

# **Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework**

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**Kariuki Muigua**

# Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework

Kariuki Muigua\*

## **Abstract**

*This paper critically discusses how the current legal and policy framework on access to justice can be enhanced through putting in place appropriate policy, statutory and administrative measures that will ensure that the Alternative Dispute Resolution (ADR), Traditional Dispute Resolution (TDR) mechanisms and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans. The author traces the existing provisions that provide for ADR and TDR mechanisms and examines the viability of such provisions in promoting the use of these mechanisms in access to justice in Kenya.*

*The paper argues that despite the formal recognition under the Constitution, TDR and other ADR mechanisms are yet to be institutionalized by way putting in place supporting adequate legal and policy measures that would ensure effective utilisation of the same in access to justice. This presents a challenge on implementation of the constitutional provisions on ADR and TDR. It is for this reason that the author offers recommendations on how best to institutionalise these mechanisms since they can go a long way in facilitating access to justice especially at the community level and the creation of a just and peaceful society for all.*

## **1. Introduction**

The constitution guarantees the right of every person to access justice and calls for the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems.<sup>1</sup> In order to guarantee access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilization of formal and

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<sup>1</sup> Articles 21, 47, 48 & 50.

informal justice systems.<sup>2</sup> In this regard, Article 159 recognizes the use of Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya which include promotion of ADR and TDR mechanisms.<sup>3</sup>

Despite the formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDR mechanisms and other community justice systems are yet to be institutionalized by way putting in place supporting adequate legal and policy measures that would ensure effective utilisation of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3).<sup>4</sup>

It is against this background that this paper examines the current legal and policy framework on access to justice and the challenges that arise therefrom. It also makes recommendations on the need for appropriate policy, statutory and administrative measures that will ensure that the TDR strategies and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the poor Kenyans.

## 2. Access to Justice through TDR and ADR Mechanisms in Kenya

Access to justice is one of the most critical human rights since it also acts as the basis for the enjoyment of other rights and it requires an enabling framework for its realisation.<sup>5</sup> The Constitution provides for the right of access to justice and obligates the state to ensure access to

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<sup>2</sup> Article 159(2) (d).

<sup>3</sup> It stipulates that in exercising judicial authority, the courts and tribunals are to be guided by the following principles: justice is to be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights, (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

<sup>4</sup> It is noteworthy that the current Constitution of Kenya calls for promotion of alternative forms of dispute resolution as a guiding principle in the exercise of judicial authority by courts and tribunals but not necessarily as a requirement under any written law.

<sup>5</sup> See D.L., Rhode, "Access to Justice," *Fordham Law Review*, Vol. 69, 2001. pp. 1785-1819; See generally M. Sepúlveda Carmona and K. Donald, 'Access to justice for persons living in poverty: a human rights approach,' Ministry for Foreign Affairs, Finland. pp.8-9. Available at [https://www.academia.edu/6907000/Access\\_to\\_justice\\_for\\_persons\\_living\\_in\\_poverty\\_a\\_human\\_rights\\_approach](https://www.academia.edu/6907000/Access_to_justice_for_persons_living_in_poverty_a_human_rights_approach) [Accessed on 2/07/2015].

justice for all persons.<sup>6</sup> Access to justice by majority of citizenry has been hampered by many unfavourable factors which include *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.<sup>7</sup> This makes access to justice through litigation a preserve of select few. Through providing for the use of ADR and TDR mechanisms to enhance access to justice, the Constitution of Kenya was responding to the foregoing challenge in order to make the right of access to justice accessible by all.<sup>8</sup> It was in recognition of the fact that TDR and other ADR mechanisms are vital in promoting access to justice among many communities in Kenya. Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.<sup>9</sup>

Notably, the Constitution provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>10</sup> This is reaffirmed under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

The recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.<sup>11</sup> This is because TDR mechanisms existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate. In most African communities, TDR mechanisms existed even before the formal dispute settlement mechanisms were introduced.<sup>12</sup> The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.<sup>13</sup> The

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<sup>6</sup>Article 48.

<sup>7</sup> J.B. Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,' 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29 at p. 29.

<sup>8</sup> Article 159(2); Article 48.

<sup>9</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 21-22; See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, Vintage Books Edition, October 1965.

<sup>10</sup> Article 60(1) (g).

