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An Analysis of the Weaknesses of Traditional Dispute Resolution Mechanisms (TDRMS) As an Avenue of Dispute Resolution in Kenya.

Joseph Sergon[1] Dr.Scholastica Omondi[2]
[1] *Phd Candidate, University of Nairobi, Kenya*
[2] *Associate Dean, University of Nairobi, Kenya*
Corresponding Author: Joseph Sergon

Abstract: Traditional Dispute Resolution Mechanisms (TDRMs)have been used to resolve disputes from time immemorial. These mechanisms are still vibrant to date despite the advent of the formal justice system through the courts of law. TDRMs are preferred on the premise that they are cost-effective, easily accessible, flexible and offer expeditious resolution of cases. This is contrasted to the formal justice system which is deemed as rigid, expensive, has procedural technicalities and backlog of cases. However, despite the merits of TDRMs, there are weaknesses characterizing the use of these mechanisms. The purpose of this study therefore was to demonstrate the strengths of TDRMs and their weaknesses (based on the natural justice, rule of law, and human rights variables). It is within this context that the present study sought to establish how best to strengthen TDRMs and integrate them with the formal justice system.The study employed Rawl's theory of procedural justice in identifying the inadequacies of TDRMs in dispute resolution. The study found that the TDRMs are faced by certain intrinsic and extrinsic challenges such as patriarchy, inequality, gender discrimination and corruption. The study concludes that these weaknesses impair the use of TDRMs as effective mechanisms of dispensing justice. The study recommends that there should be a legal framework to align TDRMs to reflect the constitutional principles of equality, non-discrimination and procedural fairness.

Key words: access to justice, customary law, formal justice system, natural justice, procedural fairness, repugnancy clause, TDRMs

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I. INTRODUCTION

The indigenous people in Kenya before colonialism were regulated by a traditional normative order[1] which operated within the lens of culture, religion and collectivism.[2] Social cohesion within families and clans was obtained through custom and consensus, with minimal use of force and coercion.[3] Regulation in the African sense, thus, entailed more than just coercive laws issuing from official governance systems.[4]Other forms of dispute resolution were preferred because of their capacity to promote cohesion even after disruptive conflicts.[5] Inter and intra-ethnic conflicts were also settled by elders from the warring communities coming together to

[1]Dial Dayana Ndima, 'Reimagining and Reintegrating African Jurisprudence under the South African Constitution' (Doctor of Laws Thesis, University of South Africa 2013) 1; J OsogoAmbani and OchiengAhaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) Strathmore Law Journal 41, 43.

[2]Ibid.

[3] Ali A Mazrui, *The Africans: A Triple Heritage* (Boston and Toronto: Little, Brown and Co. 1986) 69 (Cited in; J OsogoAmbani and OchiengAhaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) Strathmore Law Journal 41, 43.

[4]Linda James Myers and David H Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World (2010) <scholarworks.iu.edu/journals/index.php/bdr/article/download/1220> accessed 30 November 2016.

[5] Jacob K Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR" (2006) 1(6) *International Journal of Humanities and Social Science*, 219, 222; Andrew Chukwuemerie, "The Internationalisation of African Customary Law of Arbitration" (2006) 14 *African Journal, International Commercial Law* 143-175.

enter into peace pacts. As an example, the Pokot and the Marakwethad peace pacts known as the *miss* (traditional peace pact).[6]

The advent of colonialism and capitalism in Kenya introduced the Western legal systems that imposed strict limitations on the application of Traditional Dispute Resolution mechanisms (TDRMs).[7] For instance, Article 2(b) of the Native Courts Regulations Ordinance, 1897, recognized the use of existing TDRMs, which were then comprised of local chiefs and council of elders,[8] but this was subject to the repugnancy test under Article 52 of the 1897 Order-in-Council.[9] The Native Tribunals Ordinance of 1930 at s. 13 (a) empowered native tribunals to administer customary law provided it was not repugnant to justice or morality or inconsistent with any Order in Council or with any other law in force in the colony.Unfortunately, the standards of morality and justice were defined, not according to the African understanding, but according to the British perception.[10]Thus, Africans had almost no say on what they considered morally right or just. The repugnancy doctrine was often invoked to modify customs that the British considered uncivilised to conform to the western concepts of humanity, due process and fair trial procedure.[11] Where the African customary rule in question failed the test of repugnancy, the colonial officials decided the matter based on the presumed universal standards of natural justice, equity and conscience.[12] The murder of twins and trial by ordeal for instance were some of the customary practices that the "civilised" government prohibited.[13] The repugnancy test was not based on the conscience of the African community practicing a custom; it was based on "higher" and more universal standards of British justice and morality.[14]

