

A Critical Analysis of Maslaha as a Traditional Dispute Resolution Mechanism in North Eastern Kenya

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Abstract

Traditional dispute resolution mechanisms (TDRMs) like Maslaha remain vital in the resolution of disputes within the Cushite community in Kenya. The longevity in the application of TDRMs by various communities in Kenya is a manifestation of the vital role they play in the resolution of disputes. However, despite the vital role played by traditional methods of resolving disputes, like Maslaha, they face a lot of criticism, especially when they are used to resolve criminal disputes. In essence, the grey area in the discourse of application of TDRMs like Maslaha remains their limitations by the existing legal framework in Kenya.

This paper seeks to analyze the application of Maslaha in the resolution of disputes in North Eastern Kenya as well as the criticisms to this dispute resolution mechanism. In doing so, this discourse shall; offer a brief introduction, a legal basis of application of TDRMs in Kenya, a critique of Maslaha as a TDRM, recommendations and lastly, give a conclusion.

1.0 Introduction

To commence this discussion, this paper notes the words of *Emeritus Chief Justice Dr Willy Mutunga* who stated as follows in his keynote speech during the judicial marches week ¹ “*Let me reiterate our main aims in undertaking the judicial marches: ...We want to encourage the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution.*” This best captures the important role played by

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¹ Keynote Speech By The Chief Justice, Hon. Dr. Willy Mutunga, At The Commencement Of ‘the Judicial Marches Week’ Countrywide On August 21, 2012 <<http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/>> accessed on 14/07/20

traditional dispute resolution mechanisms in the resolution of disputes in Kenya.

The traditional methods of resolving disputes generally referred to as TDRMs are considered to be informal methods of resolving disputes. They operate outside the formal legal framework that exists. TDRMs vary from one community to another. Predominantly, TDRMs are based on cultural practices of various communities.

Each community has its own unique set of customary laws and as such each community has different method of dispute resolution.²The definition of offences and conflict differs from one community to another. Similarly, the punishment prescribed for each offence differs from one community to another. These various variances of traditional methods of resolving disputes inhibit creation of a concrete definition of TDRMs.

TDRMs existed even before colonialization.³These mechanisms were geared toward fostering peaceful co-existence among the members of each community. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Kenya.⁴ Communities in Kenya had their own ways of dealing with day to day challenges. They relied on their customs and practices to resolve their disputes. However, during colonialization the colonial masters deliberately suppressed customs and practices allowing them to be applied 'only if they were not repugnant to justice and morality'.⁵ The repugnancy clause '*only if they were not repugnant to justice and morality or results in*

²Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

³ Kariuki Muigua, Traditional Conflict Resolution Mechanisms and Institutions, page 2-3.

⁴ See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research, 2001, pp. 23-24 ;See also Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," African research review, Vol.8, No. 2, 2014, page 138-157

⁵Kariuki Muigua, Alternative Dispute Resolution and Access to Justice in Kenya page 59

outcomes that are repugnant to justice or morality' in regard to application of TDRMs in resolution of disputes, unfortunately has been retained in the Judicature Act, Cap 8 and the Constitution of Kenya 2010.⁶

Undoubtedly, there was a shift towards formal dispute resolution mechanisms leading to reduced application of TDRMs both after colonization and in the immediate post-colonial Kenya. This was premised on the deliberate insistence of application of formal methods to resolve disputes by colonial masters.⁷ According to *Okoth Ogendo*⁸, during this time TDRMs and in general customary law, went through a long period of expropriation, suppression and subversion.

However, this did not lead to the complete neglect of customary laws as *Francis Kariuki*⁹ rightly posits, "...it should be noted that after almost a hundred years of neglect customary laws and other indigenous traditions have remained resilient." Customary laws have continued to be applied up to date. Similarly, TDRMs have continued to be viable in communities in Kenya. This is premised on the features associated with TDRMs.

