusii was administratively part
part of South Nyanza until the early sixties and was usually
referred to as Kisii.
18. 'Emesuto'. This was a kind of claim maintained by every
eldest son in Gusii against his maternal uncles in
recognition of the fact that his mother had been lawfully
married whereof her brothers received dowry. Usually the
subject of the claim was a cow and more preferably a heifer
and once given to the eldest son he held it in trust for
all his brothers and himself.
19. Land law in the Making in African Law: Adaption and
Development

Ed. by KUPER & KUPER, University of California Press,
Berkeley, 1965.
20. Report on Native Tribunals, Governemtn Printer, Nairobi,
1945 at paragraph 112 for the year 1942 the figures were as
follows: Gusii 5835 civil cases, Luo 1,543; Gusii 895
appeal cases, Luo 190. Note also that the population
of the Gusii was half that of the Luo.
21. Nyansongo a Gusii Community in Kenya, New York, Wiley
1966 at page 66
22. Cap. 75 of the Laws of Kenya
23. Cap. 21 of the Laws of Kenya
24. Report on Native Tribunals, Government Printer, Nairobi,
1945 at paragraph 690
25. Kisii/DHCC No. 3539 of 1976
26. Kisii/DHCC No. 3695 of 1976
27. In Gusii there have always been experts for performing
head operation in cases of physical injury inflicted
on the head.
28. English Law (1943) at page 4. (This quotation was taken
from a handout given to LLB111 jurisprudence students
of University of Nairobi).
29. The African Courts Ordinance No. 65 of 1951 repealed and
replaced the Native Tribunals Ordinance. However, the
African Court system set up by the 1961 ordinance was
itself abolished by the 1967 Legislative reform.
30. The 1967 Legislative reform involved the passing of Acts,
The Kadhi's courts Act No. 14, The Judicature Act No. 16,
and the Magistrate's Courts Act No. 17.
31. Act No. 16 of 1967.

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