

TRADITIONAL DISPUTE RESOLUTION MECHANISMS UNDER ARTICLE 159 OF THE CONSTITUTION OF KENYA 2010

Kariuki Muigua*

1.0 Introduction

Traditional dispute resolution mechanisms (TDRM) are now well entrenched in Article 159 of the Constitution of Kenya, 2010 (hereinafter, 'the Constitution'). They are to be promoted by the courts and tribunals established thereof. This paper discusses traditional dispute resolution mechanisms in view of Article 159 of the Constitution. The author argues that where they have been used in managing conflicts they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective. The author begins the paper with a short background and then proceeds to examine the effect of Article 159 of the Constitution, the range of traditional dispute resolution mechanisms, implementation of traditional dispute resolution mechanisms and ends with a short conclusion.

2.0 Background

Before the advent of colonialism communities living in Africa and Kenya in particular had their own conflict resolution mechanisms. Whenever a conflict arose negotiations could be done by the disputants. In other instances the Council of elders or elderly men and women could act as third parties in the resolution of the conflict. Moreover, disputants could be amicably reconciled by the elders and close family relations and advised on the need to co-exist harmoniously.¹ As such traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence among the Africans.

Apart from the foregoing, there were certain institutions, principles, values and traditions that were crucial in the resolution of conflicts. These will be looked at later in depth. In a way, therefore, the existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others in Kenya is enough evidence that these

*Kariuki Muigua, PhD., LL.M, LLB (Hons) Nairobi, FCIArb, FCPSK, MKIM

The author wishes to acknowledge **Francis Kariuki**, **Mbiriri Nderitu** and **Timothy Njenga** for research assistance extended in preparing this paper.

¹This was common with broken marriages, especially in polygamous marriages where the potential for conflict was high due to many households. Conflicts also arose with regard to resource allocation and inheritance of property among family members.

concepts are not new in this country. They are practices that have been in application for a very long period.

Globally, the role of traditional dispute resolution mechanisms in the dispute resolution continuum has been noted over time with scholars stating that courts only deal with a fraction of all the disputes that take place in society². There are a myriad of disputes that do not reach the courts and that are resolved through informal negotiations by the disputants. Traditional dispute resolution is not a feature common in Africa only. In Sardinia an island in the Mediterranean Sea and part of the Italian nation traditional dispute resolution mechanisms including negotiation and mediation have been employed in the resolution of livestock disputes informally. Due to acute misery and poverty in Sardinia, livestock theft is seen as a means of survival, enrichment and social valor in the community. This often results in conflicts. The formal systems are not amenable in resolving these conflicts and the Sards normally use the indigenous legal system (negotiation and mediation) to resolve conflicts. According to the indigenous systems a shepherd who has lost his livestock is given moral support and the community offers to assist him search the animals and if unsuccessful in searching them they contribute to restore his flock.³

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been said that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.⁴ This is best exemplified by the South Africa's Truth and Reconciliation Commission, a rehabilitative, restorative rather than punitive form of justice which merged formal and informal procedures using the traditional methods of 'truth telling' to engender reconciliation. Similarly, so did Rwanda's endogenous *gacaca* which was

² Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law", *Journal of Legal Pluralism*, (1981) Vol. 19, p.3

³ Julio Ruffini, "Disputing Over Livestock in Sardinia" in Laura Nader & Harry Todd Jr (eds), *The Disputing Process: Law in Ten Societies*, (New York, Columbia University Press, 1978), 209-245

⁴ This is what has been done in Kenya that is, the including traditional dispute resolution mechanisms in Article 159 of the Constitution to operate alongside the formal justice systems.

motivated by the need to come up with creative solutions to bring about justice and reconciliation after the 1994 genocide. In Rwanda it was observed that the International Criminal Tribunal for Rwanda was slow, cumbersome, expensive and inefficient, while Rwanda's Courts could not cope up with the huge numbers of those awaiting trial.⁵ From both the South African and Rwandan experiences, one can clearly see the impact that traditional justice systems if modified to conform to international human rights standards can have in the resolution of disputes.

Consequently the recognition given to traditional dispute resolution mechanisms in the said Article 159 (2) (c) of the Constitution⁶ is thus a restatement of customary jurisprudence. They existed even before the other alternative dispute resolution mechanisms were invented. Nonetheless, both the traditional dispute resolution mechanisms and ADR mechanisms 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 measures.⁷

Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate. However, with the arrival of the colonialists, western notions of justice such as the application of the common law of England were introduced in Kenya. The common law brought the court system which, being adversarial by nature, greatly eroded the traditional conflict resolution mechanisms.

