

# **Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR**

## **Francis Kariuki\***

### ***Abstract***

*The Constitution of Kenya 2010, provides a firm legal basis for the application of traditional dispute resolution mechanisms. It presents courts and tribunals with the opportunity to apply these mechanisms in a wide array of disputes, including in criminal cases. Traditional dispute resolution systems are anchored and firmly embedded in the customs and traditions of communities and thus being part and parcel of their lives. These processes have been applied by communities in settling disputes of a civil and criminal nature. Consequently, they have the potential to enhance access to justice and strengthen adherence to the rule of law as they promote social justice and foster harmonious co-existence.*

*Using the court decision in *Republic v Mohamed Abdow Mohamed* [2013] eKLR, as a springboard, the paper examines the applicability and/or appropriateness of traditional dispute resolution mechanisms in settling criminal cases. The paper argues that the scope of Article 159 of the Constitution is wide enough to apply to criminal matters. It also puts forth the argument that whereas courts aim at punishing the accused persons thus retributive in nature, traditional justice system proffers restorative justice. It is argued that by encouraging restorative justice in criminal matters, these mechanisms can promote social cohesiveness, peace, social justice and development. The paper also discusses the challenges and prospects in the use of traditional dispute resolution mechanisms in Kenya.*

### **1.0 An Overview of Decision in *Republic v Mohamed Abdow Mohamed* [2013] eKLR<sup>1</sup>**

In this case, Mohamed Abdow Mohamed was charged with the murder of Osman Ali Abdi. The offence was jointly committed with others not before court on 19<sup>th</sup> October 2011 at Eastleigh, 10<sup>th</sup> Street in the Starehe District within Nairobi County. When arraigned in court, the accused pleaded not guilty to the charge. The trial was set to commence on 26<sup>th</sup> March 2012. However, on the hearing day, Mr. Kimanthi for the State informed the court that Mr. Bonyo, Counsel on record holding brief for the deceased's family had written to the Director of Public

---

\*LLB, LLM, MCI Arb and Lecturer at Strathmore University Law School. This paper was delivered during a Conference commemorating the 30 years of CI Arb's work in Kenya under the theme, "Broadening Access to Justice through ADR-30 Years On," on 7<sup>th</sup> & 8<sup>th</sup> August 2014 at the Sarova Whitesands Hotel in Mombasa, Kenya.

<sup>1</sup> Criminal Case No. 86 of 2011, High Court at Nairobi.

Prosecutions (DPP) requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. On the instructions of the DPP, Mr. Kimanthi made an oral application in court to have the matter marked as settled citing Article 159 of the Constitution. The court allowed the application and discharged the accused citing Article 157 of the Constitution under which the DPP is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. According to the court, the ends of justice would be met by allowing the application rather than disallowing it.

## **2.0 Understanding Traditional Dispute Resolution Mechanisms (TDRMs)**

Traditional dispute resolution mechanisms are all those mechanisms that local or rural communities or peoples have applied in managing disputes/conflicts since time immemorial and which have passed from one generation to the other. Such mechanisms have been described using different tags. Terms such as African, community, traditional, non-formal, informal, customary, indigenous and non-state justice systems, are often used interchangeably in describing localized and cultural-specific dispute resolution mechanisms. They are embedded in the culture and customs of communities especially those found in rural areas.<sup>2</sup> As such they vary from community to community. Although they predate colonial times, they have undergone some changes over time as a consequence of the introduction of Western legal systems in Africa. In Kenya, traditional dispute resolution mechanisms have remained resilient despite the onslaught by the formal legal system. Communities continue to apply remnants of traditional justice systems in settling disputes in Kenya. At the heart of these mechanisms is the fact that they are embedded in African customary laws. They are thus anchored on African traditional norms and values, and hence part and parcel of the social fabric. It is partly because of this reason, that the colonial administration in Kenya retained aspects of African customary law within the legal framework to ensure social ordering and stability.<sup>3</sup> Consequently, in recognizing African customary law subject to the repugnancy clauses, the colonial powers were also implicitly recognizing and validating traditional justice systems. However, as argued later in this

---

<sup>2</sup> Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, p.11, available at <http://www.gsdr.org/docs/open/SSAJ4.pdf>, accessed on 01/04/2014.

<sup>3</sup> Section 3, Judicature Act, Cap.8.

paper, subjecting customary law to the repugnancy clause has also contributed greatly to the destruction of traditional justice systems.

An underlying theme common to most traditional dispute resolution mechanisms, is the fact that they are concerned with the restoration of relationships, peace-building and parties' interests as opposed to the allocation of rights between disputants.<sup>4</sup> They therefore seek, to a great extent, to promote restorative justice as opposed to retributive justice. In this regard, Allot notes that the central theme within traditional dispute resolution mechanisms is "*the notion of reconciliation or the restoration of harmony*" in the community. He asserts that harmony cannot be realized "*unless the parties are satisfied that justice has been done.*"<sup>5</sup> On his part Elechi posits that traditional justice systems apply restorative and transformative principles in conflict resolution. This is so because the victims, offenders and the entire community are involved and participate in the definition of harm and in the search for a solution acceptable to all stakeholders.<sup>6</sup> To firm up this view, Zehr notes that restorative justice focuses more on the needs of victims, communities and offenders as the decisions are community oriented with little damage and nobody is excluded.<sup>7</sup>

Oricho observes that traditions and values undergirding traditional dispute resolution mechanisms were restorative in handling criminal offenders. Restorative justice prefers collaborative, inclusive processes and outcomes that are mutually agreed upon rather than imposed. Offenders must acknowledge and take responsibility for their actions to receive proper punishment, healing and forgiveness. The results of the justice system must repair broken relationships and address the causes of the crime while meeting the needs of victims-offenders and communities. The Council of elders was a plausible alternative in building trust and eventually improving damaged relationships.<sup>8</sup> As indicated by Johnstone, restorative justice represents a major paradigm shift to crime and justice and how society relates to offenders. In the Council of elders' system of leadership, each member has a sense of belonging and the right to be

---

<sup>4</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," (ICJ, 2011), p. 32.

