“Going Back to the Roots”; Resolving Disputes through Alternative Means with a Bias in Traditional Justice Systems

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DECLARATION

We, Mwai Samuel Maina and Macharia James Muriuki do declare that this is our original work and has not been published or under consideration elsewhere for publication or for any award. The sources we have used or quoted have been indicated and acknowledged by references.

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ABSTRACT

Proper and effective administration of justice plays an important role in addressing disputes that arises in the society. In our societies, there exist structured and recognised forms of resolving disputes. The main method of resolving disputes being formal courts established within the state. Unfortunately in most jurisdictions, there have been challenges facing the formal mechanism that have made it not accessible to majority of the population. These challenges include costs associated with litigation, complexity of rules as well as backlog of cases. This has necessitated states to adopt and recognise alternative dispute resolution mechanisms. This paper examines how traditional dispute resolution mechanisms are recognised and can be used in resolving disputes arising in the society in an effective and efficient manner. Noting that the Constitution requires traditional justice systems to meet certain requirements, this article offers some guidelines in which the same can be implemented. The Constitution of Kenya under Article 159 (2) provides that in the administration of justice, court should be guided by principles among them being promotion of alternative dispute resolution mechanisms inclusive of traditional dispute mechanisms. The mechanism was recognised based on the reality that the main form of administration of justice in the country have been found to be inadequate in addressing all the justice concerns of the people. Unfortunately despite the constitutional provision being placed more than a decade ago, little has been realised in actualising traditional dispute resolution mechanism in the country. This paper therefore provides a discussion based on traditional justice systems and offers some recommendations on how the same can be applied in Kenya within constitutional ambits. Such recommendations if implemented can contribute in enhancing formulation of laws, policies and specific guidelines that will broaden access to justice through traditional dispute resolution.

Key words: dispute resolution, access to justice, administration of justice, alternative dispute resolution and traditional justice systems
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1.0 Introduction

Due to competing interests and needs in the society, disagreements arise between different factions within the society. Some of these disputes may escalate into violent conflicts if they are not properly managed.\(^1\) In order to enhance peace and orderliness in our societies, different mechanisms are established for resolving such disputes. Notably, in all orderly societies there are institutions, organs or bodies established to enhance administration of justice. The success or failure of such mechanisms depends on how effective and efficient they are in responding to the needs of people in resolving disputes.

The main form of dispute resolution in Kenya is the court process. Formal court system has been in place since the entry of colonial administration upon the adoption of foreign form of justice system. Though the system has existed over the years coupled with a number of challenges, it has maintained its formal character in the legal system. Quite a huge proportion of the population has been left out in the formal resolution of disputes. According to Justice Needs and Satisfaction Report, more than 90% of the population do not access justice in the formal justice system.\(^2\) Such an observation had been noted by the former Chief Justice of Kenya, Willy Mutunga who stated that courts in Kenya have used processes that appear to be “remote and mystical” to the majority of the population, thereby leaving out a huge proportion in the administration of justice.\(^3\) Similar findings were noted by Judiciary of Kenya in its alternative justice systems Reports that estimates about 90% of disputes in the country to being resolved through justices outside formal court process.\(^4\)


\(^3\) The statement is captured in the speech by the former Chief Justice of Kenya Willy Mutunga on 12\(^{th}\) August 2012 when addressing the issue of resorting to alternative dispute resolution mechanisms.

Accessibility and expeditious determination of cases is a central determinant in administration of justice. Due to the persistent need for efficient and effective administration of justice, there has been awakened spirit to use and recognise alternatives means of dispute resolution. Partly, this has been through recognition and use of traditional justice systems (TJS).

1.1 Access to Justice and Administration of justice

Access to justice is the means by which an aggrieved party resorts to the avenue available for the resolution of a dispute. According to Cappelletti and Grath, an efficient justice system is where access to justice “.....is equally accessible to all, and leads to results that are individually and socially just....”

Access to justice is a fundamental right as well as the means for ensuring that other rights are observed. The Constitution of Kenya under Article 48 provides for the right to access to justice. The Article obligates the state to enhance mechanism for ensuring access to justice. This includes managing fees payable to an extent that it will not act as an impediment to administration of justice. The Constitution also provides for obligation on the part of the state of ensuring that measures are in place of adopting methods that can enable people seek justice in alternative means. Article 159 provides that judiciary must promote resolution of disputes through alternative means which includes use of traditional dispute resolution mechanism (TDRM).