Such features of TDRMs include inter alia; informality, affordability/less expensive, exhaustion of issues in dispute, they are not time consuming,

⁶The clause is retained under Section 3(2) Judicature Act, Cap 8 and Article 159(3) of the Constitution of Kenya 2010

⁷Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* page 59

⁸Okoth- Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010) Available at <<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1>> accessed on 20/07/20

⁹Francis Kariuki. *Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology.* (2015) Available at, <<http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf>> Kariuki asserts that "In customary justice systems anchored on customary law, the later becomes a critical part of its normative content and in the development of tribal/customary law jurisprudence."

reconciliatory in nature, familiarity and simplicity.¹⁰ TDRMs are considered to be accessible by the rural poor and the illiterate people, flexible, voluntary, they foster relationships, proffer restorative justice and give some level of autonomy to the parties in the process.¹¹

Most TDRMs are concerned with the restoration of relationships (as opposed to punishment), peace-building and parties' interests and not the allocation of rights between disputants.¹²

However, TDRMs are associated with some negative traits like; anarchy as TDRMs are not based on any written law, they can be contrary to the Constitution, they are sporadic and not structured as they change from one community to another, issues even not presented to the tribunal are sometimes handled, the rules guiding TDRMs maybe archaic e.g flogging as a form of punishment, TDRMs are considered to be systematically biased against certain groups e.g women, they are not formally structured, enforcement of decisions made through TDRMs can be difficult e.g in 1960 the oath was enough the same may not suffice today and they operate within a very limited view of the affairs of the world.¹³

TDRMs operate within the realms of customary law. *Okoth-Ogendo* asserts that the reason why customary law has stood the test of time, among many other reasons, is because the customary laws have over time been seen to function as a set of social and cultural facts.¹⁴ This is the case with TDRMs as they are governed by customary laws. Premised on the above assertions, it is clear that TDRMs play a critical role in the justice system in Kenya.

¹⁰ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ,2011), page 32; See also A.N. Allott, 'African Law,' in Derrett, J.D An Introduction to Legal Systems, (Sweet & Maxwell, 1968), page 131-156.

¹¹ Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, Alternative Dispute Resolution, Vol. 2, No. 1 (2014), page 202-228.

¹² ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011), page 32

¹³ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' (ICJ, 2011)

¹⁴Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2010)

However, despite the vital role played by TDRMs they face a lot of criticism, especially when they are used to resolve criminal disputes. In essence, the grey area in the discourse of application of TDRMs remains their limitations by the existing legal framework in Kenya.

This paper seeks to analyze the application of Maslaha in the resolution of disputes in North Eastern Kenya as well as the criticisms to this dispute resolution mechanism. In doing so, the starting point has to be the legal basis of application of Maslaha in the resolution of disputes in North Eastern Kenya. Below is a succinct analysis of the legal framework governing TDRMs in Kenya.

2.0 Legal Framework Governing TDRMs in Kenya

Due to the informality of TDRMs there exist limited legal framework to guide their operations. However, the Constitution of Kenya 2010 and enabling legislations contains salient provisions that either directly or indirectly promote TDRMs in Kenya. At this juncture there is need to point out that culture and TDRMs are conjoined twins.¹⁵ This assertion is based on the fact that TDRMs operate within the confines of cultural practices. As such, TDRMs vary from one community to the other based on each community's cultural practices.¹⁶ It is on this basis then that one can assert that promoting cultural practices in Kenya, to a great extent promotes TDRMs. In essence TDRMs are based on African Customary Laws.

The most explicit legal provision for application of TDRMs in Kenya is Article 159 of the Constitution which addresses judicial authority and legal system. Article 159 of the Constitution offers the best enumeration of the basis of application of TDRMs in Kenya. Under Article 159(2)(c) of the Constitution, TDRMs are considered to be one of the principles that ought to guide courts

¹⁵ See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at <<http://urn.nb.no/URN:NBN:no-17988>> [Accessed on 14/07/20]; See also Mengesha, A. D., et al, „Indigenous Conflict Resolution Mechanisms among the Kembata Society,“ *American Journal of Educational Research*, Vol.3, No.2, 2015, page 225-242.

¹⁶ Francis Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology page 11

and tribunals in exercise of their judicial authority. Verbatim Article 159(2)(c) of the Constitution provides that; In exercising judicial authority, the courts and tribunals shall be guided by the following principles; alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms* shall be promoted, subject to clause (3).

In essence, Article 159(2)(c) of the Constitution persuades courts and tribunals to at all material times promote application of TDRMs provided they operate within the scope stipulated under Article 159(3) of the Constitution.

Article 159(3) of the Constitution though couched in a negative manner seeks to promote application of TDRMs. The negative connotation notwithstanding, Article 159 (3) of the Constitution verbatim provides: *Traditional dispute resolution mechanisms shall not be used in a way that;*

- a) *contravenes the Bill of Rights;*
- b) *is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*
- c) *is inconsistent with this Constitution or any written law.*

In essence, the import of Article 159(3) of the Constitution is that TDRMs are applicable in Kenya as modes of dispute resolution provided that; they do not contravenes the bill of rights, they are not repugnant to justice and morality and lastly that they are not inconsistent with the Constitution or any written law. Overtime, courts in Kenya in promoting application of TDRMs in Kenya have heavily relied on these provisions of the Constitution.