<sup>5</sup> A.N. Allott, "African Law," in Derrett, J.D *An Introduction to Legal Systems*, (Sweet & Maxwell, 1968), pp. 131-156.

<sup>6</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

<sup>7</sup> H. Zehr, *The Little Book of Restorative Justice*, (PA, Good Books, 2002).

<sup>8</sup> D. O. Oricho, "Understanding the traditional Council of Elders and restorative justice in conflict transformation," available at <http://www.sjweb.info/sjs/pjnew/pjshow.cfm?PubTextID=8449>, accessed on 01/04/2014.

heard. The term commonly used by the community was 'WE' not 'I' as in individualistic communities.<sup>9</sup>

Some of the salient features of traditional justice systems are that: they view the problem as that of the whole community or group; they put emphasis on reconciliation and restoration of social harmony; traditional arbitrators are community members appointed on the basis of status or lineage; there is a high degree of public participation ; customary law is one of the factors considered in reaching a compromise; the rules of evidence and procedure are flexible; there is no legal representation; the process is voluntary and the decision is based on agreement; penalties are restorative; enforcement of decisions is secured through social pressure or fear of curses; the decision is confirmed through rituals aiming at reintegration; and like cases need not be treated alike.<sup>10</sup>

Traditional dispute resolution mechanisms have in the past been neglected and treated with utter contempt by formal courts. This is as a result of the notion that African culture is inferior, archaic and uncivilized compared to western cultures. However, due to challenges in accessing justice in courts particularly by the poor, TDRMs are now beginning to gain currency. The myriad challenges encountered in litigation are pushing people back to TDMRs. Litigation is often regarded as slow, expensive and cumbersome.

### **3.0 Traditional Dispute Resolution Mechanisms and Customary Law**

As already pointed out, traditional justice systems are anchored and firmly embedded in the traditions, customs and practices of local communities. Their success in promoting access to justice is therefore largely dependent on the protection and recognition of African customary law. This is in consonance with the view among structural-functionalist anthropologists that patterns of social ordering determine the justice systems in any given society.<sup>11</sup>

However, despite the strong linkages and interconnections between customary law and traditional conflict management systems, customary law has been suppressed, undermined and destroyed and its remnants denied recognition within the legal system for a long time in Kenya. Colonialism set the stage for this state of affairs by imposing on Africans an English legal system. At independence, the country adopted the formal justice system informed by the western

---

<sup>9</sup> *Ibid*; J. Gerry, *Restorative Justice: Ideas, Values, Debates*, (Willan Publishing, 2002).

<sup>10</sup> *Ibid*, p. 22.

<sup>11</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," *Op. cit.*

view of justice. The prevailing view then, was that traditional governance institutions including dispute resolution mechanisms, would be an obstacle to development and that as the country modernized they would die. This was not to be because traditional governance institutions have continued to coexist with formal legal systems. This has created a plurality or duality of justice systems which persists even today under which customary law is seen as being inferior ‘law’. Some have attributed the resilience of traditional justice systems to the inefficiency, inefficacy or inadequacy of the formal justice systems in reaching to local communities. It is also said that formal justice systems are also inappropriate in handling disputes that are not rule-oriented and that are communal in nature.<sup>12</sup>

Under the current legal framework, customary law is one of the sources of law applicable in Kenya so long as it is not inconsistent with the Constitution.<sup>13</sup> Additionally, the Constitution recognizes the culture and heritage of the Kenyan people and enjoins the State to promote the cultural diversity of the Kenyan people.<sup>14</sup> Further, the Judicature Act also lists customary law as a source of law, applicable in civil disputes where one or more of the parties are subject to it or affected by it and so long as it is not repugnant to justice and morality.<sup>15</sup> Although, customary law is one of the applicable sources of law in Kenya, its application is limited to certain civil and not criminal matters. Thus, the Magistrates’ Court’s Act restricts the civil cases to which African customary law may apply. These matters are land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as not governed by any written law.<sup>16</sup> In *Kamanza Chiyaya v Tsuma*, the High Court held that the above list of claims under customary law was exhaustive and it excludes claims in tort or contract.<sup>17</sup> It is my contention that under the Constitution of Kenya 2010, customary law can apply to a very wide array of civil and criminal cases.<sup>18</sup>

---

<sup>12</sup> *Ibid.*

<sup>13</sup> Article 2(4), Constitution of Kenya.

<sup>14</sup> *Ibid.*, Article 11.

<sup>15</sup> Section 3(2), Judicature Act, Cap. 8.

<sup>16</sup> Section 2, Magistrates’ Court’s Act, Cap. 10.

<sup>17</sup> Unreported High Court Civil Appeal No.6 of 1970.

<sup>18</sup> This is however subject to Articles 2(4) and 159(3) of the Constitution 2010.

In spite of customary law, being one of the sources of law, it is an uncodified source of law. As such, and because the main source of information about customary law is tradition, customary law has to be proved through expert witnesses, literature and past court decisions.<sup>19</sup> It, therefore, has to be proved just like any other fact in dispute thus undermining it and limiting its utility in the justice system.

In some jurisdictions, courts have understood customary law liberally as including not only 'official' customary law, the version codified or recorded by colonial masters, but also 'living' customary law. 'Living' customary law is that which grows out of processes of adaptation and change that reflect the voices, views and struggles of a range of different interests and sectors in rural society.<sup>20</sup> It changes with times, from one generation to the other. Williams and Fayker describes 'living' customary law as the development of law by those who live it.<sup>21</sup> The custom would have to be established, and the duty of the court would be to develop it in line with the Bill of Rights.<sup>22</sup> Because of the fluidity of customary law, its legislation may hamper its development. This means that since traditional dispute resolution mechanisms are based on customs and traditions, legislating on these mechanisms may lead to inflexibility, underdevelopment and destruction of African customary law.

Because of the low place that customary law occupies in the Kenyan legal system, traditional dispute resolution mechanisms have been subjected to the litmus test of repugnancy or being contrary to the Bill of Rights for instance if they are discriminatory, gender biased or against the rules of natural justice. In *R v Mohamed Abdow*, traditional dispute resolution mechanisms were given effect to by the court because they were in accordance with the customs of the two families concerned. Parties felt that justice could only be done and seen to be done through the application of customary law. This is what could foster social cohesiveness, co-existence and communal living. It is evident then, that fixation to legal formalism and dogma that castigates customary or traditional norms that aids in access to justice, should be abandoned. Traditional dispute resolution mechanisms are a part of the culture of the Kenyan people and that is why they are recognized in the Constitution.