Though the Constitution requires certain impediments like fees be addressed by the state, this might not been addressed to a satisfactory level, thereby leaving out a huge margin of the population from accessing justice in the formal system. Beyond costs associated with litigation, there exists a wide range of other factors that denies some people an opportunity to seek justice.

1.3 Challenges in regard to administration of justice

Colonisation in Africa brought with it among other factors foreign forms of dispute resolution. Mohamed claims that to a great extent, these mechanisms were prioritised by the

colonial administration and disregarded the traditional justice systems that were in place.⁷ According to Price, most of the disputes resolution mechanisms that existed were muted by the colonial administration.⁸ Noting that it was not possible to fully do away with TDRMs, the colonial administration provided for their application but subjected to certain limitations.⁹ This was actualised by enactment of Natives Courts Regulations Ordinance that allowed use of customary law in native courts. However, this was co-opted later in the formal courts but use of customary law limited through inclusion of repugnancy clause. Unfortunately the repugnancy to morality and natural justice was measured in the eyes of foreign concepts but not in the African perspective. This was evidenced in the infamous case of *R Versus Amkeyo* that failed to recognise a marriage conducted under African customary practice on account of ‘bride price’ being ‘wife purchase’.¹⁰ Pwiti and Ndoro claims that this pushed the African states to primarily adopting the foreign justice systems as the main and formal ways of resolving disputes.¹¹ To a great extent, such practices continued at the formal level whereas the traditional systems continued at the local level and in most cases in unstructured manner. The same arrangement continued further into independent states. This was seen in legislations such as the Judicature Act of 1967. The Act allowed application of African customary law in civil cases if found to be consistent with natural justice and morality.¹² However there were some modifications that allowed customary practices to be recognised when brought to the attention of court. That was the case ain a number of succession cases handled in various years. Though court process is the main means of resolving dispute, it has not been able to address the justice needs of the society.¹³ There have been a number of barriers in accessing justice in courts. In addition, Price notes that courts are faced with numerous cases that ought to be resolved at other avenues.¹⁴ There have been challenges of backlog of cases in courts; matters taking long duration in courts as well delayed judgments. Such realities and practices has

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⁹ Order-in Council Ordinance 1897 Article 52.  
¹⁰ R versus Amkeyo is explained in chapter three.  
been delaying administration of justice and thereby tarnishing the image of courts as an institution of delivering justice. According to Muigua complex rules, cost of litigation and backlog of cases are some of the barriers affecting courts as the main dispute resolution mechanism.\textsuperscript{15}

According to UN Women, UNICEF and UNDP, due to complexity, tediousness and costs associated with formal structures, majority of people at the community level have been left without capacity to access justice in such mechanisms.\textsuperscript{16} Dammann and Hansmann, claims that increase in popularity on the other forms of resolving dispute other than litigation to a great extent has been due to challenges in the formal structures.\textsuperscript{17}

Cappelletti argues that there are three main obstacles to access to justice. These obstacles are economic, procedural and organisational.\textsuperscript{18} He, therefore, proposes solution to them based on each obstacle. For example in economic obstacles, Cappellatti argues that majority of people are not able to get information or adequate representation because of poverty. In his place, Muigua claims that majority of people are not aware about alternative means of resolving disputes.\textsuperscript{19} In such instances, Cappellelli proposes solutions such as creation of social rights, citizen action, action collective and creation of ombudsman.\textsuperscript{20}

On procedural factors, the courts have formal and complex rules that make some people unable to access justice. Further they are unable to afford legal representation in helping them navigate through the complex rules.\textsuperscript{21} Beyond rules, there is requirement of documentation that also require knowledge and expertise. This excludes those people who cannot draft documents or afford legal assistance from accessing justice in courts.

On organisational barriers, a number of factors act as impediments to accessing justice in the formal structure. In some regions justice seekers have to walk for long distances in order for

\textsuperscript{19} Muigua Access to Justice And Alternative Dispute Resolution Mechanism in Kenya pg 5-11
them to reach institutions of justice. Mwimali writes that most people in the frontier region are very far from institutions of justice.\(^{22}\)

Economic, procedural and organisational barriers make accessing justice in courts a toll order. Such barriers and challenges push some people either not to seek justice or resort to informal processes.