<sup>11</sup>K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at

<http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>; See also I.K.E., Oraegbunam, *The Principles and Practice of Justice in Traditional Igbo Jurisprudence*, *African Journal Online*, p.53.

Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 30/06/2015].

<sup>12</sup> See generally L.J. Myers and D.H. Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at [scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220](http://scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220) [Accessed on 29/06/2015].

<sup>13</sup>J. Kenyatta, *op.cit.* pp. 259-269.

use of TDR in accessing justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.<sup>14</sup>

The use of TDR mechanisms fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.<sup>15</sup> Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDR mechanisms encourage resolution of disputes through restorative justice remedies. TDR mechanisms derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDR mechanisms is to foster peace, cohesion and resolve disputes in the community.<sup>16</sup> The other advantages of TDR mechanisms and other community based justice systems are that: traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDR are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDR and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions.<sup>17</sup>

TDR mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling

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<sup>14</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* at pp.21-22; See also N.N. Ntuli, 'Policy and Government's Role in Constructive ADR Developments in Africa.' *Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013*. pp. 2-3. Available at <http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf> [Accessed on 30/06/2015].

<sup>15</sup> *Ibid*, p.23.

<sup>16</sup> Articles 60(2) (g) & 67(1) (f) of the Constitution of Kenya; AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," *An International Multidisciplinary Journal*, Ethiopia, Vol. 8 (2), Serial No. 33, April, 2014, pp. 138-157 at p. 154.

<sup>17</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 23-26; see also A.A. Theresa, 'Methods of Conflict Resolution in African Traditional Society,' *Indexed African Journal Online*, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157 at pp. 151-152.

matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grassroots' level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other.<sup>18</sup> In recognition of this, the Constitution obligates the State to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.<sup>19</sup> According to the Food and Agricultural Organisation of the United Nations, indigenous knowledge can be conceptualised as a repertoire of ideas and actions from which community members faced with specific problems can draw, depending on their level of knowledge, their preferences, and their ability and motivation to act. In this regard, it would involve improvisation and flexibility in response to ongoing conditions. Dispute processing is similarly characterized as a repertoire of processes which communities and their members respond to dynamically and differentially.<sup>20</sup> It has been argued that chances for peaceful resolution of Africa's conflicts can be enhanced considerably if the region's indigenous principles, skills, and methods of conflict resolution are understood and harmonized with those of the modern nation-state.<sup>21</sup>

It is for this reason that the Constitutional provisions on the protection and enhancement of intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the Kenyan communities should be actualized through ensuring that there is put in place supportive policy and legal framework. This is because despite the constitutional spirit of promoting ADR and TDR mechanisms most of which rely on indigenous knowledge of the respective communities, what is not clear is how this should be carried out because as it is now, there is no defined procedure on how they should determine the matters to go for TDR and those

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<sup>18</sup> K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, *University of Botswana*.

Available at [http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu\\_en\\_29\\_33.pdf](http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf) [Accessed on 3/07/2015]

<sup>19</sup> Article 69(1) (c).

<sup>20</sup> Food and Agricultural Organisation of the United Nations, 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," January-April 1996*. Available at <http://www.fao.org/docrep/005/AC696E/AC696E09.htm> [Accessed 4/07/2015]

<sup>21</sup> F.B., Mensah, 'Indigenous Approaches to Conflict Resolution in Africa,' in the World Bank, *Indigenous Knowledge: Local Pathways to Global Development*, 2004. pp. 39-44 at p. 39. Available at <http://www.worldbank.org/afr/ik/ikcomplete.pdf> [Accessed 4/07/2015]

for courts or even who should carry out the TDR. While it is true that the use of ADR and TDR mechanisms can go a long way in resolving some of the long standing conflicts over natural resources in Kenya, this well intentioned constitutional provision may be defeated owing to lack of a proper legal framework or guidelines on how they should be implemented. Arguably, a strong legal system based on a fusion of formal and informal justice systems improves the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves.<sup>22</sup>

It is against the foregoing that the author herein sets out to explore how best these mechanisms can be entrenched in Kenya's legal system through legal and policy measures.