---

<sup>19</sup> P. Kameri-Mbote & M. Aketch, "Justice Sector and the Rule of Law," (Open Society Foundations, 2011), p.174.

<sup>20</sup> J. Williams & H.A. Fayker, "Women's Access to Justice-Evidence, Custom and Equality," Perspectives Issues 3 (2013), 12-14.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

#### 4.0 Legal Framework for Traditional Dispute Resolution Mechanisms

Apart from being anchored on customary law, which is one of the sources of law in Kenya, traditional justice systems are explicitly recognized within formal laws. There are numerous provisions in our laws that allow for the application of traditional dispute resolution mechanisms.<sup>23</sup> Article 159 (2) (c) of the Constitution entreats the courts and tribunals in exercising judicial authority to be guided by, *inter alia*, the principle that:

*“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);”*

However, traditional dispute resolution mechanisms are not to be applied 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 the Constitution or any written law.<sup>24</sup>

One of the principles of the land policy in Kenya is that land is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in a way that encourages communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>25</sup> In addition, one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>26</sup> Further, the Marriage Act 2014 provides that parties to a customary marriage may undergo through a process of conciliation or customary dispute resolution mechanisms before the court may determine a petition for the dissolution of the marriage.<sup>27</sup> There are several other laws providing for the use of traditional justice systems in different contexts.

It remains to be seen how traditional dispute resolution mechanisms will be operationalised in the different areas where they are applicable. Some important aspects about TDRMs to reflect upon include the following. Firstly, although each of the ethnic tribes in Kenya has conflict management mechanisms, they are not yet documented. This portends a challenge in using them, and that is why even customary law has to be proved before a court of law. Secondly, what criteria should be used in deciding whether certain matters not expressly provided for in the Constitution are amenable to TDRMs, for example in criminal cases?

---

<sup>23</sup> See generally the Penal Code Cap. 63, Criminal Procedure Code Cap. 75 and the National Cohesion and Integration Act No. 12 of 2008.

<sup>24</sup> Article 159(3), Constitution of Kenya 2010.

<sup>25</sup> *Ibid*, Article 60(1) (g).

<sup>26</sup> *Ibid*, Article 67(2) (f). See also Section 5(1) (f) of the National Land Commission Act, Act No. 5D of 2012.

<sup>27</sup> Section 68(1), Marriage Act 2014.

Fourthly, does the Constitution limit the application of TDRMs to certain matters, for example civil matters? Fifthly, is there need for traditional customary courts that run parallel to the normal court system? Sixthly, if we are to have, traditional courts who would head them? And lastly, can there be legal representation before a traditional court or forum? Is it judges, magistrates, local leaders, traditional elders, chiefs, family heads, men or women? These are some of the issues that need reflection upon as we move towards implementing the constitutional provisions touching on TDRMs.

## **5.0 Traditional Dispute Resolution Mechanisms and Access to Justice**

Access to justice is a broad concept that is not easy to define. It may refer to a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.<sup>28</sup> It could also refer to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. Further, it refers to a fair and equitable legal framework that protects human rights and ensures delivery of justice.<sup>29</sup> It also refers to the opening up of formal systems and structures of the law to disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>30</sup> Access to justice could also include the use of informal dispute resolution mechanisms such as Alternative Dispute Resolution (ADR) mechanisms and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable. This is the sense in which access to justice is discussed in this paper. On their part, courts have said that access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision

---

<sup>28</sup> M.T. Ladan, "Access to Justice as a Human Right under the Ecowas Community Law," available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->, (accessed on 19/04/2014).

<sup>29</sup> *Ibid.*

<sup>30</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (accessed on 09/03/2014).



of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.<sup>31</sup>

Courts have also opined that the right of access to justice in the Constitution requires us to look beyond the dry letter of the law, and that it is a reaction to and a protection against legal formalism and dogmatism.<sup>32</sup> Article 48 must be located within the Constitutional imperative that recognizes the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice, the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized. It is within the legal processes that the rights and fundamental freedoms are realized. Therefore, Article 48 invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

Recognition of traditional dispute resolution mechanisms in the Constitution must be understood within this context. TDRMs are accessible, flexible and inexpensive. They do not employ technicalities as complex as courts do and use local languages that are easily understood by parties. There is no need for legal representation under TDRMs. They therefore have the potential to enhance access to justice. Article 48 of the Constitution enjoins the State to ensure access to justice for all persons and if any fee is required, it shall be reasonable and not impede access to justice. Judicial authority is to be exercised to ensure justice is done to all irrespective of status; justice is not delayed and that justice is administered without undue regard to procedural technicalities. TDRMs bring about reconciliation and harmony meaning that justice is done to all. It also ensures the expeditious resolution of disputes without regard to technicalities.

To ensure access to justice through TDRMs a number of issues have to be reflected upon. First, should TDRMs be formalized or should they operate as stand-alone traditional customary courts? Formalization of TDRMs may mean that these mechanisms will suffer from the challenges that have impeded access to justice within formal systems. However, formalizing may engender compliance with the Bill of Rights. The advantage of having traditional customary courts is that they may allow for the application of customary law by experts in customs and traditions from different communities. However, where traditional courts are in place they have,

---

<sup>31</sup> *Dry Associates Limited v Capital Markets Authority & another* Nairobi Petition No. 358 of 2011 (Unreported).

<sup>32</sup> *Kenya Bus Service Ltd & another v. Minister of Transport & 2 others* [2012] eKLR.

*inter alia*, been blamed for undermining women rights by focusing on the powers of traditional leaders, thus perpetuating patriarchy.