However, the colonial administration allowed traditional institutions to operate in order to use customary law as a tool for gradually moulding the African society.[15] This may be buttressed by the transformations that took place between 1930 when the Native Tribunals Ordinance was enacted to establish native tribunals, and 1967 when the Magistrate's Courts Act, was enacted to replace all African Courts with District Magistrate's Courts.[16]

The post-independence government of Kenya inherited the English formal systems of law, including the repugnancy clause.[17]However, this has not stopped Kenyan tribal communities from using TDRMs.[18]In a study conducted by the International Commission of Jurists (ICJ) in 2011, it was found that many Kenyans resort to alternative dispute resolution mechanisms, including TDRMs, because of the difficulties associated with the formal justice system, namely high court fees, physical inaccessibility and the huge backlog of cases.[19]

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[6]RutoPkalya, Mohamud Adan and Isabella Masinde, *Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet*(ed. Betty Rabar& Martin Kirimi, Intermediate Technology Development Group-Eastern Africa 2004) 89-95.

[7]Ndima (n 1) 2.

[8] Article 57 of the 1897 Native Courts Regulations Ordinance also allowed Muslims to apply Muslim law.

[9] Article 52 of the 1897 Order-in-Council provided that African customary law applied to Africans provided it was not repugnant to justice and morality.

[10]*Regina v Luke Marangula*, Reports of Northern Rhodesia (1949-1954) 140; KariukiMuigua,'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' (n.d) 5, available at <http://www.chuitech.com/kmco/attachments/article/111/paper%FINAL.pdf> accessed on 30/6/2015.

[11]Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford, United Kingdom: Oxford University Press 2013) 59.

[12]ibid. In the researcher's view, while natural justice and equity are reasonable standards of justice, the British notion of morality based on civilised values was incompatible with the African understanding of morality. For instance, slavery was immoral to Africans.

[13] ibid.

[14] ibid 58.

[15]Brett L Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60' (1999) 40 *The Journal of African History* 412.

[16]Abel Richard L, "Customary Laws of Wrongs in Kenya: An Essay in Research Method" (1969) 4013 Faculty Scholarship Series 582-586.

[17] See the Judicature Act Cap 8 Laws of Kenya, section 3(2); Constitution of Kenya 2010, Article 159(3).

[18] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' (2014) 2(1) Alternative Dispute Resolution Journal 206; J W van Doren, 'African Tradition and Western Common Law: A Study in Contradiction' in Ojwang J B and Mugambi J N K (eds), *The SM Otieno Case: Death and Burial in Modern Kenya* (Nairobi University Press 1989) 332.

[19] International Commission of Jurists (ICJ-Kenya), *Interface between Formal and Informal Justice Systems in Kenya* (ICJ Report, April 2011) 31; KariukiMuigua, 'Avoiding Litigation through the Employment of Alternative Dispute Resolution' (Paper presented at the In-House Legal Counsel, Marcus Evans Conference,

On the contrary, TDRMsare preferred since they are easily accessible, consensus-based, impartial, affordable and seek to rebuild relationships rather than breeding hatred.[20]

II. STATEMENT OF THE PROBLEM

While TDRMs reflect the culture and interests of the Kenyan communities, it is not without fault. Some of the TDRMs have been politicised and used to propagate the ideologies of political aspirants and state administrators like chiefs.[21] Additionally, lack of regulation of TDRMs has led to their abuse through corruption. For instance, the *Kambi* of the Agiriama have increasingly been accused of being influenced by corrupt individuals.[22] The TDRMs are also perceived as patriarchal tools which subvert the rights of women and children.[23]The study therefore sought to interrogate the weaknesses of the TDRMs which may hinder their effective use for dispute resolution.