### 3. Overview of TDR and ADR Mechanisms

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. Most of the African communities had their own unique dispute resolution mechanisms.<sup>23</sup> Similarly, each African community had a council of elders that oversees the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics /qualifications. The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication amongst others.<sup>24</sup>

Negotiation aims at harmonizing the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication

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<sup>22</sup>See K. Venerando, *et al*, United Nations Development Programme, "Access to Justice in Asia and the Pacific: A DGTTF Comparative Experience Note Covering Projects in Cambodia, India, Indonesia and Sri Lanka," *The DGTTF Lessons Learned Series*, 2009.

Available at [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf-access-to-justice-in-asia-and-the-pacific/UNDP\\_CE%20Paper\\_Asia\\_web.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf-access-to-justice-in-asia-and-the-pacific/UNDP_CE%20Paper_Asia_web.pdf) [Accessed on 29/06/2015] p. 11.

<sup>23</sup> B. Laurence, "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at: <http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 26/06/2015].

<sup>24</sup> *Ibid*.

between the parties in which offers for settlement are made by either party.<sup>25</sup> Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate.<sup>26</sup>

If negotiation fails, parties resort to mediation where they attempt to resolve the conflict with the help of a third party. In mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a solution. Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.<sup>27</sup>

In adjudication, the elders, Kings or Councils of Elders summon the disputing parties to appear before them and orders are made for settlement of the dispute.<sup>28</sup> The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.<sup>29</sup>

Under reconciliation, once a dispute is heard before the Council of Elders, the parties are bound to undertake certain obligations towards settlement. These are mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there is reconciliation which results in restoration of harmony and mending relationships of the parties.<sup>30</sup>

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.<sup>31</sup> The

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<sup>25</sup> See M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi, 2006). p.115.

<sup>26</sup> See United Nations, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities.' *Study by the Expert Mechanism on the Rights of Indigenous Peoples*. August 2014. A/HRC/27/65.

<sup>27</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 27-28.

<sup>28</sup> AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," *op cit* at p. 150.

<sup>29</sup> *Ibid*, p. 150.

<sup>30</sup> J. Kenyatta, *op.cit*.

<sup>31</sup> K. Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at <http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf>



main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.<sup>32</sup>

Unlike litigation which results in dispute settlement, TDR and majority of ADR mechanisms (perhaps except arbitration) focus on conflict resolution. Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. Conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.<sup>33</sup> The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes. On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the issues without venturing into the root causes of the dispute.<sup>34</sup> Examples of dispute settlement mechanisms are arbitration and litigation.

TDR utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions.<sup>35</sup> These mechanisms can be effective in managing conflicts and have their outcome recognized by the formal institutions especially under the current constitutional dispensation.<sup>36</sup>

However, TDR mechanisms do also have some disadvantages such as: disregard for basic human rights; application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the

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<sup>32</sup> K. O. Hwedie and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, *op cit* p. 33.

<sup>33</sup> M. Mwagiru, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

<sup>34</sup> See K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [Accessed on 29/06/2015]

<sup>35</sup> *Ibid.*

<sup>36</sup> Article 159(2); See also S. 20, Environment and Land Court Act, 2011.

community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDR and general rights, among others. However, these disadvantages can effectively be addressed through putting in place an efficacious policy and legal framework in order to foster the use of these mechanisms since the advantages thereof outweigh the demerits.

The Constitution of Kenya, 2010 recognizes application of TDR and ADR mechanisms in dispute resolution for efficient dispensation of justice since their merits outweigh the disadvantages thereof.<sup>37</sup> It is noteworthy that the Constitution supports access to justice through informal systems such as TDR and ADR mechanisms in addition to the court process. A high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility. The main disputes that may be resolved by way of TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.<sup>38</sup>

Generally, many cases are resolvable through TDR except for serious criminal offences that require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.<sup>39</sup> This therefore calls for an effective policy and legal framework on ADR and TDR mechanisms although the debate on what may or may not be subjected to these mechanisms may go on for a while.

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<sup>37</sup> See Article 159 (2) (c) of the Constitution of Kenya 2010.

<sup>38</sup> J. Kenyatta, *op.cit.*

<sup>39</sup> See the case of *Republic V Mohamed Abdow Mohamed* [2013] eKLR, High Court at Nairobi (Nairobi Law Courts) Criminal Case 86 of 2011, where the learned Judge of the High Court upheld a community's decision to settle a murder case through ADR. It is also important to point out that the *National Cohesion and Integration Act*, No. 12 of 2008 [2012] under S. 25(2) thereof states that the National Cohesion and Integration Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. To achieve this, the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace. What remains to be seen is how the Commission will handle any cases which, just like the *Mohamed case*, the involved communities or families feel that they can be handled locally but the Commission feels that the same should go to courts owing to their magnitude.