In the *Mohamed case* the Court and the DPP's office accepted the settlement as suggested by the parties themselves. If TDRMs are to be integrated in the court system, the process must give the parties autonomy in the resolution of their dispute. Nonetheless, in this case the court would have to determine whether the alleged custom is unconstitutional, repugnant to justice and morality or contravenes the Bill of Rights. In satisfying itself that the constitutional threshold is met, the court needs to consider the constitution in totality. The judge must bear in mind that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.<sup>33</sup>

Secondly, what matters should be amenable for resolution through traditional justice systems? The legal framework in Kenya allows for limited application of customary law in civil cases.<sup>34</sup> The implication is that traditional justice systems may apply in civil cases subject to those limitations. However, in criminal cases the view has been that traditional justice systems cannot apply to criminal cases. This is not entirely correct as will be demonstrated shortly. But in implementing traditional justice systems so as to enhance access to justice, what kind of criminal cases, when (for example, at what stage of the criminal justice process) and how are the mechanisms to be applied? This is not expressly provided in the law and some form of regulation would be appropriate in applying traditional justice systems in criminal cases. The writer suggests how traditional justice systems are to be regulated in subsequent parts of this paper.

## **5.1 Restorative Justice vis-à-vis Retributive Justice**

Traditional dispute resolution mechanisms bring about restorative rather than retributive justice. Retributive justice postulates that punishment for a crime is acceptable as long as it is proportionate to the harm caused.<sup>35</sup> Retributive justice is premised on three principles. Firstly, those who commit certain kinds of wrongful acts, mostly serious crimes, morally deserve to suffer a proportionate punishment. Secondly, that it is intrinsically and morally good for

---

<sup>33</sup> Article 259, Constitution of Kenya, 2010.

<sup>34</sup> Section 2, Magistrates' Court's Act, Cap. 10.

<sup>35</sup> W. Alec, "Retributive Justice", *The Stanford Encyclopedia of Philosophy* (Fall 2014 Edition), Edward N. Zalta (ed.), forthcoming URL = <<http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/>>.

someone to mete out punishment to offenders. And thirdly, that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.<sup>36</sup> The idea of retributive justice has played a dominant role in theorizing about punishment over the past few decades.<sup>37</sup>

Restorative processes bring those harmed by crime or conflict, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward. In criminal justice, restorative processes give victims the chance to tell offenders the real impact of their crime, to get answers to their questions, and an apology. Restorative justice holds offenders to account for what they have done, helps them understand the real impact of what they've done, to take responsibility and make amends.<sup>38</sup>

Restorative justice has, at its heart, the notion of victim and offender coming face-to-face as part of a restorative process for those involved. It is a process for resolving crime that focuses on redressing the harm done to victims, while holding offenders to account and engaging the community in the resolution of conflict. The main goal of restorative justice is to provide opportunities for both victims and offenders to be involved in finding ways to hold the offender accountable for their offending and, as far as possible, repair the harm caused to the victim and community.<sup>39</sup>

The principles that undergird restorative justice process are, *inter alia*, that:<sup>40</sup> they are voluntary; flexible; responsive; both the victim and offender participate fully and are informed; offender is held accountable and they ensure the emotional and physical safety of participants. Traditional justice systems are grounded on these principles. Reconciliation of parties and restoration of social harmony are at the heart of traditional justice systems.<sup>41</sup> Even the penalties under TDRMs, usually focus on compensation or restitution so as to restore the *status quo* but

---

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Available at [http://www.restorativejustice.org.uk/what\\_is\\_restorative\\_justice](http://www.restorativejustice.org.uk/what_is_restorative_justice), (accessed on 08/08/2014).

<sup>39</sup> Available at <http://www.justice.govt.nz/policy/criminal-justice/restorative-justice>, (accessed on 08/08/2014).

<sup>40</sup> *Ibid.*

<sup>41</sup> See the *Abunzi* or Mediation Committees in Rwanda which settle disputes, reconcile the conflicting parties and restore harmony in the community, available at <http://www.rwandapedia.rw/explore/abunzi>, (accessed on 08/08/2014).

not to punish the offender.<sup>42</sup> However, sometimes traditional justice forums may order the restitution of, for example, twice the number of the stolen goods to their owner, “especially when the offender has been caught in *flagrante delicto*” and fines may be levied. Imprisonment has never existed as a penalty for any offence. Corporal punishment, however, has been and continues to be administered by a number of traditional systems in Africa – almost invariably on juvenile offenders, but never on women or girls.

Formal justice systems have for long focused and overemphasized on meting out some form of punishment for wrongdoing. Virtually all the statutes that regulate law and order in Kenya prescribe a punishment for every kind of offence committed. The rationale has always been that those who commit wrongful acts should be punished even if punishing them would serve no other purpose than just punishing them. In this regard, the formal justice system promotes retributive justice and does not seek to bring affected parties together to resolve the issues affecting them. The State does not deal adequately with the issues that may arise in the post-punishment period. Its focus is short term and fails to deal with the concerns of the victims, their families and larger community. This partly explains why our prisons are full of prisoners, some serving sentences over petty offences which would have been resolved through the application of traditional justice systems where offenders would be reconciled with the victims.<sup>43</sup>

Although, a crime is an act against the state and therefore the state has the right to determine what punishment suffices for a particular crime, some form of balancing between restorative and retributive justice is necessary. It has to be realized that tax payers’ money is expended in keeping prisoners in prisons. In addition, punishments meted out by courts may harden criminals and thus lower their deterrent role.. Imprisonment also tends to exclude prisoners from their communities, and after imprisonment they are seen as outcasts in the society. Formal justice systems do not have appropriate mechanisms for integrating offenders into the society as does traditional justice systems. They also ignore the victim because the focus is on meting out a punishment.

---

<sup>42</sup> S. Merry, “The Social Organisation of Mediation in Non-industrialised Societies: Implications for Informal Community Justice in America,” in Abel (ed) *The Politics of Informal Justice*, Vol. 2 (1982), pp. 17-45.

<sup>43</sup> The draft Victim Protection Bill, 2014 seeks to include the aspect of the victim in the whole judicial criminal system.