**1.4 Alternatives to What?**

Alternative dispute resolution (ADR) is the mechanism of resolving disputes in any other form other than through the court. The theory of ADR holds that resolution of disputes other than through litigation is more effective and expeditious.\(^{23}\) Black’s law dictionary defines alternative dispute resolution as a process of solving dispute other than litigation.\(^{24}\) The process is said to be alternative presupposing existence of the main method of resolving dispute. Some of the alternative justice processes include mediation, conciliation, negotiation, arbitration and traditional dispute resolution mechanisms. Reconciliation, mediation, arbitration and traditional dispute resolution mechanisms are specifically mentioned under Article 159 of the Constitution.\(^{25}\)

It should be noted that disputes are part and parcel of the society. These disputes may be resolved at different levels depending on the form, nature and extent of dispute. In a well structured society, court as the main structure of resolving disputes should come as the last resort. However due to lack of proper structures, Price opines that some of disputes that end up in courts could have amicably been resolved at other avenues.\(^{26}\)

Due to challenges associated with litigation, it becomes vital to adopt and recognise other alternatives to resolving disputes.\(^{27}\) Alternative justice presupposes a situation that it will offer a better platform to the main method. In this case, Price recommends that the

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\(^{25}\) Constitution of Kenya, 2010 Article 159 (2).


alternatives must address issues of cost, time taken in resolving a dispute, complexity of the process and accessible justice.\textsuperscript{28}

Ntuli claims that litigation being the main form of resolution of disputes is proving to be a complex and sometimes expensive process.\textsuperscript{29} Such challenges prevent some quotas of the population from not seeking justice in the court systems. Muigua and Francis find that litigation is faced with various disadvantages like delay, technical procedures and high costs that give alternative dispute resolution a lee way in accessing justice.\textsuperscript{30} They further hold that recognition of ADR and traditional dispute resolution mechanisms have contributed to enhanced access to justice especially to the poor.\textsuperscript{31}

Muigua argues that traditional dispute resolution mechanisms are flexible, affordable, expeditious and offer a friendly outcome.\textsuperscript{32} He further holds that their positive use will in turn lead to reduced backlog of cases in court.\textsuperscript{33} This is premised on the notion that ADR mechanism will be used in resolving most of the disputes that are filed in court that lead to clogging of cases in courts. Price claims that alternative dispute resolution and specifically traditional justice system has been in use in Africa but in an informal way.\textsuperscript{34} She claims that the uniqueness of the African legal system cannot work without resorting to use of traditional system that applies customary law in resolving disputes.\textsuperscript{35}

Muigua recommends sensitization be done to judges, magistrates, lawyers and the members of the public on the appropriateness and effectiveness of ADR mechanism and its use will in turn lead to access to justice.\textsuperscript{36} In agreement with Muigua assertion, Price posits that access to justice in Africa cannot be realised without strengthening alternative dispute resolution


\textsuperscript{30} Muigua and Francis, Alternative Dispute Resolution, Access to justice and development in Kenya pg 1-4.

\textsuperscript{31} Muigua and Francis Alternative Dispute Resolution, Access to justice and development in Kenya pg 2.


\textsuperscript{34} Catherine Price, \textit{Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?}, 18 Pepperdine Dispute Resolution Law Journal pgs 395 -396. (2018) Available at: https://digitalcommons.pepperdine.edu/drlj/vol18/iss3/2.


\textsuperscript{36} Muigua Access to Justice and Alternative Dispute Resolution Mechanism in Kenya pg 5.
mechanism. Price advocates for adoption of ADR as the case is in Ghana of borrowing ADR mechanism from the west but also integrate it with traditional mechanisms. 

According to UN, informal justice system can come in and provide justice especially in situations where formal justice fails to achieve. Wojkowska argues that informal justice system provides culturally relevant remedies and is supported and seen as more legitimate at the community level.

This paper proceeds to examine alternative justice in the context of traditional dispute resolution mechanisms. Findings are that the mechanism is (was) preferred for a number of its benefits notably being its ability to grant restorative justice.

1.5 Traditional Justice Systems as the Alternative

In the traditional African society, disputes were resolved through mechanism established within the community and majorly based on customs and practices. Communities’ institutions and leaders played an important role in resolving disputes. In most communities, there existed a council of elders that played an important role in resolution of disputes. Majorly, these council of elders comprised of men who had attained a certain age. According to Joireman, most disputes were therefore resolved through the men’s perspective.