#### 4. Legal and Policy Framework on ADR in Kenya

Currently, there is no stand-alone statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The preservation of TDR mainly relies on the fact that customs and traditions are handed down from one generation to the next and there is no form of documentation for TDR in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. Some of the Kenyan laws make reference to ADR and TDR mechanisms and advocate for their use in conflicts management in the country.

##### 4.1 The Constitution, 2010

The Constitution seeks to promote the cultural practices and traditional knowledge of the Kenyan communities including the use of ADR and TDR mechanisms in conflict management. In this regard, Article 159 (1) provides that judicial authority is derived from the people and vests in and it is to be exercised by courts and tribunals established by or under the Constitution with regard to the principles of *inter alia* promoting the use of ADR mechanisms in conflicts management.<sup>40</sup>

The rationale of the constitutional recognition of TDR is to validate alternative forums and processes that provide justice to Kenyans. However, Article 159 (3) provides that traditional dispute resolution mechanisms are not to be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law. The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards. This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.<sup>41</sup> Besides, the repugnancy clause suffers from a grievous misconception of ‘justice and morality’ because it imposes the Western moral codes on African societies who have their own conceptions of justice and morality. Redefining

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<sup>40</sup> Article 159 (2) (c) and (3).

<sup>41</sup>Section 3(2), Judicature Act, Cap.8.

the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.

#### 4.2 Civil Procedure Act and Rules

The Civil Procedure Act and rules, Cap 21 embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. The Act and Rules envisage enabling provisions within which ADR mechanisms are to be supported.<sup>42</sup>

Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDR mechanisms are arguably part of such options.

Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective. Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice, the court can promote the use of TDR.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee. The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators.

Further, the use of TDR in resolution of civil disputes can be promoted under Order 46 rule 20<sup>43</sup> of the Civil Procedure Rules. Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDR or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed

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<sup>42</sup> Section 1A (1) of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

<sup>43</sup> "Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."

TDR and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

The application of TDR in dispute resolution can be promoted under the Evidence Act, Cap 80 by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses, competency of witnesses and rules as to examination of witnesses.

To promote TDR in dispute resolution, Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

#### **4.3 Land Act, 2012**

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The Act lays down the guiding values and principles of land management and administration which include *inter alia*: elimination of gender discrimination in law, customs and practices related to land and property in land; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; and alternative dispute resolution mechanisms in land dispute handling and management.<sup>44</sup>

This Act promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDR can effectively be utilized within the framework of

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<sup>44</sup>Section 4.

providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDR. It is also important to point out that the use of ADR and TDR mechanisms can also facilitate the implementation of the constitutional principles of public participation, inclusiveness, protection of the marginalised, non-discrimination, equity and social justice amongst others.

Lack of a policy and legal framework on the operation of ADR and TDR mechanisms however gives a wide discretion to the National Land Commission<sup>45</sup> on how to go about ensuring the use of ADR and TDR in land matters and may even create confusion as how and when the same should be used.

#### **4.4 Commission on Administrative Justice Act, 2011**

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions.<sup>46</sup> Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.<sup>47</sup> The Commission has been instrumental in promoting the use of ADR mechanisms especially in handling disputes between various State and Constitutional organs with a high success rate.<sup>48</sup>

#### **4.5 The National Land Commission Act, 2012**

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya.

Under section 5 (f) of the Act, the Commission is obligated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission

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<sup>45</sup> Established by the Constitution of Kenya under Article 67 and the National Land Commission Act, 2012, No. 5 of 2012.

<sup>46</sup> See also Article 59(4), Constitution of Kenya, 2010.

<sup>47</sup> O, Amollo, "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," in *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014, pp. 96-111 at pp. 109-111.

<sup>48</sup> *Ibid.*

and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Having a legal framework on the use of TDR and ADR is arguably the only way that community elders can have a say in deliberations on the use, access and management of natural resources affecting their livelihoods, especially land, without being sidelined by the Commission. Currently, there have been no sign of actual and meaningful engagement of communities in land matters especially in the ongoing supremacy battle between the National Land Commission and the Ministry of Land, Housing & Urban Development on who should spearhead the control of use, access and management of land in the country.<sup>49</sup> There is need to put in place provisions in the Act that obligate the Commission to engage the community experts in handling land disputes and ensuring that the same enable such communities to challenge the Commission's actions where they feel that they were sidelined.