III. JUSTIFICATION OF THE STUDY

Given the high level of recourse to TDRMs locally, these mechanisms have become integral in the justice sector. Article 48 of the Constitution of Kenya, 2010, obliges the State to ensure access to justice for all persons. In order to achieve this, the Constitution acknowledges the use of alternative dispute resolution mechanisms, including TDRMs to augment the formal justice system. However, TDRMs as an avenue for dispute resolution is faced by challenges and inherent weaknesses which affect its effectiveness. The aim of the study was to identify and analyse these weaknesses in comparison with the strengths of these mechanisms. This information will be useful in improving the efficacy of TDRMs as a complementary avenue to the formal justice system. The information elicited from the study may also be a basis for further research and policy making particularly on the legitimacy of TDRMs.

Secondly, the findings generated in this study are in line with Kenya's long-term national policy blueprint, better known as the Kenyan Vision 2030. Vision 2030identifies national and inter-community dialogue as a tool of ensuring harmony among the Kenyan people.[24]Thus, by identifying the possible ways in which TDRMs can be strengthened, bearing in mind their conundrums, the study will have the effect of enhancing the efficacy of TDRMs alongside the formal justice system in dealing with disputes in Kenya.

IV. OBJECTIVES OF THE STUDY

The objectives of the study were;

1. To establish whether the TDRMs are consistent with the principles of natural justice, rule of law and fairness in Kenya
2. To evaluate the weaknesses and strengths of TDRMs as dispute resolution avenues in Kenya
3. To determine the effect of the repugnancy clause on the use of TDRMs in Kenya
4. To make recommendations on the effectiveness of TDRMs as dispute resolution mechanisms in Kenya

V. RESEARCH QUESTIONS

The research questions of the study were;

1. Whether there are any challenges that hinder the development, use and integration of TDRMs with the formal justice system in Kenya
2. Whether the repugnancy clause has any impacts on the development of TDRMs in Kenya

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Tribe Village Market Hotel, Kenya, 8-9 March 2012) 6-7 <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf> accessed 13 February 2017.

[20]Ibid, International Commission of Jurists 32.

[21] Martha Mutisi and KwesiSansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from Selected Cases in Eastern and the Horn of Africa* (ACCORD, Africa Dialogue Monograph Series No 2, 2012) 8 <https://www.files.ethz.ch/isn/146648/ACCORD-monograph-2012-2.pdf> accessed 21 December 2016.

[22] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' <http://www.ciarb.org/docs/default-source/> accessed 13 February 2017.

[23] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya 2010' (2015) 1(1) Strathmore Law Journal 32; *see also* Asian Indigenous Peoples Pact, 'Case Studies in Asia Regarding Indigenous Women, Development and Access to Justice' in Institute for the Study of Human Rights, *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (New York: Institute for the Study of Human Rights 2014) 268-305, on gender inequality and patriarchal ideologies within the traditional justice systems.

[24] Republic of Kenya, *Vision 2030* (Government Printer's Press 2007) 176, available at <http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf> accessed on 24 October 2015.

VI. THEORETICAL FRAMEWORK

6.1 Rawls' Theory of Procedural Justice

The study employed the procedural justice theory in identifying some of the inadequacies of TDRMs. Procedural justice denotes the fairness of a dispute resolution procedure.[25] The concept of fairness relates to equality, equity and satisfaction by the disputants.[26] In the present study, procedural justice is construed to include the principles of procedural fairness, equal opportunities for all the parties to a dispute, and equal gender representation in the councils of elders or traditional courts.

Rawls perceives justice as the core value of institutions.[27] In his view, an injustice is reasonable only if it is necessary to circumvent an even greater injustice.[28]Further, Rawls's concept of justice as fairness is based on the principle of equal opportunities and liberties.[29] Every citizen is treated equally in a just society, and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.[30] Rawls explains this argument further using two principles: the difference principle and the equal liberty principle.[31] The principle of equal liberty refers to a society that is fair and just by assigning equal opportunities (rights and liberties) to everyone.[32] On the other hand, the difference principle is a pure egalitarian concept, which is to the effect that, unless there is another distribution that will satisfy both parties, an equal distribution is the best option.[33]

The theory in relation to procedural fairness engenders legitimacy by according the disputing parties a neutral and dependable arbiter, giving them voice and treating them with respect.[34] This demonstrates respect for their rights and imbues confidence and trust. The parties are, thus, able to own and accept the procedures. The fair procedures explained to and accepted by the parties, lead to a fair and acceptable outcome even though one of them is disgruntled.[35]

6.2 Relevance of Procedural Justice Theory to the Study

This study uses Rawls' concepts of procedural fairness, equal opportunities and liberties in examining the procedural and substantive aspects of TDRMs. The theory provides a standard of examining the extent to which TDRMs meet the principles enshrined under Articles 47, 50 (1), and 159 (3) of the Constitution of Kenya 2010. It provides guidance for TDRMs, by ensuring that the parties to a dispute have equal treatment, that their dispute is determined by persons who have no ulterior interest, who are obliged to render a decision only on the basis of facts and objective rules rather than on personal preferences, and that any assertions or accusations must be buttressed by cogent evidence.