2.1 Resilience of Informal Systems in Africa

It should be noted that after almost a hundred years of neglect customary laws and other indigenous traditions have remained resilient.⁸ Okoth-Ogendo talks of a century of expropriation, suppression and subversion of informal social systems by the formal systems. He explains the resilience of customary land laws in several ways. Firstly, indigenous land laws operate as sets of social and cultural facts which provide an environment for the

⁵Sourced from, http://www.idea.int/africa/conflict_management_en.cfm, accessed on (18/01/2013).

⁶ This section categorizes traditional dispute resolution mechanisms under 'alternative forms of dispute resolution' putting them at a similar pedestal with reconciliation, mediation and arbitration.

⁷ Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p.73.

⁸ This is despite onslaught by the formal justice systems. In *Esiroyo v. Esiroyo* [1973] EA 338 and *Obiero v. Obiero* [1972] EA 227 the courts held that a first registration of land extinguishes customary claims, trust and rights.

operation of formal systems. Secondly, it is the realization that indigenous values and institutions still provide the only meaningful framework for the organization of social and economic livelihoods in Africa.⁹ That is why attempts have been made recently to recognize indigenous legal systems in relation to matters such as land¹⁰, dispute resolution and marriage.

In relation to marriage and their dissolution, courts have time and again ruled that there is a presumption of marriage in situations where there is cohabitation between a man and a woman and where they have lived as a husband and wife. This is exemplified by the case of *Peter Hinga v. Mary Wanjiku Yawe*¹¹ where the court held that the couple was married even though they had not undergone a formal marriage ceremony. This is a clear scenario of the operation of indigenous legal systems under the shadow of the law.

Of late there have been efforts by the National Assembly to enact Bills legislating on polygamy which is commonly practiced under African customary law. For example under the Marriage Bill of 2012 polygamy has been legalized and is not restricted to certain tribes or religions, that is it relates to Islamic, Christian, Hindu and traditional marriages. The above examples attest to the resilience of traditional customs and practices and their operation under the formal law. In marriages also traditional dispute resolution mechanisms have been most successful in resolving conflicts arising thereof. The Federation of Women Lawyers (FIDA) has particularly played a lead role in resolving family disputes using mediation. They have recorded success in this regard because unlike courts traditional dispute resolution mechanisms aims at creative solutions, are voluntary, flexible, cost-effective, fosters relationships and are not coercive.

3.0 Article 159 of the Constitution

⁹ HWO Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,' Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP,5-7

¹⁰ See Article 67 (2) (f) of the Constitution, which provides that one of the functions of the National Land Commission shall be to encourage the application of traditional dispute resolution mechanisms in land conflicts.

¹¹ Civil Appeal No. 94 of 1977 (Unreported). See also *Hortensiah Wanjiku v Public Trustee* Civil Appeal No 13 of. 1976

Due to the resilience of customary laws in the way social and cultural aspects of most Kenyans there was a need to incorporate customary laws within the legal framework. It is on this basis that traditional dispute resolution mechanisms are now recognized and protected in the supreme law of the land. They have been recognized as some of the mechanisms for managing conflicts in Kenya. Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or result to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.¹²

Though there are certain aspects of customary laws that do not augur well with human rights standards, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws. There is need for customary laws to be recognized at the same pedestal just like formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards. There is need for a change of attitude by the courts and the formal legal systems towards customary laws. This bias against customary laws has roots to the colonial days when the judicial attitude was that, though acceptable as being applicable in courts of law, customary laws were inferior to formal/English laws.¹³ This is the attitude depicted in Article 159 (3) of the Constitution. It is unfortunate that this judicial attitude still persists in Kenya today with its fetters on the application of customary laws in the Kenyan courts.

From Article 159 (1) it is clear that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.

¹² Article 159 (2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi. This partly reenacts and constitutionalizes the prerequisites to the applicability of customary law under section 3(2) of the Judicature Act, Cap. 8.

¹³ See generally the judges views in *R v. Amkeyo* (1917) 17 E.A.C.A and *Gwao bin Kilimo v. Kisunda bin Ifuta*, (1938)1 T.L.R 403.

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora), disputes are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system as they are very informal. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation.¹⁴ Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution under Article 11.

As it will be seen shortly, traditional dispute resolution mechanisms have been very effective in resolving conflicts especially natural resource-based conflicts among the pastoralist communities in Kenya. Such conflicts are intractable with complex cultural dimensions and the formal mechanisms of conflict management may not address the underlying causes of the conflict. Traditional justice mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people and help reduce backlog of cases in courts.