#### **4.6 Environment and Land Court Act, 2011**

Under section 3, the objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives. Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court must stay proceedings until such condition is fulfilled. What is ambiguous is what or who determines a matter where the use of ADR and TDR mechanisms is a condition precedent to any proceeding before the Court. The court's discretion and lack of clarity on these provisions may defeat the spirit of Article 159 and the same should therefore be clarified.

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<sup>49</sup> Standard Digital, F. Ayieko, "Ngilu- National Land Commission wars hit lenders," Thursday, October 23rd 2014. Available at <http://www.standardmedia.co.ke/lifestyle/article/2000139137/ngilu-national-land-commission-wars-hit-lenders>. [Accessed on 06/7/2015]; Daily Nation, "Ministry, judges on the spot over 5,000 land cases," Monday, June 9, 2014. Available at <http://www.nation.co.ke/news/Ministry-judges-on-the-spot-over-5-000-land-cases/-/1056/2342658/-/qjbgvh/-/index.html> [Accessed on 06/7/2015]

## 5. Towards a Policy and Legal Framework

### 5.1 Policy Framework on ADR in Kenya

It is noteworthy that currently there is no policy on TDR and other community based justice systems in Kenya. Thus, dispute resolution through TDR and other community justice systems is communal based. The rules governing the TDR processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDR MECHANISMS. There ought to be put in place a TDR policy framework in order to recognize and affirm the importance of TDR mechanisms in the administration of justice and establish a clear interface between TDR and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDR mechanisms promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.<sup>50</sup>

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. The absence of a clear legal framework on coordination in matters arising between the State and local communities leaves room for potential conflicts between the State organs and such communities. National policy on ADR and TDR mechanisms should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

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<sup>50</sup> See *National Cohesion and Integration Act*, No. 12 of 2008 [2012]. S. 25(1) thereof states that the object and purpose for which the National Cohesion and Integration Commission is established is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. S. 25(2)(g) goes further to state that Without prejudice to the generality of subsection (1), the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.



The Policy should provide the minimum qualifications for the recognised TDR practitioners. Mechanisms should also be put in place to ensure that TDR practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

The Policy should also promote continuous training of TDR practitioners. In order to link TDR mechanisms to formal justice systems, there is a need to train TDR practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDR. Further, an enactment on TDR is necessary to provide for training programmes designed to promote efficient functioning of TDR mechanisms.

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. An enactment with clear guidelines would help clear the ambiguity that may arise.

The sanctions imposed in TDR processes should not contravene the Bill of Rights. As such, TDR and ADR practitioners would greatly benefit from clarification on what amounts to violation of the Bill of rights as spelt out in the Constitution.<sup>51</sup>

The policy framework should also outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

Further, the policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice.<sup>52</sup> These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

There should also be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes

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<sup>51</sup> Chapter Four (Articles 19-58), Constitution of Kenya 2010.

<sup>52</sup> Articles 48, 50.

from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

In order to overcome the challenge of poor record keeping especially for purposes of appeal, review or referral, there is need to adopt information technology in TDR processes.

## 5.2 Legal and Administrative /Institutional Framework

Article 159 (2) (c) of the Constitution obligates courts and tribunals in the exercise of judicial authority to promote the application of TDR and ADR mechanisms. In addition, the Civil Procedure Act under section 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. Courts and tribunals, in consultation with knowledgeable community leaders, can therefore go a long way in encouraging and promoting the use of TDR and ADR mechanisms in conflict management.

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes.

The foregoing institutions can join hands in a mutual relationship to promote the active uptake of TDR and ADR mechanisms in conflict management in Kenya. An effective working relationship between the formal justice system and TDR mechanisms, would call for an effective court-annexed TDR and ADR framework where the outcomes of such processes would enjoy the approval of the Judiciary for purposes of recognition, enforcement and appeal. It would also call for simplified procedures to ensure that courts and tribunals focus on substantive rather than procedural justice. This would tackle the problem of backlog of cases, enhance access to justice, and encourage expeditious disposal of disputes and lower costs of accessing justice.