Existing literature reveals that African indigenous justice systems offer opportunities for dialogue amongst the victim, the offender, their families and friends, and the community.<sup>44</sup> Traditional justice systems are thus inclusive systems that address the interests of all parties to the conflict. The social solidarity and humane emphasis of the system is reflected in the treatment of offenders. Offenders are encouraged to understand and accept responsibility for their actions. Accountability may result in some discomfort to the offender, but not so harsh as to degenerate into further antagonism and animosity, thereby further alienating the offender.<sup>45</sup>

## 5.2 Resolution vis-à-vis Settlement

Traditional justice mechanisms are resolution as opposed to settlement mechanisms. In resolution parties cooperate and mutually agree to find a solution to a conflict. Parties dig deeper into the conflict to identify the causes of the conflict and aim at a post-conflict relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.<sup>46</sup> This explains why traditional justice systems would proffer restorative justice rather than retributive justice. Because traditional justice systems address the underlying causes of a conflict and other factors that may have a bearing on successful reconciliation including the history of the relationship between the parties, they may be the most appropriate in dealing with historical land injustices.<sup>47</sup>

In the *Mohammed case*, a resolution of the conflict could not be feasible during the court process. It is only after the two families had sat down for negotiations and reconciliation, and blood money paid that *'each of the parties was satisfied and felt adequately compensated.'* Application of traditional justice systems in this case addressed the root causes of the dispute. Parties felt satisfied with the outcome and relationships between the two families were fostered. An appeal on the matter could not be forthcoming.

---

<sup>44</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada, p.2.

<sup>45</sup> *Ibid*, p.3.

<sup>46</sup> J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria," *Cardozo Journal of Conflict Resolution*, Vol.7; D. 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; M. Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

<sup>47</sup> Penal Reform International, 2000, *Op. cit*, p.28.

A settlement on the other hand, is what is obtained in court. Disputing in courts and in arbitration, is in the nature of a contest where the party with the best advocate, powerful and most resourceful prevails. It is also a zero-sum game in the sense that one party must lose. Further, it is superficial in nature and fails to address all the cause of a conflict. This is because it focuses on the parties in court, it is individualistic trying to allocate rights to the parties before it. The underlying causes of the conflict are ignored and the likelihood of the dispute flaring up again are high. Because a settlement focuses on interest as opposed to needs, that are inherent in all human beings, it fails to deal with the parties' relationships, emotions, perceptions and attitudes. Parties may therefore feel dissatisfied and appeal the outcome of a settlement and to a higher court.<sup>48</sup> This is in contrast to traditional justice systems which aim at consensus building in conflict management. They do not isolate the dispute from its overall social context but rather through that context the indigenous tribunals seek a solution which maximizes social harmony or abates group conflict or tension. Reconciliation of parties through compromise and consensus characterizes outcomes in traditional justice systems, whereas litigation and arbitration manifests a 'winner-take-all' attitude."<sup>49</sup> Therefore, traditional justice systems ensure a "win-win" outcome for both parties.

## **6.0 Traditional Dispute Resolution Mechanisms and Human Rights**

One of the main criticisms against traditional justice systems is that they are incapable of respecting and protecting the fundamental rights and freedoms of suspects and parties before such forums. A common view has been that they do not uphold human rights standards and they are repugnant to justice and morality. This thinking is premised on a wrong assumption that pre-colonial Kenya did not have a concept of human rights. But the question always asked is whose morality is it that is used to calibrate African customary law against? It is my submission that this was the dominant view during colonialism, and was meant to present Western culture as a dominant culture and African customary law as an inferior one. It is this perception against traditional justice systems that has contributed to the resistance that they have faced in law and policy. But traditional justice systems existed even before formal justice systems. They are not younger or inferior. Traditional justice processes and procedures respect and protect the rights

---

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

<sup>49</sup> B. Upendra, 'People's Law in India: the Hindu Society,' in M. Chiba ed., *Asian Indigenous Law*, (KPI, 1986), p.227.

and interests of victims, offenders, and the community.<sup>50</sup> They are the dominant justice systems because they are accessible and understood by local people. 50 years after independence, it has been realized that formal justice systems have failed to deliver justice to Kenyans. It is for this reason that the Constitution has provided for the use of traditional justice systems in enhancing access to justice.

The basis for recognition and protection of human rights and freedoms is to preserve the dignity of individuals and communities, promotion of social justice and the realization of the potential of all human beings. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.<sup>51</sup> The rights and freedoms in the Constitution are not to be limited except in the ways contemplated by the Constitution. However, there are certain rights and fundamental freedoms that cannot be limited by law or any other means. These rights are: - freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus*.<sup>52</sup> Traditional justice systems must therefore not impose sentences that contravene these rights and freedoms. However, some of the sentences under traditional justice systems like beatings, banishment from communities are also inflicted under formal justice systems. Some practices under traditional justice systems such as oath administration, performance of curses and exorcising may be against human rights.

However, and contrary to the dominant view that African justice systems are anti-human rights, Elechi asserts that the restoration of rights, dignity, interests and wellbeing of victims, offenders, and the entire community has been the goal of African justice systems. It is argued that there are greater opportunities for the achievement of justice under traditional justice systems than with African state criminal justice systems because they seek to empower victims, offenders and the community at large. Being a victim-centered justice system, traditional dispute resolution mechanisms prioritize the safety of victims and assist them to restore their injury, lost property, sense of security and dignity. Again, the victims' needs for information, validation,

---

<sup>50</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada, p.23.

<sup>51</sup> Article 19(1) of the Constitution of Kenya, 2010.

<sup>52</sup> *Ibid*, Article 25.

social support, and vindication are given prominence in African justice systems.<sup>53</sup> Formal justice lack such facilities and resources.