Buttressing this *Justice Edward M. Muriithi in the case of :Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR¹⁷* stated as follows;

“I would agree with Counsel for the Interested Party that “the Constitution of Kenya 2010 recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties

¹⁷eKLR, Petition No. 285 of 2016 at paragraph 17 & 18

[with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose. Accordingly, Alternative Dispute Resolution (ADR) “including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms” are available means of settlement of criminal cases under the Constitution, and the Court is enjoined Article 159 to promote ADR.”

It is fair to state that, the underlining negative connotation under Article 159 (3)(b) of the Constitution when referring to application of TDRMs, reflects the continuing conflict between African legal systems and legal systems which began in the colonial era. The view that African legal systems are inferior to legal systems which began in the colonial era has been captured in writing by various foreign writers.

Arthur Phillips,¹⁸ in a report he prepared propounds that it is inevitable and indeed desirable that Africans should eventually attain to a system of law and justice which is similar to though not necessary identical to the British system of law. *Frederick Lugard*, argued that only from native courts employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility and evolve among a primitive community some sense of discipline and respect for authority.¹⁹ The view of Africans cultural practices like TDRMs as ‘primitive’ has always downgraded African legal systems which are primarily based on different cultural practices of communities.

It is observable that, where African ideas of custom and of law were retained by the legal systems imposed on the Africans during the colonial era the same was based on necessity. This was observed by *Karen Fields*²⁰ who verbatim stated “...Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, in order to make colonial rule work with only a ‘thin white line’ of European administrators, African ideas of custom and of

¹⁸ Arthur Phillips, Report on Native Tribunals (Nairobi: Government Printer, Colony and Protectorate of Kenya, 1945), 5±6 on the powers of Native Tribunals,

¹⁹ Lord Lugard, *The Dual Mandate in British Tropical Africa* (London, 1965 [1922]), 547-8, 549-50.

²⁰ See *Karen Fields, Revival and Rebellion in Colonial Central Africa* (Portsmouth, NH, 1997), chs. 1±2.

law had to be incorporated into the new state systems. In a very real way, customary law and African courts provided the ideological and financial underpinnings for European colonial rule.”

It is on this background, then that one can appreciate why even where cultural practices like TDRMs are promoted by the existing legal framework the same is subject to various caveats and limitations like “*TDRMs are not used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.*”²¹”

Apart from Article 159 of the Constitution there are other few articles of the Constitution that encourage the use of TDRMs. It is important to appreciate that TDRMs as earlier stated is part and parcel of culture and/or cultural practices. As such, where the Constitution or statutes promote application, preservation and promotion of culture and/or cultural practices, TDRMs is part and parcel of the same. The preamble of the Constitution states that we are proud of our ethnic, cultural and religious diversity. Article 2(4) of the Constitution recognizes existence of customary law which governs TDRMs, though it limits its application where it is inconsistent with the Constitution. Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. To this end, it advocates for promotion of cultural expressions.

Article 44 of the Constitution posits that every person has the right enjoy their language, and culture though no one should be compelled to perform, observe or undergo any cultural practice or rite. The Constitution under Article 45(4) requires the parliament to enact legislation that recognizes traditional marriages. Such marriages are based on cultural practices. Article 60 (1)(g) of the Constitution encourages communities in Kenya to settle land disputes through recognised local community initiatives consistent with this Constitution.

²¹Article 159 3(b) of the Constitution of Kenya 2010

Lastly, Article 67(2)(f) of the Constitution enlists one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

On the other hand statutes have sought to incorporate TDRMs as modes of dispute resolution. Judicature Act²², under section 3(2) stipulates when the customary law is to be applicable. It states verbatim that: *‘The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.’* Unfortunately, this provision retains the limitation of application of African customary law *‘so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law’* as contained under Article 159(3) (b) of the Constitution.

Marriage Act²³, under Section 68 encourages use of TDRMs. Buttressing, Article 67(2)(f) of the Constitution, Section 5(1) (f) of the National Land Commission Act²⁴ provides that one of the functions of National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts.

Under Section 3(5) (b) of the Environmental Management and Co-ordination Act²⁵, the Environment and Land Court in exercise of its jurisdiction is required to be guided by the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law.