Among the Ameru community there was (is) an institution of traditional leaders known as Njuri Ncheke. Kieyah and Khaoya write that members of the Nchuri Ncheke were elderly men who met certain customary attainment. The institution was very instrumental in traditional society in resolving disputes existing in the society. The institution applied Ameru customary law and practices in making their determination. Apart from resolving internal

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39 Informal Justice System, Charting A Course For Human Rights Based Engagement.


disputes, *Njuri ncheke* also played an important role in resolving external conflicts.\(^{44}\) *Nchuri Ncheke* has survived its role of resolving disputes over the years despite presence of formal courts.\(^{45}\) The institution has helped in resolving disputes at the community level. In the contemporary times, even courts have come to recognise the important role being played by *Nchuri Ncheke*. In the case of *Lubaru M’Imanyara versus Daniel Murungi*\(^{46}\) court agreed that a land matter be transferred to *Njuri Ncheke* for determination.

Kenyatta writes that Kikuyu community had an organised form of governance before the colonial invasion.\(^{47}\) He notes that resolution of disputes started at the lowest level of the society which was a family. Kenyatta notes that the head of every household was the father who was entrusted in resolving disputes at the family level. If a dispute was not resolved at the family level, United Nations reports that the matter was referred to the extended family known as *ndundu ya muchii*.\(^{48}\) It was only the most serious disputes that were taken to the council of elders known as *ndundu ya athuri*. Kenyatta writes that *Ndundu ya athuri* was composed of older men who had attained certain qualifications in the community. Their proceedings were held in open places and members of the communities were free to attend. Kenyatta notes that parties to a dispute were notified and invited to the proceedings.\(^{49}\) They were free to call their witnesses and present their case to the elders. United Nations states that the decision given by the council of elders in Gikuyu was majorly to reconcile and restore the relationship of the parties.\(^{50}\) The elders could also order compensation to the aggrieved party. Enforcement of the decision was through societal pressures and it was unlikely to find a party not complying with the decision of the council of elders.

The Somali community had a traditional court known as *maslah*.\(^{51}\) These courts though still functional to date, applied Somali customary law and practices. Sage writes that *maslah* also


\(^{46}\) [2013] eKLR.


borrowed heavily from Islamic religious teachings.\textsuperscript{52} The courts hold their sittings in open places near markets or mosques. According to Sage, Somali customary courts provides restorative and reconciliatory justice.\textsuperscript{53}

Despite adoption of English legal system many years ago, Kariuki notes that institution of elders in resolving disputes have not been fully eroded at the community level.\textsuperscript{54} Traditional practices and mechanisms have continued in the modern society at the local level in a manner that is unregulated and not within the reach of the state operations. However, as Uwaize argues, due to their ability to resolve disputes at the local level and in an affordable manner, they have become popular at the community level.\textsuperscript{55} Determination by traditional justice system is not about quality based on ‘entitlement’ but providing social harmony and orderliness.

Article 159 (2) (c) of the Constitution provides that “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...” Further clause 3 of the Article provides that “Traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.” Article 11 (1) also recognises culture as the foundation and cumulative civilisation of Kenyan people.\textsuperscript{56} In addition Article 19 (2) provides that human rights are recognised and protected in the Constitution with the purpose of preserving dignity of individuals and communities in order to attain social justice and potentiality of all human beings. As noted by Price, this is the spirit that drove the African way of life as evidenced in their humane practices.\textsuperscript{57} In addition to the provisions discussed above, Article 60 provides a number of principles in regard to land management and use inclusive of “encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.” Further, the National Land Commission functions under Article 67 of the Constitution include

\textsuperscript{52} Le Sage, “ Stateless justice in Somalia”.
\textsuperscript{53} Le Sage, “ Stateless justice in Somalia”.
\textsuperscript{56} Constitution of Kenya, 2010.
encouragement of the application of traditional dispute resolution mechanisms in resolving land conflicts. Article 50 (9) of the Constitution and Victim Protection Act provides for the rights, protection and welfare of victims of offences. The judiciary of Kenya has made a stride towards promotion of TDRMs by establishing the alternative justice policy framework. The policy reports that majority of people do not seek justice in courts for various reasons. The policy framework recommends recognition of autonomous alternative justice system institutions or court annexed alternative justice system institutions in dealing with cases based on customary traditions and practices. Though the policy is still at the infancy stage, a lot still remains to be done towards adopting and use of traditional justice systems within the legal framework. The law in the Constitution has not been brought out to the practice to benefit the Kenyan society as anticipated. The robust bill of rights cannot be enjoyed without proper mechanism of accessing justice.