TDRMs are embodied in customary laws that are often considered patriarchal and discriminating against women and children. The theory, therefore, underscores the need to ensure equal representation of women in dispute resolution institutions, such as the council of elders. Traditional dispute resolution procedures should strike a gender balance in terms of opportunities and liberties. This is in keeping with Article 27 (3) of the Constitution of Kenya 2010, which provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

Rawls' concept of fairness is a natural justice principle that is fundamental in the administration of justice. Other natural justice principles include the absence of procedural technicalities, due process, impartiality, the right of being heard, and giving reasons for a decision. Procedural justice theory therefore provides a yardstick for examining the extent to which TDRMs meet the above principles in line with Articles 47, 50 (1), and 159 (3) of the Constitution of Kenya, 2010. It provides the necessary standards against which TDRMs can be analysed and improved as an effective avenue for dispute resolution.

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[25] Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' (2011) 2011(1) Journal of Dispute Resolution 2, 3.

[26]ScholasticaOmondi, 'Procedural Justice and Child Sexual Abuse Trial in Kenya' (2014) 2 (5) *Journal of Research in Humanities and Social Science (Quest Journals)* 30-56: 30, available at <http://www.questjournals.org> accessed on 04 November 2015.

[27] John A Rawls, *A Theory of Justice* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1971) 3.

[28]ibid 4.

[29]ibid 52.

[30]ibid.

[31]ibid.

[32]Riel Vermunt and Kjell Y Tornblom, 'Distributive and Procedural Justice' 5 retrieved from <www.goverpublishing.com/pdf> accessed on 4 December 2015.

[33] Rawls (n 27) 65-66.

[34]ibid.

[35] J D Galligan, *Due Process and Fair Procedures* (Oxford University Press 1996) 12.

VII. RESEARCH FINDINGS AND DISCUSSIONS

TDRMs constitute the most cost-effective and expeditious avenues for access to justice.The term "access to justice" refers to a situation where people with a complaint are able to get effective remedies from a justice system that is cost-effective, accessible, and which will dispense justice fairly and expeditiously on the basis of human rights and the rule of law. It may also include the entrenchment of rights in the law, awareness of and understanding of the law, access to information, and speedy enforcement of decisions.In this study, access to justice is construed to include the principles of expeditious disposal of disputes, proportionality, equal opportunities in the justice system, procedural fairness, party autonomy, affordability, party satisfaction, and effectiveness of remedies. Some of these principles define natural justice and the rule of law.

TDRMs in Kenya continue to play an important role in managing conflicts relating to, among others, land, family, water, cattle rustling and petty offences. The continued use of TDRMs is based on their cost-effectiveness, flexibility, and the fact that they are not informed by legalese and strict rules of evidence. Their use, therefore, brings about harmony and ensures that justice is served expeditiously without undue regard to technicalities that bedevil the formal justice system. The recognition of TDRMs under Article 159(2) of the Constitution, 2010, creates a platform for the use of these mechanisms in reducing the huge backlog of cases that has plagued access to justice in the formal courts.

Further, with their emphasis on the rebuilding of relationships between the disputants, TDRMs are guided by the principles of restorative justice theory, namely accountability of the offender, participation of the victims and their family or community members, flexibility, responsiveness, emotional and physical safety of the parties.

Despite the merits of TDRMs, their application as an avenue for dispute resolutionmay be characterised by procedural hurdles, such as non-compliance with the rule of law and the principles of natural justice. TDRMs rarely incorporate factors such as recusal of the 'adjudicators' on the basis of bias, giving reasons for decisions and the right of being heard which are integral for an effective justice system. This is contrary to Rawls' argument that justice can only be realised through fair procedures and equal distribution of opportunities between the parties to a dispute.