²² Cap No.8 of the laws of Kenya

²³ Cap No. 4 of 2014

²⁴ Cap No. 5 of 2012

²⁵ Cap No.8 of 1999

Section 7(3) of the Magistrates Court Act²⁶ offers an enumeration of Civil matters that are subject to African Customary Law and to a great extent TDRMs.

On 4th March 2016, his Lordship the Chief Justice, Hon. (Dr.) Willy Mutunga, *vide The Kenya Gazette (Special Issue) Gazette Notice. Vol. CXVIII-No.21*, appointed the Taskforce on Alternative Justice Systems to look at the various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)*. The tenure of the Taskforce was subsequently extended by Chief Justice Hon. David Maraga.²⁷

The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159 (2) and its plans to develop a policy to mainstream Alternative Justice System (*hereinafter AJS*) with a view to enhancing access to and expeditious delivery of justice as espoused at Pillar one of the *Judiciary Transformation Framework*, which was the blueprint which undergirded transformation in the Judiciary in the period 2012-2016. This objective was later included in the *Sustaining Judiciary Transformation Blueprint*.²⁸

On 27th August 2020, which was the 10th Anniversary of the adoption of the Kenya Constitution, Chief Justice David Maraga presided over the launch of the Alternative Justice System Baseline Policy(AJS) after the completion of its preparation by the Taskforce. The Alternative Justice System Baseline Policy²⁹(hereinafter the policy) basically outlines steps to embrace and implement alternative justice systems in accordance with article 159(2) (c) of the Constitution 2010. This policy best encapsulates the effectiveness and application of TDRMs in Kenya comprehensively.

²⁶ Cap No.26 of Laws of Kenya

²⁷ Alternative Justice System Policy, Executive Summary page xiv

²⁸ Alternative Justice System Policy, Executive Summary page xiv

²⁹ Alternative Justice Systems Baseline Policy

<<https://www.judiciary.go.ke/resources/publications/>> accessed on 9/18/20

The policy analysis³⁰:

- a) *Alternative Justice Systems and the need for an AJS policy in context.*
- b) *Conceptual framework and imperatives for Alternative Justice Systems.*
- c) *Challenges and responses on Alternative Justice Systems.*
- d) *How is AJS practiced? Existing models of AJS.*
- e) *Operational doctrines of interaction between Courts and matters determined by or before AJS institutions.*
- f) *Key areas of intervention and implementation.*
- g) *Operationalizing the AJS policy—the roles of different actors.*
- h) *Operationalizing the AJS policy: The implementation matrix.*

The policy in a nutshell emphasizes on importance AJS and the need for them to be adopted in our justice system to promote access to justice in Kenya. TDRMs form part of Alternative Justice Systems in Kenya as such the policy promotes TDRMs.

The significance of the policy lies in the fact that unlike the other legislations which seeks to promote TDRMs in Kenya, the policy identifies; the *key areas of intervention and proposes ways for operationalizing the AJS policy*. This in return will contribute significantly in promoting TDRMs in Kenya.

From the above analysis of legal framework governing TDRMs in Kenya, it is clear that TDRMs like Maslaha have a legal basis for application in Kenya as a mode of dispute resolution.

3.0 A Critique of Maslaha as a Traditional Dispute Resolution Mechanism

Maslaha, variously translated as '*social good*' or '*public interest*,' has become a buzzword in reformist circles, where it is touted as a remedy for legal stagnation. The practice has been successfully used to solve matters in most

³⁰The table of Contents Alternative Justice Systems Baseline Policy page x to xi <<https://www.judiciary.go.ke/resources/publications/>> accessed on 9/18/20

Islamic states and has been adopted by the Cushitic communities and those who ascribe to Islam as a religion.³¹

The Maslaha system is an informal Traditional Dispute Resolution Mechanism practiced by the Somali Community in settling their feuds and disputes through elders and it has generally evolved as a way of maintaining cordial relationships between different neighbouring families and clans. Maslaha courts are managed by elder's usually male relatives of the survivor and perpetrators and uses traditional means to solve the problem, mostly this involves compensation in terms of money or livestock.

These courts are accused of being unfair, lack of legal representation; decisions that rely upon predetermined cultural rules; limited or no distinctions drawn between civil and criminal cases; social pressure to cover shame; and a lack of separation of powers for the accused and complainant, meaning that an authority figure in the Maslaha justice system may also have decision-making authority in the community, the Maslaha courts are viewed as not putting the victim at the center of the resolution but focusing more on the communal relationship.³²

The Maslaha are influenced by the relative position of the clans involved and their negotiating power.³³ Nevertheless, people prefer the Maslaha system as it is part of their culture, it applies a concept of justice that is easily understood, and because it delivers at least monetary compensation while formal Kenyan justice is perceived as complicated, lengthy and often inconclusive.³⁴

In addition, Maslaha is applied even to murder and sexual offences thereby raising contestations of the constitutionality and legality of this application.