If traditional justice systems operate in an unstructured and unregulated environment, it becomes difficult to know and understand the extent to which they conform to the requirement of the Constitution. TDRMs can be an enabler or impediment to access to justice depending on how they operate, functions and deals with issues of justice.

1.5.1 Case for Traditional Justice Systems

The African traditional justice systems were based on unique values and norms. These norms were based on values that recognised the worth and dignity of groups and individual persons in the African society. As United Nations notes, the African had a philosophy based on human dignity and respecting human beings. According to Bennet, African communities had their values and concepts guiding humanity though different from the one introduced by the foreign powers. Unfortunately some of these African cultures and traditions were eroded or diluted by colonial administrators. For example the traditional dispute resolution mechanism that were applied by communities in resolving disputes were weakened and replaced by western form of justice systems. Such TDRMs had their benefits that enabled people to access justice in an effective and friendly manner.

59 Victim Protection Act.
Traditional justice systems offer an avenue of accessing justice to most people at the community level especially those who cannot afford the formal structures. Price reports that TDRMs offers benefits such as restorative justice as a dispute under traditional mechanism is viewed as a communal challenge. The system also allows parties to practice their own cultures as provided by the Constitution. This was noted in the case of Lubaru M’Imanyara versus Daniel Murungi where the matter was referred to Njuri Ncheke for determination according to Ameru customary law and practices.

Mkangi writes that formal justice system majorly offers retributive and punitive justice in criminal cases, compared to traditional justice system that is restorative in nature. The peace and orderliness of the society is given more recognition as opposed to punishing the wrong doer. This majorly explains why a dispute in the context of traditional setting is viewed as a communal problem.

Dispute resolutions among most communities in Africa were conducted by institutions of the council of elders as well as other traditional leaders like kings. Though informal in nature, TDRMs processes seem to have complied with some important principles of international rights and principles. As revealed by Mwimali and Kenyatta, traditional sessions of resolving disputes were held in open places where all parties concerned had opportunity to appear before the decision makers. Members of the public were free to attend the sessions and in some communities they were allowed to make contributions in the proceedings. Parties to the case were given an opportunity to state their cases and call their witnesses.

At the end of TDRMs session, the decision makers invited both parties and applied mechanism of ensuring that they comply with their decision. Societal pressures and cooperation was also used in enforcing decision made by leaders entrusted in resolving disputes. More importantly, the justice granted was restorative in nature and offered the parties an opportunity to reconcile and live peacefully within the community. According to Muigua most of such proceedings ended with a reconciliatory and celebratory tone. This

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65 [2013] eKLR.
contrasts with the formal justice system where some parties develop permanent bad relationship between themselves based on the outcome of a case.

Even when courts are applying formal laws, they can allow customs, religions and practices to thrive. This is so if the customary practice will offer a better and effective mechanism in resolving disputes. As noted in the case of *Lubaru M’Imanyara v Daniel Murung*, courts can play an important role in promoting resolution of disputes through customary practices. In this case the Environment and Land Court agreed with the parties request to refer the matter to *Njuri Ncheke*, the *Ameru* council of elders.

**1.5.2 Gaps in the traditional justice systems**

Cases have been witnessed where traditional justices systems have acted contrary to constitutional provisions. Instances of violation of fundamental rights and freedoms have been very rampant. Some traditional institutions have been found to operate in a manner that disregards human rights standards and principles. Noting that traditional justice systems are based on community customs and practices, it has been found that majority of them are patriarchal in nature. They therefore exclude women in decision making and as well make determination that are discriminatory against women. According to Kenyatta, council of elders that determined disputes among the Kikuyu community was composed of elderly men. Fida Kenya in its report based on experiences in the coastal region found that women are not included in decision making under traditional justice systems. This contrasts international and national human rights provisions requiring inclusion of gender in all spheres of life. For example the Convention on Elimination of All Forms of Discrimination against Women requires state to uphold right to equality and non-discrimination of women in political, economic, social, and cultural spheres.

Winfred claims that most customary practises relegate a woman position to an inferior place as compared to that of a man. She claims that women lacked many capacities in their social and economic life. For example she finds that in most communities a woman lacked ability to own property or custody to children she had birthed.