Additionally, Article 159(3) (b) of the Constitution, 2010, stipulates that TDRMs should not be applied in a manner that is contrary to the Bill of Rights, the Constitution and other written laws, or repugnant to justice and morality. A notable weakness of TDRMs in Kenya emanates from the patriarchal nature of the applicable customary law.[36] TDRMsoften provide limited opportunity for women to participate and effectively benefit from the use of these mechanisms. In most communities, women do not constitute the dispute resolution forum which prevents them from voicing out their concerns with any undertakings of the forum. The exclusion of women in these forums is often informed by patriarchal ideologies where women are deemed as subordinate. The man as the head of the home is the decision maker and therefore qualifies to participate in dispute resolution forum as the administrator of justice. This negates the principles of non-discrimination, fairness and equality. Other weaknesses of TDRMs include corruption, political influence and harsh sentencing customs (like banishment). These weaknesses necessitate the need to have basic guidelines reflecting on the Bill of Rights and enhance access to justice for vulnerable groups.

The repugnancy clause in the Constitution, 2010, also hinders the development of TDRMs and their integration with the formal justice system. While the other limitations in Article 159(3) (b) are clear, the Constitution does not define the standards of morality and justice in the context used, leaving it open for the formal courts to decide. Admittedly, the repugnancy clause is a statutory filter, seeking to sift the bad elements of customary law.

The relationship between TDRMs and the formal justice system is a delicate one due to the hurdles identified above. Thus, taking into account these practical hurdles and the obscurity of the repugnancy test envisaged in the Constitution, 2010, the researcher argues that there is need to develop legal mechanisms that can deal with these weaknesses to enhance access to justice.

VIII. CONCLUSION AND RECOMMENDATIONS

Although the above weaknesses and the dominance of the formal justice system may affect people's perceptions about TDRMs, the complementarity between TDRMs and the justice system is very imperative given the huge demand for efficient and timely justice.[37] Indeed, formal courts have supported this fact by

[36] T Murithi, 'All-Africa Conference on African Principles of Conflict Resolution and Reconciliation' (United Nations Conference Centre - ECA, Addis Ababa, Ethiopia, 8-12, 1999, 2000) 14.

[37]For instance, as at 30th June 2013, the number of pending cases in all courts stood at 426,508, out of which 332,430 were civil and 94,078 were criminal. *See* The Judiciary, Republic of Kenya, *Institutionalising Performance Management and Measurement in the Judiciary* (Report by the Performance Management and Measurement Steering Committee, April 2015) 1.

recognising the importance of TDRMs. However, there are intrinsic and extrinsic weaknesses such as patriarchy, discrimination, inequality and corruption which characterize the use of TDRMs. These weaknesses hinder the effectiveness of TDRMs in dispensing justice. The repugnancy clause reflects an attempt to regulate the administration of TDRMs by assessing whether they negate justice and morality. However, there is no agreed test the justice and morality elements of the repugnancy clause. Different communities in Kenya have their own unique systems of TDRMs, which may differ from one another, hence the difficulty in setting a standard of application of justice and morality. Moreover, there is no regulatory or policy framework that states when and how TDRMs are to be applied. These hurdles if not adequately addressed would affect the ability of TDRMs to resolve disputes in a just and fair manner.

Therefore the study recommends that;

i. There is need for resocialization of communities on negative ideologies such as patriarchy which fosters inequality and discrimination in the administration and composition of TDRMs.
ii. There is need for equal representation of women and other vulnerable groups in TDRMs such as council of elders.
iii. There is need to align TDRMs to reflect principles of natural justice and procedural fairness.
iv. The Parliament should come up with a legal framework to operationalize and regulate the administration of TDRMs. The legal framework should contain basic guidelines that each community should follow in the application of TDRMs. It should also provide for a basic guideline defining the repugnancy clause for elders to identify and eliminate rules that are "immoral" and "unjust" pursuant to Article 159(3) (b) of the Constitution. It should further ensure that TDRMs adhere to basic human rights standards and procedural fairness.
v. The Government together with the relevant stakeholders such as the Judicial Service Commission and the NGOs should initiate and provide for training forums for those involved in TDRMs through which they may be made aware of the importance of equality, non-discrimination, the dangers of negative cultural ideologies such as patriarchy and the need to ensure that the TDRMs dispense justice in a fair manner that aligns with the principles of natural justice

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