³¹Grace Konde, *Women And Peace building in Kenya: The Case Of Wajir Peace And Development Agency (2002-2018)*.

³²Maryam Hassan Abdi, *Assessment Of Sexual And Gender Based Violence Reporting Procedures Among Refugees In Camps In Dadaab, Kenya* November, 2016

³³Danny Turton (B.A., L.L.M) UNHCR Consultant, *Strengthening Protection Capacity Project* April 2005

³⁴Supra

In February 2018, the Minister for Interior reportedly directed national government officials, including chiefs, to cease the application of Maslaha in determining sexual offences.³⁵ However, questions arise as to the practicability, legality and rationale of enforcing such orders. Maslaha as a TDRM best demonstrates the challenges facing application of TDRMs in Kenya in a bid to enhance access to justice. The question has always been; To what extent should the TDRMs be applied in Kenya? What limitations exist in application of TDRMs in Kenya? Which offences should TDRMs not be used to resolve in Kenya?

These questions basically revolve around the question of jurisdiction of TDRMs (i.e. matters that TDRMs can hear and determine). The key concern is usually whether TDRMs like maslaha should be used to hear and determine all disputes or whether a limitation should be placed on the matters that are referred to these fora.

The most notable limitation of application of TDRMs in Kenya lies in the repugnancy clause '*only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality*' as encapsulated under Article 159 3(b) of the Constitution of Kenya 2010 and the Judicature Act, Cap 8 of Laws of Kenya.³⁶

This question has been presented before Courts which have sought to reconcile the existing provisions of the law especially Article 159 (3) of the Constitution and Section 3(2) Judicature Act, Cap 8 and the cases presented before them. In the case of: *Republic Vs. Abdulahi Noor Mohamed (alias Arab) [2016] eKLR (Criminal Case No. 90 Of 2013 High Court Nairobi)* Judge Lesiit J seeking to interpret Article 159 (3) of the Constitution, Section 3(2) Judicature Act, Cap 8 and Section 176 of the Criminal Procedure Code stated:

"...From the reading of the aforementioned statutory provisions, it is quite evident that application of alternative dispute resolution

³⁵Available from www.nation.co.ke/news/Matiangi-warns-chiefs-mediating-rape-cases/1056-4322400-format-xhtmlhpy4b2/index.htm lastly accessed 4/8/20

³⁶The clause is retained under Section 3(2) Judicature Act, Cap 8 and Article 159(3)(c) of the Constitution of Kenya 2010.

mechanisms in criminal proceedings was intended to be a very limited. The Judicature Act in fact only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in the criminal matters, it is limited to misdemeanors and not on felonies. The accused herein has been charged with the offence of murder, which has been classified as a felony and therefore, among the crimes that Section 176 of the Criminal Procedure Code prohibits the courts from adopting reconciliation as a form of justice.”

It is observable that in regard to application of TDRMs in Civil matters, Section 7(3) of the Magistrates Court Act³⁷ offers an enumeration of Civil matters that are subject to African Customary Law and to a great extent TDRMs. These include;

- a) Land held under customary tenure;
- b) Marriage, divorce, maintenance or dowry;
- c) Seduction or pregnancy of an unmarried woman or girl;
- d) Enactment of, or adultery with a married woman;
- e) Matters affecting status, particularly the status of women, widows and children, including guardian-ship, custody, adoption and legitimacy;
- f) Intestate succession and administration of intestate estates, so far as it is not governed by any written law;

Affirming the provisions of Section 7(3) of the Magistrates Court Act the case of; ***Kamanza Chiwaya Vs. Tsuma (unreported High Court Civil Appeal No. 6 of 1970)*** the High Court held that the above list of claims under customary law was exhaustive and excludes claims in tort or contract.

The ***Alternative Justice System Baseline Policy (AJS)*** offers yet the most recent and what in our considered view ought to be adopted in application of

³⁷ Cap No.26 of Laws of Kenya

TDRMs in Kenya. The policy analysis various issues which are seminal in delimiting the application of TDRMs in Kenya including but not limited to the issue of jurisdiction of TDRMs.