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69 *Lubaru M’Imanyara v Daniel Murung*.
70 Winfred Kamau Customary Law and Women’s rights in Kenya.
72 Winfred Kamau Customary Law and Women’s rights in Kenya.
Such customary practices do not also uphold the vulnerable position of children in the society. Some practices do not give children an opportunity in addressing their needs as children. This has always been the case when resolving disputes where children are victims of sexual or physical abuse. Parents or adult relatives are the one who receive compensation in exchange of the wrongs committed by an offender at the expense of children who are subjected to harassments and abuse. Such violations were noted by a report prepared by Kilonzi and Maina on a study carried out in Machakos on cases of defilement. 73 Victims of such violations could also be subjected to rituals and cleansing that may affect their development.

The Constitution under Article 50 provides that no one should be punished of an offence that is not written down. Offences in Kenya are mainly provided in the Penal Code as well as other penal laws in the country. Contrary to this, some traditional institutions have been found to assume jurisdictions they do not have. They have been found to resolve cases of criminal nature including sexual related offences.

Some decisions by traditional justice systems have also been found to contravene the Constitution. Punishments such as banishment, physical beating and being tortured are not only against the specific Constitutional provisions but also principles of morality and justice.

1.6 Lessons on traditional justice systems

In order to have an insightful experience, this paper briefly reviews on the operations of traditional justice systems in jurisdictions of Rwanda and South Africa. These two jurisdictions are selected because of their unique history, values and reconsideration of traditional justice systems.

The South African state experienced one of the worst forms of separatism and discrimination in the society. Apartheid regime separated the South African people majorly based on racial, social and economic spheres. With the fall of the regime, there was need to rebuild the society and this was hugely based on traditional arrangements. 74 The Truth and Reconciliation Commission was born from a traditional restorative principle of ‘ubuntu’. The architect of the principle was Reverend Desmond Tutu who emphasized on the principle of

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73 Samuel Maina/Rachael Kilonzo; “Government lays roadmap to address defilement cases in Machakos.” (www.kenyanews.go.ke).
truth telling and reconciliation. According to Costa, such values were based on African communities’ values, traditions and practices.\textsuperscript{75}

The South African Constitution recognises institution of traditional leadership and customary law. The Constitution also provides a robust bill of rights including group rights. Similarly the Constitution recognises customary practices as a source of law in the country. Further parliament of South Africa it has enacted the Traditional Leaders and Governance Act.\textsuperscript{76} Among other provisions, the Act is important in actualising constitutional provision in regard to institution of traditional leadership and governance. The Act also enabled creation and operation of traditional courts with mandate to handled cases under customary practices. Importantly the jurisdiction of courts is limited when it comes to dealing with serious criminal cases. According to Kayitare, the traditional courts have been found to be important in offering restorative justice.\textsuperscript{77} Such milestones are found to be important in strengthening the operation and functioning of traditional mechanisms of resolving disputes.

Rwanda experienced a worst form of genocide in 1994. The atrocities committed during the conflict left the Rwandan society fragmented and its social fabric weak. At the higher level, the Rwandan government with the support of international community established an international mechanism under the International Criminal Tribunal for Rwanda to try the main perpetrators of genocide.\textsuperscript{78} At the local level there was also need to establish mechanism of dealing with other cases and rebuilding the society. Kayitare finds that this was achieved through creation of Gacaca courts that was modelled from traditional justice system. The idea behind it was to deal with offenders and at the same time rebuild the society. Though the gacaca courts created to deal with issues that arose from the 1994 genocide were different from the traditional gacaca courts, the circumstances were different. Therefore the modern gacaca was crafted and modified to deal with huge magnitude and nature of criminal cases.\textsuperscript{79} The courts were to be conscious about appeasing the victims of conflict, deal with compensation, minimise the number of person to be imprisoned and at the same time enhance reconciliation and rebuilding of Rwandan society.

\textsuperscript{76} Traditional Leadership and Governance Act 2003.
Kayitare states that Gacaca proceedings were held in open places and members of the public were free to attend proceedings. The philosophy of the system was truth telling in public, seeking a public apology, reconciliation of parties and compensation of the victims of genocide. However as Clark reports, there were some aspects of fair hearing like legal representation and the manner of selecting adjudicators that were not observed.

Though gacaca courts were criticised in regard to the application of right to a fair hearing, considering the circumstances and magnitude of cases involved to a great extent the courts enabled reduction of cases of hatred and disunity in the society.