## **7.0 Application of TDRM in Land Disputes and Customary Marriage Disputes**

In recognition of the volatile nature of land disputes in Kenya, the Constitution requires the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>54</sup> Land disputes are some of the common matters that courts handle in Kenya. And due to the sensitivity of the land question in Kenya, traditional dispute resolution mechanisms would be the most amenable. This is because they would foster relationships and coexistence even after the dispute settlement. Property rights are held within a social context, and within most customary systems; persons define themselves by reference to the lands they come from.<sup>55</sup> Principles pertaining to land policy in Kenya encourage the use of local initiatives to settle land disputes at the community level.<sup>56</sup>

Already courts have begun encouraging disputants to use traditional dispute resolution mechanisms in land disputes. In the case of *Lubaru M'imanyara v Daniel Murungi*<sup>57</sup>, parties filed a consent seeking to have the dispute referred to the Njuri Ncheke Council of Laare Division, Meru County. The court citing Articles 60(1) (g) and 159(2) (c) of the Constitution referred the dispute to the Njuri Ncheke noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court. In *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] Makau J discussed how the *Njuri Ncheke* council of elders works. The council of elders receives complaints and summons parties who are free to submit to their jurisdiction or not. The parties have to consent to submit before *Njuri Ncheke* council. Once a party refuses to submit to the *Njuri Ncheke* council of elders the council is supposed to refer the complainant to court of law. The court went on to state that in cases of deadlock in the case before *Njuri Ncheke* there are mechanisms of breaking such a deadlock, such mechanisms are performance of *Kithiri* curse or *Nthenge* oath. Apart from the Njuri Ncheke, the courts have

---

<sup>53</sup> O.Oko Elechi, "Human Rights and the African Indigenous Justice System," A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

<sup>54</sup> Article 67(2) (f).

<sup>55</sup> S. Farran, "Law, Land, Development and Narrative: A Case Study from the South Pacific" 6 *International Journal of Law in Context*, (2010), pp. 1-21, at 1.

<sup>56</sup> Article 60, Constitution of Kenya, 2010.

<sup>57</sup> Miscellaneous Application No. 77 of 2012. [2013] eKLR.



recognized the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.<sup>58</sup>

In relation to customary marriage disputes, the Marriage Act 2014 provides for the application of traditional dispute resolution mechanisms over such disputes. According to Section 68(1) thereof;

*“The parties to marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.”*

However, customary dispute resolution must conform to the principles of the Constitution.<sup>59</sup> Further, the person who takes parties through the process of conciliation or traditional dispute resolution must prepare a report of the process for the court.<sup>60</sup> Here, it seems that courts will play a supervisory role over customary dispute resolution processes to ensure compliance with the Constitution. But, who will be the dispute resolver in such an instance? Is it a traditional leader, a counsellor, family member, village elder or chief? Application of TDRMs in customary marriages may contribute to enhanced access to justice by parties in customary marriages since most disputes touching on marriages have had to be handled by courts. Courts have not given customary law the similar treatment as statutory law, and thus parties to customary unions could not have justice there.

## **8.0 Applicability of TDRMs in Criminal Cases in Kenya**

Traditional justice systems or principles akin to those underpinning traditional justice system are already being applied in the formal criminal justice framework in Kenya. For example, Section 176 of the Criminal Procedure Code courts are urged to promote reconciliation. The said section provides as follows:

*“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in*

---

<sup>58</sup> *Seth Michael Kaseme v Selina K. Ade*, Civil Appeal 25 of 2012; [2013]eKLR.

<sup>59</sup> Section 68(2), *Marriage Act*, 2014.

<sup>60</sup> *Ibid*, section 68(3).

*degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.*"<sup>61</sup>

Under the National Cohesion and Integration Act, the National Cohesion and Integration Commission is established to, *inter alia*, promote, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya.<sup>62</sup> To realize this, the Commission is mandated with the task of promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms so as to secure and enhance ethnic and racial harmony and peace.<sup>63</sup> The Commission is also enjoined to take all reasonable endeavors to conciliate a complaint referred to it under section 49 and by a written notice it can require any person to attend before it to discuss the subject matter of the complaint and any documents specified in the notice.<sup>64</sup> It is instructive to note that under the Act a complaint may include hate speech, which is an offence under the Act. As such, traditional justice systems have not only been applied to misdemeanors but also to felonies. Under the Penal Code, reconciliation is employed in resolving misdemeanors.

In Rwanda, the *Abunzi* has jurisdiction over criminal cases involving the removal or displacement of land terminals and plots; any form of devastation of crops by animals and destruction of crops when the value of crops ravaged or destroyed do not exceed three million Rwandan francs or US \$4,762; theft of crops when the value of crops does not exceed three million Rwandan francs and larceny (theft) when the value of the stolen object does not exceed three million Rwandan francs.<sup>65</sup>

Because of their strong connection to customs, unwritten laws, traditions and practices,<sup>66</sup> traditional justice systems may be most appropriate in dealing with certain matters of a criminal nature. Most traditional justice systems had procedures for dealing with serious criminal offences such as murder.<sup>67</sup> However, in their application they must 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

---

<sup>61</sup> Section 176, Criminal Procedure Code, Cap. 75.

<sup>62</sup> Section 25(1), National Cohesion and Integration Act, No. 12 of 2008.

<sup>63</sup> *Ibid*, Section 25(2) (g).

<sup>64</sup> *Ibid*, Section 51.

<sup>65</sup> Available at <http://www.rwandapedia.rw/explore/abunzi>, (accessed on 09/08/2014).

<sup>66</sup> ICJ-Kenya Report, "Interface between Formal and Informal Justice Systems in Kenya," *Op. cit*, p.32.

<sup>67</sup> *Ibid*, p.33.

to justice or morality; or is inconsistent with the Constitution or any written law.<sup>68</sup> If traditional justice systems are in compliance with Article 159(3), there is no bar to their applicability in criminal cases where the parties have so consented to their use. Judicial authority emanates from the people and where courts and tribunals should allow people to resolve their disputes in the most appropriate forum they so choose. In *Ndeto Kimomo v Kavoi Musumba*<sup>69</sup> Law V.P stated as follows on a similar point:-

*“In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court’s jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent.”*

The court went on to give an example of what would happen in such an instance:

*“...For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the Judge “we have decided that this appeal is to be decided by the toss of a coin.” The Judge would surely say: “In that case, you must either withdraw this appeal, or come before me in due course with a consent order that the appeal be allowed or dismissed.” It would be wrong in principle, in my view, for the Judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis.”*

It has also be held that where parties have resorted to traditional dispute resolution procedures consensually, courts should not participate in those procedures, or dispose of a case as a result of the outcome of those procedures, in the absence of a clear and unambiguous agreement as to that result on which a consent decree can be based. Such proceedings would be a nullity. This is what informed the office of the DPP in the *Mohammed case* to accept the request made by the parties to have the case withdrawn and marked as settled.<sup>70</sup> The role of the court in such a circumstance as presented by the Mohamed case is to consider the three issues provided in Article 159(3). If satisfied that the issues have not been contravened then it shall allow such an application to pass.