Seminal features of the Policy that promote and delimit the application of TDRMs in Kenya

The following constitutes the seminal features that seek to promote and delimit the application of TDRMs in Kenya;

- a) *Agency Theory of Jurisdiction of AJS as a means of delimiting jurisdiction of TDRMs*: The Policy proposes an Agency Theory of alternative justice system in delimiting the jurisdiction of TDRMs. The theory *does not distinguish civil from criminal law*.³⁸

Instead, it asks if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to TDRMs; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable. If the answer is in the affirmative and if there is no specific legislation or public policy ousting the jurisdiction of TDRMs, then the dispute is amenable to the TDRMs whether the dispute is formally determined to be “civil” or “criminal.”³⁹ Addressing the issue of jurisdiction in essence the policy proposed the following⁴⁰:

- i) *Enhanced non-distinction between civil and criminal matters in regard to jurisdiction of TDRMs.*
- ii) *Enhanced stakeholder and peoples’ involvement in cases of public interest and concerns of the aggrieved party.*
- iii) *Enhanced efficiency and effectiveness of the justice system.*

³⁸ Alternative Justice System Baseline Policy, page xvii

³⁹ Ibid No. 38 page xvii

⁴⁰ Ibid No. 38 page 67

b) *Operational Doctrines of Interactions Between the TDRMs and Courts:*

The Policy makes recommendations and provides guidelines of how Judges and Judicial Officers should deal with questions related to TDRMs when they encounter them in the course of determining controversies filed in Court. The Policy terms the different approaches to this question as “*Operational Doctrines*” and identifies six such doctrines as follows⁴¹:

- i) *Avoidance*: The Court could simply ignore previous TDRMs proceedings and awards.
- ii) *Monism*: The Court could treat previous TDRMs proceedings or awards as a tribunal of “first instance” from which a dissatisfied party is permitted to appeal to the Court. In this mode, the Court conducts a *de novo* review of both facts and law.
- iii) *Deference*: The Court reviews previous TDRMs proceedings and awards for procedural propriety and proportionality only. This is the most appropriate interaction between the Courts and TDRMs.
- iv) *Convergence*: The Court defers to the TDRMs process only when both parties agree. In this mode, either party has a veto to choose whether previous, concurrent or intended TDRMs proceedings should be taken into account by the Court.
- v) *Recognition and Enforcement in the Mode of Arbitral Awards*: Here, the Court has a duty to recognize and enforce an award by an TDRMs mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reasons: where the award is unconscionable or offends public policy or where the adjudicators/members of the panel were corrupted or otherwise unduly influenced.
- vi) *Facilitative Interaction*: In this mode, the Court accepts the TDRMs proceedings or awards as evidence for the parties in the Court process. While the Court, therefore, does not accept and enforce the TDRMs award or verdict as given in the TDRMs proceedings, the award or proceedings serve as one of the pieces of evidence the Court uses to reach its own verdict. The probative value the Court assigns to this

⁴¹ Alternative Justice System Baseline Policy, page xvii to xviii

evidence will vary depending on the nature of the TDRMs proceedings.

In conclusion, the Policy encourages Judges and Judicial Officers to deploy either the *Deference or Recognition and Enforcement Operational Doctrines* when they encounter these questions in practice. There may be instances where a prior agreement of the parties or the specific circumstances of the case make the *Monist or Facilitative Doctrines* appropriate.⁴²

However, the Policy reaches the conclusion that *Avoidance and Convergence doctrines* are inappropriate in Kenya constitutional context in view of Articles 159, 11 and 44 of the Constitution. The Policy insists Courts should not, therefore, resort to these two doctrines when they encounter questions related to TDRMs.⁴³

c) TDRMs expands human rights and human autonomy

TDRMs is an important tool for the vindication and expansion of human rights and human autonomy.⁴⁴ Its mechanisms are based on three human rights-based avenues. Firstly, the human rights imperative under article 48 of the Constitution. This provision mandates the State to ensure access to justice for all persons. Engaging TDRMs has the direct consequence of fulfilling, respecting and protecting this important fundamental human right as majority of Kenyans access justice through TDRMs Mechanisms.⁴⁵

Secondly, human rights-based constitutional principles under Article 10 as read together with Article 28 of the Constitution provide the principles for vindicating and expanding the TDRMs framework in Kenya. Finally, TDRMs acts as a strong framework for anchoring human rights. Article 44 (on everyone's right to use the language and to participate in the cultural life of their choice) anchors this position. This is bolstered by the Constitution's