1.7 Adopting and streamlining Traditional Justice Systems within the Realm of the Constitution

Access to justice is provided as a human right in the Constitution. Similarly the Constitution broadens access to justice through recognition and promotion of alternative justice systems. It specifically recognises and requires promotion of traditional dispute resolution mechanism upon meeting specified requirements. This paper proposes adoption and recognition of resolution of disputes under traditional mechanisms but in a manner that conforms to constitutional requirements. This means the system should not contravene human rights, should not be contrary to morality and natural justice including providing an outcome that respects the same as well as being consistent with the Constitution and other written law. The judiciary has made a stride towards this by adopting the alternative justice systems policy framework 2020. The policy recommends use of autonomous alternative justice systems and also court annexed alternative justice systems. To strengthen TDRMS, parliament must enact a law establishing the structuring, composition, operation and functioning of traditional justice systems.

The accessibility and affordability of TDRMs is necessitated by their informal character. This means that when regulating them, their accessibility character in terms of rules, cost and closeness to the people must be addressed. Noting that circumstances in Rwanda and South Africa allowed modification of traditional courts, Kenya should not shy away from regulating

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and constituting TDRMs operations and functioning. This will enable them to operate and function within legal realm.

There is need to provide for intersection between the traditional justice systems and the courts. The Alternative Justice System Policy Framework has already recommended autonomous alternative justice systems and court annexed alternative justice systems. Constitutionally, Judiciary is the organ responsible for administration of justice. It therefore has a crucial role coordinating the operations and coordination of TDRMs. This includes mechanism of registering decisions arrived by TDRMs. This may also help in enforcement of TDRMs cases if societal pressure fails. Similarly such filing may provide a record to the court such that a dispute may not become a subject of litigation in future.

The composition of traditional justice system must adhere to constitutional principles. They must therefore observe international human rights standards and principles. This can be catered through living customary law that has provided for inclusion of all persons in decision making. Traditional institutions should embrace inclusion of women in their processes. Institutionalisation of TDRMs as seen in South Africa and Rwanda demonstrates that issues of gender representation can be dealt with by legislation.

Traditional justice systems must continue handling their proceedings in an open manner. They must allow the members of the public to be involved in seeking for solutions. Further parties involved in a dispute must be given an opportunity to state their case. In addition their right to call their witnesses must be respected as well as other rights protected within the Constitution.

In regard to criminal cases, and in light of Article 50 of the Constitution on the requirement offences being written, the state should provide for the scope and jurisdiction of TDRMs in dealing with specific offences. There are several cases that were handled under traditional justice system and can still be effectively and efficiently handled at this level. However, borrowing a leaf from South Africa under the Traditional Leadership and Governance Act jurisdiction and limitation of traditional courts in criminal cases should be done to ensure that dictates of justice are upheld.

Compliance with human rights standards as well as basic knowledge in written laws is paramount. There is need to train and enhance traditional leaders’ knowledge and awareness
on basic laws and human rights principles. This will in turn enable them to carry out their processes and make decisions that are in conformity with the Constitution.

As this paper reveals absorption of alternative dispute resolution mechanism broadens administration of justice in the society. Regulation and strengthening access to justice through traditional justice systems will ease cases filed in formal courts and in turn reduce backlog of cases. This will eventually enhance effectiveness and efficiency of courts in the country.

1.8 Conclusion

The main form of dispute resolution being court process has not been able adequately resolve all the justice needs of the society. Though court process remains an important avenue of resolving disputes in a country, it is coupled with some challenges that make them not available and accessible by a huge margin of the population. Some of the challenges facing formal court process are high costs, complex rules, long distances between courts and justice seekers and backlog of cases. To broaden avenues for access to justice and address some of the mentioned challenges, there is need to have alternative systems. This paper finds that alternative justice systems are important in enhancing administration of justice in the country. Specifically traditional justice systems have been found to be popular at the community level. It has been found to be still in use informally in communities. Unfortunately to a great extent the processes continue outside the mechanism and regulation of the state. Though TDRMs have been found to offer restorative and reconciliatory justice, sometimes they have violated some human rights. The paper argues that if traditional dispute resolution mechanism are adopted and regulated, they will broaden access to justice at the local levels. This will be realised if enactments are made to actualise operation and functioning of TDRMs as contemplated by the Constitution.