---

<sup>68</sup> Article 159(3), *Constitution of Kenya*, 2010.

<sup>69</sup> [1977] KLR 170.

<sup>70</sup> Article 157 of the Constitution, confers on the DPP State powers of prosecution under which he may discontinue at any stage criminal proceedings against any person.

Additionally, under Article 159 courts can promote the usage of TDRMs on their own motion by asking parties to go and try settling the case using TDRMs.

Since the Constitution does not limit the application of TDRMs to any area of the law, the important issue would be to determine when, how and under what circumstances they can apply in criminal cases or whether there is a need to come up with a standard for cases that would be settled under TDRMs. Courts have expressed the view that traditional dispute resolution mechanisms are applicable to misdemeanors and not felonies.<sup>71</sup> However, in the *Mohamed case* we see TDRMs being applied effectively to a murder case, a capital offence. It is also imperative to assess the point at which courts can encourage parties to try TDRMs. In one case the judge held that a conviction could not be quashed on the basis that there had been reconciliations.<sup>72</sup> In my view, where it is evident that parties have amicably resolved a matter after a conviction, a court should be ready to quash a conviction. Judicial authority emanates from the people and in the exercise of this authority courts are enjoined not to give undue regard to legal technicalities. Moreover, upholding a conviction after reconciliation would not foster social cohesion and harmony which is at the heart of traditional dispute resolution mechanisms.

In *Stephen Kipruto Cheboi & 2 others v R*<sup>73</sup> five (5) appellants were convicted of offences emanating from their conduct when they assaulted three (3) complainants. All the appellants and complainants were brothers. However, the conviction of two of the appellants was quashed on 10<sup>th</sup> May 2012 on the basis that traditional dispute resolution mechanisms were applicable to misdemeanors and not felonies. This is why it is only 3 Appellants who appealed against conviction in the present case arguing that there had been discussions yielding in an amicable resolution of the dispute. The resolution was aimed at voluntarily enhancing family cohesion and reconciliation. The reconciliation meeting had been attended by 89 persons from Nerkwo-Katee village. An affidavit was filed by one of the complainants asking court to quash convictions. Court held that a conviction could stand even though there had been reconciliation.

Under the TDRMs each community has its own sentences that they mete out on offenders. Some of these sentences include curses, oaths, beatings, being exorcised etc. In the *Mohammed case*, the two families reached a settlement that was recognized by the court as valid. The settlement entailed payment of blood money in form of camels, sheep and other livestock. The

---

<sup>71</sup> *Stephen Kipruto Cheboi & 2 others v R* [2014]eKLR.

<sup>72</sup> *Ibid.*

<sup>73</sup> [2014] eKLR.

essence of blood money was to ‘compensate’ for the blood lost of the deceased person. Communities that still allow for caning of offenders would be stopped by the courts from carrying out such a sentence does not satisfy the three stage test. Corporal punishment does not have any place in the Constitution as it infringes on the right to human dignity. Therefore, each community needs to reevaluate the sentences that they give out on offenders and ensure compliance with the three stage test in totality. Failure to do so would lead to it falling on its fours.

## **9.0 Prospects and Challenges in the use of TDRMs**

Traditional justice systems have the potential to promote access to justice. They are especially accessible by the rural poor and the illiterate. They are flexible, voluntary, foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process. Traditional dispute resolution mechanisms are therefore, the most appropriate in relation to certain disputes such as family disputes and land disputes where the parties’ relationships after the conflict situation need to be restored. It is my submission that even in criminal cases the Constitution does not expressly prohibit their application. Further, looking at the Constitution broadly, traditional justice systems can co-exist with formal justice systems so as to promote the values and principles in the Constitution, particularly access to justice.

Application of traditional justice systems will also reduce the backlog of cases in courts since most disputes will be resolved locally. Traditional justice systems have also been very effective in peace efforts in different parts of the country. They are good forums for dialogue on matters affecting communities. Further, because they are resolution mechanisms, they are able to address the underlying causes of a conflict. They heal the emotional and physical wounds the parties suffered as a result of the conflict. And unlike litigation, which mostly deals only with disputants, traditional justice systems address the concerns of the victim, the accused and the wider community. This is exemplified by the case of *Stephen Kipruto Cheboi & 2 others v R*<sup>74</sup> where a reconciliation meeting was attended by 89 persons from Nerko-Katee village yet the dispute concerned brothers.

Although traditional justice systems have the potential to enhance access to justice, a number of challenges exist in their use in the administration of justice. First, because customary

---

<sup>74</sup> [2014] eKLR.

law is considered inferior in comparison to statutory law, traditional justice systems may be undermined thus constraining their application in the delivery of justice. Secondly, and probably the most problematic issue is whether traditional dispute resolution mechanisms can apply to criminal cases. One view on this issue is that Article 159(2) (c) of the Constitution is worded in such a way that it does not limit the applicability of TDRMs to criminal cases. The other view could be that, the Constitution provides expressly for instances when traditional justice systems are to apply mostly in land disputes and can thus not apply to criminal justice system. It is also argued that Article 159(1) does not extend to courts in criminal matters and does not give power to the Director of Public Prosecution to consent to settlements without invoking laid down procedures of plea bargaining or excusing murder suspects. This interpretation may not be correct as the Constitution does not state that traditional dispute resolution mechanisms are not to apply to criminal cases. Because of the likelihood of disempowering the DPP in certain cases, especially sensitive ones, such as rape and defilement, some form of regulation is necessary. This could be in the form of guidelines outlining certain cases that cannot be settled out of court due to their sensitivity.

Another argument advanced against the use of traditional justice systems in criminal cases, is that criminal cases are matters between the state and the accused and not between citizens inter se. Such an argument is based on a misconception of traditional justice systems and the role they play in society. Criminality is not between the state and the accused only. There are other constituents to a dispute who are affected by the outcome of a dispute. These include the victim, accused, the family of the accused and victim and the community. Actually, one of the criticisms against the court system is its failure to address the interests of victims of crimes. Traditional justice systems fill in this gap.