⁴² Alternative Justice System Baseline Policy, Executive Summary page xviii

⁴³ Alternative Justice System Baseline Policy, Executive Summary page xviii

⁴⁴ Alternative Justice System Baseline Policy, Executive Summary page xv

⁴⁵ Ibid No.44 page 17-18

recognition of culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation (Article 11 of the Constitution).⁴⁶ The policy therefore argues that promotion of TDRMs contributes to the expansion of the fundamental human rights mandated and anchored in the Constitution. The policy asserts that it is a misconception and an error of a contextual reading to identify, reify and essentialize TDRMs as spaces for human rights violations.⁴⁷

To this end the policy argues that while it is true that some processes and substantive outcomes of TDRMs Mechanisms may run afoul of the Constitution in the same way some Court and Tribunal procedures and outcomes may be violative of the Constitution, characterizing TDRMs spaces as cesspools of human rights violations is empirically and epistemologically false. Instead, properly conceived, TDRMs Mechanisms are an important site for guaranteeing human rights by providing an easier, more affordable, more approachable and more culturally and socially appropriate forums for individuals to access justice.⁴⁸

In conclusion, it is the considered view of the policy that where the TDRMs fail to adhere to the minimum human rights standards in terms of their obligations of process as well as obligations of results, it is incumbent upon the Judiciary, through its mandate under Article 159(2)(c) to engage with and appropriately intervene by deploying the Human Rights Framework proposed by the Policy in order to respect and protect the other rights which might potentially be violated by the TDRMs while simultaneously transforming TDRMs to be respectful of the human rights.⁴⁹

d) Interpreting the Repugnancy Clause

The policy recognizes that Kenya legal framework has retained the repugnancy clause (*i.e* 'repugnant to justice and morality or results in outcomes that are repugnant to justice or morality') under Article 159(3)(b) of the Constitution

⁴⁶ Alternative Justice System Baseline Policy page 18

⁴⁷ Ibid No.46 page 18

⁴⁸ Alternative Justice System Policy, Executive Summary page 18

⁴⁹ Alternative Justice System Baseline Policy page 18

and Section 3(2) of the *Judicature Act* cap 8 of laws of Kenya.⁵⁰ This is read together with the Article 2(4) of the Constitution, which provides that any law, including customary law that is inconsistent with the Constitution is void. The policy deliberately offers a progressive interpretation on this clause.

The policy argues that it is apparent that the limitation placed on the application of customary law to civil matters under the *Judicature Act* cannot be permissible under the Constitution. It is the progressive lens through which the doctrine of repugnancy should be viewed.

The policy asserts that the progressive character of the Kenyan Constitution requires Courts to give new meaning to Article 159 of the Constitution. The policy insists that compliance with the call of Article 259 of the Constitution will be critical in meeting this goal.⁵¹

The policy insists that the repugnancy clause should neither be seen as a stumbling block, nor be allowed to constitute a supervising doctrine for customary law. It beseeches litigants and Courts to reject the “civilization mission” approach. The policy argues that the repugnancy clause ought to be viewed as a building block towards access to justice and promotion of the rights set out in the Bill of Rights. This is the lens via which Courts should view the repugnancy clause.⁵²

The policy argues that the repugnancy limit in the Constitution can also be said to be redundant as Article 153(3) of the Constitution subjects the use of traditional dispute resolution to the Bill of Rights, the Constitution and any other written law. The policy asserts that the redundancy is based on the breadth

⁵⁰The ‘*repugnancy clause*’ is retained under Section 3(2) *Judicature Act*, Cap 8 and Article 159(3) of the Constitution of Kenya 2010 which provides that TDRMs will only be applicable *if they are not repugnant to justice and morality*’

⁵¹ This article requires the Constitution to be interpreted in a manner that—

- (a) promotes its purposes, values and principles;
- (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- (c) permits the development of the law; and
- (d) contributes to good governance.

⁵² Alternative Justice System Baseline Policy, page 21

and coverage of constitutional rights in the bill of rights. The policy argues that it is difficult to see why a repugnancy clause based on justice and morality is still present yet the Kenyan Constitution prides itself in having a robust Bill of Rights.⁵³ The policy arguing against the application of the repugnancy clause states that; the net effect of the application of the clause is that it renders it easy for any party challenging the decision of an AJS forum such as TDRMs to allege that the process did not comply to ‘*justice and morality*’ or it ‘results in outcomes that are repugnant to justice or morality’.⁵⁴