Kenya can learn a lot from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict

resolution of disputes and crimes.<sup>53</sup> The Constitution of Rwanda provides for the establishment in each Sector a “Mediation Committee” responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.<sup>54</sup> The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.<sup>55</sup> Such a framework may be useful in dealing with the challenges that are likely to arise in the actualization of Articles 60(1)(g) and 67(2)(f) together with all the relevant land laws which require the use of ADR and TDR mechanisms in managing natural resource based and especially land conflicts. There should be set in place a legal framework within which such an arrangement may operate.

Order 46 Rule 20 of Civil Procedure Act and Rules,<sup>56</sup> does not expressly mention TDR mechanisms. This needs to be amended so as to put it in line with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases. These provisions have has the potential to promote the active use of ADR and TDR through an all-inclusive policy, which takes into account the particular context, cultural distinctions and value systems of particular communities.

The Evidence Act, Cap 80 should also be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d). This is in appreciation of the fact that most of the practitioners of TDR are usually non-lawyers and mostly even persons with no formal education. If these persons are to take part in the justice system, then there should be created an environment that allows them to participate meaningfully such as one that allows them to utilize their expertise and knowledge based on their cultural backgrounds.

It is also important that the Judicature Act, 1967 be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution

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<sup>53</sup> M. Mutisi, “Local conflict resolution in Rwanda: The case of abunzi mediators”, in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012

Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 28/03/2015]

<sup>54</sup>Article 159, Constitution of Rwanda, 2003.

<sup>55</sup>*Ibid.*

<sup>56</sup>Cap 21, Laws of Kenya.

and should inform the use of ADR and TDR mechanisms in conflict management and access to justice.

There should also be put in place proper procedures and channels through which application of TDR in the appellate process where the matter in dispute involves customary law can take place.

Land Act, 2012, should also be reviewed to ensure clear and substantive provisions that ensure that requirement on encouragement of communities to settle land disputes through recognized local community initiatives and participation is phrased in a more mandatory manner so as to ensure that there is equal and equitable opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDR, in land dispute handling and management. As it is now, the provisions appear to be too general and ambiguous rendering their implementation more discretionary than mandatory. In addition to the foregoing, section 17 of the National Land Commission Act should be amended so as to ensure that the Commission consults or seeks assistance from community leaders on matters pertaining to land on a mandatory basis rather than discretionary one. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders/elders who would advise such boards on matters of ADR and TDR.

Such elders should also be accorded an opportunity through a legal platform to assist or advise the court in matters pertaining to customary law. There is therefore a need to formulate an enabling policy and legal framework for ADR and TDR mechanisms. As such, one of the ways that this would be actualized is enactment of a statute to be known as ADR and TDR Mechanisms Act in order to provide for the effective implementation of Article 159 of the constitution on the use of ADR and TDR and to provide for the regulatory and institutional framework to govern the practice of ADR and TDR. This would go a long way in ensuring that such mechanisms: are used in a way that is consistent with the Bill of Rights; existence of a clear referral mechanism; formal recognition and enforcement of ADR and TDR outcome and that there is clearly defined jurisdiction of ADR and TDR practitioners . All this should be done while ensuring that there is preserved the informality of these mechanisms.

## 6. Conclusion

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDR, there is no elaborate legal or policy framework for their effective application. Currently, the legal framework does not provide comprehensive guidelines on linkage of TDR with the formal court process. This has further frustrated the utilization of TDR in Kenya.

While acknowledging that the adoption and application of Africa's traditional dispute resolution mechanisms including indigenous principles and methods on conflict management do not apply to all situations, there are relevant aspects of these principles and practices that can be integrated and harmonized with the formal legal and institutional framework to offer an all-round approach on access to justice which caters for all persons despite any social differences. They can be weighed against the constitutional safeguards so as to get rid of the negative aspects therein. Traditional dispute resolution mechanisms can go a long way in facilitating access to justice at the community level, especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures.<sup>57</sup> There is therefore a need for enactment of a sound legal and policy framework for effective utilization of TDR and ADR to ensure full access to justice for Kenyans. It is only through putting such legal and policy measures in place that we can fully legitimize the ADR and TDR mechanisms and tap into their advantages. This will facilitate effective justice for Kenyans and ultimately promote the creation of a just and peaceful society for all.

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<sup>57</sup> Article 60(1)(g) of the Constitution of Kenya provides that one of the principles of land policy in Kenya is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution. This is also reflected under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

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