The only limitation to the application of these mechanisms is that they must not be used in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender-biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality. Justice and morality are however not defined in the Constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law, for instance disinheriting women in a succession dispute.

4.0 Resolution and Settlement

Traditional justice systems are resolution mechanisms. Where they have been employed they have been effective in managing conflicts and their declarations and resolution have been recognized by the government. This is exemplified for instance by the

¹⁴ Article 11 of the Constitution of Kenya

Modogashe Declaration in which members of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems, identifying role of peace committees among others. It also outlined decisions made by the community around these issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.¹⁵

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.¹⁶ Since resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.¹⁷ The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.¹⁸ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.¹⁹

Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings. Within conflict management literature resolution is often presented as being inherently superior to settlement as it deals with the root causes of the conflict and negates the need for future conflict or conflict management. Resolution is contrasted with settlement. The latter is a potentially damaging half-measure which leaves the root causes of the conflict unaddressed

¹⁵ See generally, CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, available at, www.cewarn.org, (accessed on 30/08/2012)

¹⁶David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153

¹⁷ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

¹⁸ Ibid

¹⁹ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

and hence the possibility of the conflict later flaring up while a resolution addresses the root causes of the conflict.²⁰

On the other hand, a settlement is informed by the power possessed by the parties to the conflict. In a conflict then a settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing the process becomes a contest of whose power will be dominant. Power therefore defines both the process and the outcome in a settlement.²¹

A settlement process, “seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute”.²² Due to its superficial nature settlement is only reached over the issues of the conflict. As such a settlement may be an effective immediate solution to a violent situation and it will therefore not address the factors that instigated conflict in the first place.

It has been observed that settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties’ relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms are prone to flare up again in future leading to conflicts.²³ Mediation in the traditional concept led to a resolution. Mediation in this context is different from the mediation envisaged in Sections 59A-59D of the Civil Procedure Act²⁴ which envisages a court-annexed mediation. Court-annexed mediation results in a settlement rather than a resolution due to the lack of voluntariness and party autonomy.

5.0 Traditional Dispute Resolution Mechanisms

²⁰ J. Bercovitch, “Mediation Success or Failure: A Search for the Elusive Criteria”, *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

²¹ Claire Baylis and Robyn Carroll, “Power Issues in Mediation”, ”, *ADR Bulletin*,Vol.7, No.8 [2005],Art.1, p.135

²² Ibid, pg.135

²³ A.B. Fetherston, “From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia”, *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8

²⁴ Civil Procedure Act, Cap. 21 Laws of Kenya, *Government Printer*, Nairobi

5.1 Negotiation

This is the most widely used mechanism for dispute resolution. It is customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources and coming up with amicable solutions without resort to courts. In Kenya today, many conflicts are being resolved through negotiation. Even in the traditional or daily lives of many Kenyans many conflicts were resolved through negotiations.

In negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties room to come up with creative solutions. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.²⁵ As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome is arrived at in negotiation it is one that satisfies both parties and addresses the root causes of the conflict and that is why negotiation is a conflict resolution mechanism.

In appropriate cases courts should be at the forefront in encouraging parties to negotiate so as to come up with mutually acceptable solution and allow for the expeditious resolution of their dispute. This could happen for example in family disputes. It has happened in many cases before courts, where the judge or magistrate asks the parties or their advocates to negotiate and then record consent.

5.2 Mediation

Mediation in traditional dispute resolution is a very informal process. It is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the

²⁵ See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994); Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981), p.4.

negotiations between the parties.²⁶ Mediation is thus a continuation of the negotiation process in the presence of a third party.

It is voluntarily entered into, parties' exhibited autonomy in the choice of the mediator, over the process and the outcome. It is effective, efficient, depicted fairness and addressed power imbalances among parties. Such mediations result in a resolution of the conflict as opposed to a settlement. The outcome of the process is acceptable to the parties and enduring. An example of the use of mediation informally to resolve conflicts is the peace committees in Northern Kenya among the Pastoralist communities.

The earliest models of peace committees were used in the North Rift and Western Regions by the National Council of Churches of Kenya (NCCCK) where it led in the development of Village Peace and Development Committees (VPDCs). Later, Peace Committees borrowing heavily from the NCCCK model were formed by POKATUSA (Pokot, Karamojong, Turkana and Sabinu), a World Vision's cross-border peace building Project.²⁷ One such committee is the Wajir Peace and Development Committee inspired the formation and strengthening of peace committees in various parts of the country notably Garissa, Mandera, Isiolo, Samburu, the POKATUSA cluster among others.²⁸ The main attractive feature of the Wajir Peace and Development Committee is that the local people owned the process of mediation and the outcome of the process has been enduring. This is the main essence of resolution as opposed to mere settlement of the issues in the conflict.