Premised on this understanding the policy asks several vital and rhetorical questions :Whose morality are we going to base our analysis on?⁵⁵ What is the applicable standard? Which test(s) should we draw on? What amounts to justice? The policy argues that these are some of the questions that will need to be fleshed out, at the outset.⁵⁶

The policy states that failure to adopt this approach when interpreting the repugnancy clause will set the bar for challenging an AJS decision very low. The consequence of this is that it is counterproductive as Courts will be clogged with challenges from AJS decisions which is an unintended consequence.⁵⁷

The policy argues that customary law is dynamic, not static. Hence it is simplistic to assume that these laws are the way they were when the colonialists first came to Africa. Courts must come to grips with this reality. Judges and Magistrates must adopt a view that is consistent with the modern times. The policy argues that adopting this dynamic approach proposed by the policy will ensure customary law endures.⁵⁸

e) *Key Areas of Intervention:*

⁵³ Alternative Justice System Baseline Policy, page 21

⁵⁴ Article 159(3)(b) of the Constitution.

⁵⁵ See Roscoe Pound, ‘Law and Morals-Jurisprudence and Ethics’, (1945) 23(3) *North Carolina Law Review*.

⁵⁶ Alternative Justice System Baseline Policy, page 21

⁵⁷ Ibid No. 56, page 22

⁵⁸ Alternative Justice System Baseline Policy, page 22

To promote application of AJS like TDRMs the policy has identified the following five key areas of intervention and implementation⁵⁹:

- i) To recognize and identify the nature of cases AJS mechanisms can hear.
- ii) Strengthening the processes for selection, election, appointment and removal of AJS practitioners.
- iii) Develop Procedures and Customary Law jurisprudence.
- iv) Facilitate Effective intermediary interventions.
- v) Strengthened and Sustainable Resource Allocation and Mobilization.

The policy to a great extent addresses main challenges facing the application of TDRMs in resolving dispute and ensuring access to justice.

4.0 Recommendations

Whereas, the traditional justice systems draw their inspiration from well-defined cultural structures of various communities, the underlying frameworks and principles of the traditional justice systems are similarly well defined. Since the traditional systems are operational within the context of a broader formal justice system to which it is not well aligned, this has given rise to gaps that reflect in effectiveness and impact of these traditional justice systems. There is therefore a need for organizations and stakeholders that are working with traditional justice mechanisms to enhance awareness and sensitization on human rights, gender and the law.

Since the traditional structures almost invariably all start off from the point of male domination, it is important for the promotion and protection of the rights of women in the processes and judgments of the traditional justice systems. To effectively incorporate the principles of equality and non-discrimination in the actualization of Article 159 (2) (c) and (3) of the Constitution of Kenya 2010, the structure of the traditional justice systems must embrace the 2/3 principle to ensure that men and women are represented. As it were, some structures such as the Kuria have no female members.

⁵⁹ Alternative Justice System Policy, Executive Summary page xviii

Previously, the lack of recorded proceedings has been a challenge in follow up of the cases to ensure that the decisions of the elders are adhered to. The elders now record the proceedings and have the parties sign the agreements or decisions. The elders also ensure that the proceedings are typed and these have been used in inheritance cases that have proceeded to the formal justice system.

The elders are currently not paid and are working with non – governmental organizations in the traditional justice system who are funded to do the work. This would also minimize the instances of actors engaging in corruption to ensure that their cases are heard and determined favorably. This is particularly important if the traditional justice systems are to be incorporated into the formal justice system since the latter operates on the basis of a well-defined and financed structure. This would facilitate the provisions of administrative support for the traditional justice systems.

To better align the work of the traditional justice systems with the Constitution, there is need for more training on the Constitution especially on the Bill of Rights and how it relates with the work that they do. The elders would also benefit from training on all the other aspects of the Constitution, including Chapter 5 on land, for a greater understanding of this fundamental document on which their work must be invariably be based to bring into effect Article 159 (2) (c) and (3) of the Constitution.

5.0 Conclusion

TDRMs like Maslaha play a seminal role in promoting access to justice in Kenya. As such, their application in our justice system is vital. Buttressing this, the Alternative Justice System Policy opines that majority of Kenyans resolve their disputes through alternative justice systems like TDRMs. It is premised on this understanding that there is need to promote TDRMs in Kenya especially through enabling legislations, progressive interpretation of the legal provisions that seek to promote TDRMs by courts and sensitization of the public on the need to adopt TDRMs in resolving their disputes.

The question has always been: Does enacting more legislation to promote application of TDRMs in Kenya take away the informality nature of TDRMs, which make them attractive to citizens?

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