In Zimbabwe, whether a case is to be decided using customary or general law is determined by Customary Law and Local Courts Act based on circumstances such as: the mode of life of the parties, subject matter of the case, the understanding by the parties of the provisions of customary law of Zimbabwe and the relative closeness of the case and the parties to customary law or the general law of Zimbabwe.<sup>75</sup> In Swaziland customary courts have jurisdiction both in criminal and civil matters over Swazi nationals residing within their

---

<sup>75</sup> See S. Chirawu, "Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women," in *Women, Custom and Access to Justice*, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary, Issue 3 December 2013, pp.15-17.

jurisdictional areas. However, at a practical level whether a criminal case is to be tried by a traditional or formal court is made at a police station. It is argued that the choice is normally influenced by the strength of the case such that if evidence is strong the case is sent to a magistrate's court and if weak it is sent to traditional courts.<sup>76</sup> The different approaches have to be researched into to assess their appropriateness. Moreover, circumstances are quite different in the different countries.

Thirdly, because of the evolving nature of customary law, traditional justice systems should not be legislated. Traditional justice systems vary from community to community, and thus they would be challenges in coming up with a legislation harmonizing or consolidating different mechanisms. This may impede the growth of customary law. Again, legislating on traditional justice systems may lead to rigidity, inflexibility, underdevelopment and destruction of African customary law. If there is need for legislation on traditional justice systems, it should be a framework law outlining the principles that such processes must comply with, e.g. fairness, non-discrimination and adherence to human rights standards. However, the regulatory framework on traditional justice systems must allow for their development.

Courts should not involve themselves in traditional justice procedures.<sup>77</sup> Once it is established that a traditional justice system exists, courts should promote that system by developing it in accordance with the Constitution. The State should not be involved in the appointment of traditional leaders or 'arbitrators.' In addition, legal representation in traditional dispute resolution fora should be barred completely. A party should appear in person or be represented by a spouse, family member, neighbor or member of the community. Barring legal representation would safeguard these processes from legalities and technicalities applied in litigation. Further, the rationale for excluding legalities is that certain legal procedures such as cross-examination may be inconsistent with traditions, especially where the person being cross-examined is a senior male in the family or community.<sup>78</sup>

Consequently, traditional justice systems should not be incorporated in the formal judicial system. Traditional justice systems should be entirely voluntary, consensual and their decisions

---

<sup>76</sup> T. Masuku, "Women and Justice in Swaziland: Has the Promise of the Constitution been Fulfilled?" in in *Women, Custom and Access to Justice*, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary, Issue 3 December 2013, pp.22-25.

<sup>77</sup> *Ndeto Kimomo v Kavoi Musumba* [1977] KLR 170.

<sup>78</sup> T. Masuku, "Women and Justice in Swaziland: Has the Promise of the Constitution been fulfilled?" *Op. cit.*

non-binding. In some jurisdictions, traditional customary courts have been established that allow for the application of customary law by experts in customs and traditions from different communities. This would be a better alternative instead of incorporating them with courts.

Fourthly, traditional justice systems must be sensitive to the plight of women. Such processes should not be discriminatory against women. They should encourage the appointment of women as elders and allow them to represent themselves in such forums.

The other hindrance to the application of traditional justice systems is the un-codified nature of the customary law of the different ethnic communities in Kenya. As such, these mechanisms have to be proved in court to determine their existence and application by expert witnesses, through case law, sworn testimonies of traditional leaders and existing literature of customary law. Documentation of traditional justice systems and research on the different systems would be necessary to ascertain where, how and under what conditions they operate<sup>79</sup> and to determine whether they comply with the thresholds set in the Constitution.

Going forward there is need for dialogue and consensus building with communities as custodians of customary laws, particularly on the need to prohibit certain customary practices that are retrogressive, repugnant to justice and morality and that are unconstitutional.<sup>80</sup> Through such efforts traditional leaders will see the need for changing customary law to accord to constitutional thresholds.

Traditional leaders must realize that they have a constitutional mandate to ensure that they ensure the delivery of an effective process. They must ensure fairness in their processes, deliver justice without delay and do justice to all irrespective of status. Further, they must ensure that the processes do not contravene the Bill of Rights, repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or be inconsistent with the Constitution or any written law. This would require some form of training.

## **10.0 Conclusion**

The *Mohamed case* is a good precedent. Recognition of traditional justice systems was meant to open up and liberalize the justice system in efforts to enhance access to justice due to the inaccessibility of formal justice systems. By extension also, their recognition is an appreciation of the ethnic, cultural and religious diversities amongst Kenyans and their resolve to live

---

<sup>79</sup> Available at <http://www.gsdc.org/go/display/document/legacyid/98>, (accessed on 13/08/14).

<sup>80</sup> S. Chirawu, "Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women," *Op. cit.*, p. 17.



peacefully and harmoniously by having disputes resolved using mechanisms that are flexible and easier to apply. Traditional justice systems have the potential to enhance access to justice. They are flexible, informal, they foster relationships, use local languages and do not allow for legal representation. They are victim-centered justice systems, addressing all the constituents in dispute that is the victim, accused and the wider community. They are also easily accessible and therefore available in rural areas. Consequently, they can be helpful in easing the perennial problem of backlog of cases in our court system. They can also reduce the congestion of our prisons and the tax payers' burden because they are restorative rather than retributive justice systems.

In retributive justice systems, the offender is punished by meting out a punishment equal to the crime he has committed. The decision in the *Mohammed case* has paradigmatically shifted this thinking about crime. The decision has shown that to realize restorative justice and foster peace among communities, criminal justice system ought to focus also on the victims, concerned families and the community. Formal justice system has for long focused on the offender and neglected the victims of the offence.

Application of TDRMs is thus expected to strengthen adherence to the rule of law because they enhance social justice and foster harmonious co-existence. This in turn fosters good governance and spurs economic development. This explains their wide acceptance. A case has been established for the application of TDRMs in criminal cases where the three stage test has been fully complied with. The courts need to heed to the voice of Kenyans who inserted that clause in the Supreme governing law- the Constitution. Let justice prevail.