Local peace dialogues, negotiations and reconciliation meetings often result to peace and harmonious co-existence. If such conflicts are to be lodged in a court of law it would be difficult for the underlying causes to be addressed hence the recognition of the role of traditional dispute resolution mechanisms in the constitution.²⁹

²⁶Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006),p.115

²⁷ Mohamud Adan and Ruto Pkalya, "*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*", (Practical Action, Nairobi, 2006), pg. 7.

²⁸ Ibid, pg.7

²⁹ Andries Odendaal, "Local and Peace and Development Committees in Kenya", an unpublished paper forming part of a study commissioned by the *United Nations Development Programme's Bureau for Crisis Prevention and Recovery (BCPR) titled Local Peacebuilding and National Peace Architectures: Lessons Learned from Local peace Forums; a Working Paper*, pp. 6-7

5.3 Problem-Solving Workshop

This is a conflict resolution mechanism. Though used in formal systems it is a traditional and informal mechanism whose focus is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. It tries to understand the root causes of the conflict. When the parties have understood the causes of the conflict they can then ultimately resolve the conflict. It is a more analytical mode of managing conflicts and that is why it resolves because the nature and sources of particular conflicts will have been known.³⁰ It could for example be employed intractable conflicts and other complex cases where analysis is vital in the effective determination of the dispute.

6.0 Other Traditional dispute resolution Mechanisms

Apart from the foregoing there are other concepts and mechanisms that are used in conflict resolution by many Kenyan communities. These included;

6.1 Council of Elders

This is a common mechanism that has been used in resolving conflicts in many areas in Kenya. It is also a common institution in almost all communities in Kenya. The institution of *Wazee* exists in almost all communities in Kenya. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment.³¹

Among the Pokot and Marakwet the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is

³⁰ M. Light, "Problem-Solving Workshops: The Role of Scholarship in Conflict Resolution" in M. Banks (ed), *Conflict in World Society: A New Perspective on International Relations* (Brighton: Wheatsheaf Books, 1984) pp. 146-160; See also A.B. Fetherston, "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 4-8

³¹ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 30/08/2012). p. 8.

composed of respected, wise old men who are knowledgeable in the affairs and history of the community.³²

The council of elders among the Agikuyu community was referred to as the '*Kiama*' and used to act as an arbitral forum or mediator in dispute resolution. These elders and institutions were accessible to the populace and their decisions were respected. This notion is in consonance with the earlier assertion that mediation has been practiced by Kenyan communities for centuries only that it was not known as mediation. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of resources. In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community disputes such as those involving use and access to natural resources among the communities in Kenya.

6.2 Consensus Approaches

Traditionally the *consensus approach* was used where resolutions were attained on the basis of consensus rather than on winner-takes-all approach. Consensual outcomes were highly regarded as they created confidence as party had autonomy over the process. Thus the decision of the elders was effective, durable and long lasting. An agreement reached through consensus could be communicated to the whole community and affirmed as a social contract in a ritual way. This was done to pass the news of the satisfactory conclusion of the conflict resolution process. In terms of implementing the agreement the parties and the entire community followed up to confirm compliance with the agreement.³³

6.3 Role of Local Elders in Conflict Resolution

Traditional local leaders including male and female elders played a pivotal role in conflict management. Due to their wide powers, knowledge, wisdom and the respect they were accorded in the society they could resolve family conflicts and conflicts related to natural resources. There are some conflicts that come to courts that could well have been handled by the local elders in a community or the Local administration such as the chief.

³² See generally, a Report by Ruto. P, Mohamud .A, & Isabella .M (eds. Betty Rabar & Martin Karimi) *Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet Communities*, (ITDG, Nairobi, 2004)

³³Karugire S.R, *A Political History of Uganda*, (Fountain Publishers, Kampala, 2010), pp. 1-16; See also Ayot H.O, *A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940*, (KLB, Nairobi, 1979), pp. 177-190

There are many disputes that are reported to chiefs and other local administrators everyday and resolved without moving to court. Recognizing the role played by such leaders in their locality in dispute resolution will ease access to justice and bring it to the people. Such opportunities are the ones that are being evinced by article 159 of the constitution.

The success of the above mechanisms in conflict management was due to the strong values held by the people *inter alia*, communal living, respect for one another and environment, reciprocity, kinship ties, age-grade systems and joking relations. The traditional and cultural ties still exist among many Kenyans. Conflicts for example arising among kinsmen with such strong ties may not be amicably resolved in courts. Such conflicts would best be resolved through traditional conflict resolution mechanisms so as to foster and preserve relations.

7.0 Implementation of Traditional Dispute Resolution Mechanisms

Before the promulgation of the Constitution of Kenya 2010, it used to be contended that one of the main barriers to accessing justice in Kenya was the lack of awareness and recognition of traditional dispute resolution mechanisms.³⁴ Traditional dispute resolution mechanisms are now expressly recognized by the Constitution. So as to realize access to justice these mechanisms must be effectively embedded within the justice system. A legal and policy legal structure should be developed to effectively link these mechanisms with the formal court systems. Caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration. The legal environment has swallowed arbitral practice in Kenya. It has become a court process in which lawyers use court technicalities to derail the process. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice.

A framework should also be formulated providing that before parties file a case in court, they should first exhaust traditional dispute resolution mechanisms in appropriate disputes so as to ease backlogs in courts. For instance a boundary dispute should first be looked into at the local level by the elders or recognized council of elders through negotiations and informal mediations before they are brought to court. Mediations

³⁴ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *op. cit*

conducted in such a forum are distinguishable from court-annexed mediation as envisaged in section 59A-59D of the Civil Procedure Act. Whereas court-annexed mediation is a legal process leading to a settlement informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships.

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a criterion for selecting elders, areas of jurisdiction and the types of disputes that are to be handled by the elders or a community dispute resolution committee. Such dispute resolution committees should take cognizance of the devolved units.

It should be noted that though traditional dispute resolution mechanisms have been recognized in the Constitution, they are to operate under the shadow of the law. This will have serious implications for instance when it comes to the operationalization of community land rights under Article 63 of the Constitution. Here it seems the informal systems may not be effective in protecting community land rights as they are still subject to formal laws.

On the other hand there are traditions, cultural norms and practices that are repugnant and contrary to written laws and that hinder the participation of women in conflict management and which should be discarded or realigned to conform to international human rights standards. This is because the participation of women in various conflict resolution fora as they are the majority of the victims of conflicts is essential. Their role as carriers of life and as agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace either directly or through creation of peace networks among warring communities. Their participation in conflict resolution should thus be enhanced.

8.0 Conclusion

Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict continuum has been recognized in the Constitution. They include negotiation, reconciliation, informal mediation, council of

elders, local elders, problem-solving workshops among others. The constitutionalisation of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise traditional dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if traditional conflict resolution mechanisms can be applied and linked up well with courts and tribunals.

References

A.B. Fetherston, "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000)

Andries Odendaal, "Local and Peace and Development Committees in Kenya", an unpublished paper forming part of a study commissioned by the *United Nations Development Programme's Bureau for Crisis Prevention and Recovery (BCPR) titled Local Peacebuilding and National Peace Architectures: Lessons Learned from Local peace Forums; a Working Paper*

Constitution of Kenya 2010, *Government Printer, Nairobi.*

CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, available at, www.cewarn.org, (accessed on 30/08/2012)

Claire Baylis and Robyn Carroll, "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1

Civil Procedure Act, Cap. 21 Laws of Kenya, *Government Printer, Nairobi*

David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995)

HWO Okoth-Ogendo, '*The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*,' Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP.

J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289

Julio Ruffini, "Disputing Over Livestock in Sardinia" in Laura Nader & Harry Todd Jr (eds), *The Disputing Process: Law in Ten Societies*, (New York, Columbia University Press, 1978)

Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

Karugire S.R, *A Political History of Uganda*, (Fountain Publishers, Kampala, 2010), pp. 1-16; See also Ayot H.O, *A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940*, (KLB, Nairobi, 1979)

Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006)

Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law", *Journal of Legal Pluralism*, (1981) Vol. 19

Mohamud Adan and Ruto Pkalya, "*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*", (Practical Action, Nairobi, 2006)

M. Light, "Problem-Solving Workshops: The Role of Scholarship in Conflict Resolution" in M. Banks (ed), *Conflict in World Society: A New Perspective on International Relations* (Brighton: Wheatsheaf Books, 1984)

"Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994); Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981)

Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007)

Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 30/08/2012)

Ruto. P, Mohamud .A, & Isabella .M (eds. Betty Rabar & Martin Karimi) *Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004)