

**TRADITIONAL DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE  
FOR WOMEN IN KENYA**

**A paper submitted in partial fulfillment of the requirements of the Bachelor of Laws  
degree**

**By**

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## DECLARATION

I hereby certify that this is my original work done in partial fulfilment of the requirements of the Bachelor of Laws degree in Strathmore University Law School. It has not been submitted to any other institution for any other qualification.

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## **DEDICATION**

I dedicate this work to my mother.

## **LIST OF ABBREVIATIONS**

TDRMs – Traditional Dispute Resolution Mechanisms

ADR – Alternative Dispute Resolution

FIDA- Federation of Women Lawyers Kenya

UNDP- United Nations Development Programme

ICJ- International Commission of Jurists

USIP- United States Institute of Peace

**LIST OF CASES**

*Kenya Bus Service Ltd & another v Minister for Transport & 2 others [2012] eKLR*

*Dry Associates v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011  
(Unreported)*

## ABSTRACT

The right to Access to Justice is not only enshrined in our Constitution but also under international human rights instruments. It is a tool through which one is able to ensure the protection of other fundamental rights. It is also an essential component of the rule of law. Kenyan history shows an over emphasis on the court system as the only means through which persons can access justice. However, the court system was plagued with a numerous challenges which left majority of Kenyans at a gross disadvantage.

In an effort to undo these injustices, the Constitution of Kenya (2010), under Article 48 recognizes the Right to Access Justice. Article 159 recognizes that in order for the state to enhance access to justice, other forms of dispute resolutions must be promoted. This includes Alternative Dispute Resolution and Traditional Dispute resolution Mechanisms (TDRMs). This paper examines the role of TDRMs in enhancing access to justice for women in Kenya. However, customary laws that govern these mechanisms are known to be discriminatory against women and women rarely participate in these processes.

The repugnancy test set forth in Article 159, recognizes that TDRMs should not be applied if they are contradicting the Bill of Rights. If subjected to this test, the paper finds that, TDRMs as they are now, lead to the infringement of women's rights especially those concerning equality and fair trial. Therefore, for TDRMs to become a viable means through which women in Kenya can access justice, the author suggests modifications that can be made to ensure that women's rights are not infringed.

# CHAPTER 1

## 1.0 INTRODUCTION TO THE STUDY

This paper seeks to examine whether traditional dispute resolution mechanisms, (hereinafter 'TDRMs'), will enhance access to justice for women in Kenya.

In an effort to enhance access to justice, Article 159 of the constitution recognizes the use of alternative dispute resolution mechanisms and TDRMs as methods of solving disputes. However, TDRMs are governed by customary law which is infamous for its patriarchal nature. Most of these systems of solving disputes are run by men, with little if any, participation from women. This poses a challenge to women who are not adequately represented in the dispute systems. The Constitution in recognition of these challenges, sets requirements that must be met for TDRMs to be used. Under Article 159 (3) of the Constitution, traditional dispute resolution mechanisms are only to be used in so far as they do not contravene the Bill of Rights or are repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or they are not inconsistent with the Constitution or any written law. This paper will investigate, in the context set above, whether TDRMs will enhance or impede access to justice for women and whether any changes can be made to improve the systems.

## 1.1 BACKGROUND TO THE STUDY

Pre-2010, the judiciary was characterized by understaffing, corruption, insufficient facilities and long and unnecessary procedures used to prolong and discredit cases, among other things, leading to grave injustices being committed.<sup>1</sup> The state furthered this injustice by focusing on the formal means of solving disputes.<sup>2</sup> However, even with this emphasis on the formal means of solving disputes, the use of TDRMs was still rampant in certain areas of the country.<sup>3</sup> This is especially the case in areas where there were no court facilities readily available such as the

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<sup>1</sup> The International Commission of Jurists – ICJ, report on the Interface between formal and informal justice systems in Kenya, 2011, 32.

<sup>2</sup> The International Commission of Jurists – ICJ, report on the Interface between formal and informal justice systems in Kenya, 2011, 32.

<sup>3</sup> Available at <http://panafricanthinking.blogspot.com/2011/04/customary-law-and-conflict-resolution.html> on 14th February 2015.

North Eastern areas of Kenya.<sup>4</sup> These mechanisms were based on the culture and practices of the people of that area and were preferred due to their accessibility and affordability.<sup>5</sup> The main problems that arise in the use of formal systems include; the mistrust of the law, unfamiliarity with the formal procedures and court atmosphere, low legal literacy, unequal power relations, physical and financial inaccessibility, formal systems are viewed as culturally ‘uncomfortable’, the formal system lacks legitimacy i.e. they can be complicit in conflict and past oppression, corruption and finally there is a long and cumbersome process before any decision is arrived at<sup>6</sup>

It is upon this background that the Constitution of Kenya 2010 was enacted. The Constitution enshrined the right of access to justice.<sup>7</sup> Article 48 places the burden upon the state to ensure that all persons have access to justice.<sup>8</sup> In an effort to do so the use of informal dispute resolution mechanisms has been recognized in the Constitution Article 159 that states;

*“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).....”*

However, even with the recognition of TDRMs their use has been limited. According to Article 159 (3)<sup>9</sup> TDRMs are not to 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.”*

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<sup>4</sup> Available at <http://panafricanthinking.blogspot.com/2011/04/customary-law-and-conflict-resolution.html> on 14th February 2015.

<sup>5</sup> The International Commission of Jurists – ‘ICJ report on the Interface between formal and informal justice systems in Kenya’ (ICJ, 2011), 32.

<sup>6</sup> Wojkowska E. ‘Doing justice: How informal justice systems can contribute’ 2006 UNDP, 13.

<sup>7</sup> Article 48, Constitution of Kenya (2010).

<sup>8</sup> Constitution of Kenya (2010).

<sup>9</sup> Constitution of Kenya (2010).

TDRMs are a form of alternative dispute resolution governed by customary law.<sup>10</sup> In the pre-colonial era, communities living in Africa and Kenya in particular had their own conflict resolution mechanisms.<sup>11</sup> Whenever a conflict arose negotiations would be done by the disputants.<sup>12</sup> The role of TDRMs has been recognized globally due to the inability of the formal system to settle all the cases presented to it.<sup>13</sup> An example of these mechanisms is the use of council of elders who would hear conflicts that arise in the community. The system is based on ensuring harmony and peace in the community. Customary law which governs TDRMs is notorious because of its patriarchal nature. It is often criticized for its discriminatory nature towards women. It tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals.<sup>14</sup>

The Constitution recognizes customary law as a source of law in the country although it is subject to the provisions of the Constitution.<sup>15</sup> With this in mind, the question arises as to whether the use of TDRMs, in light of the nature of customary law, would lead to infringement of women's rights and what reforms could be made to TDRMs to ensure that they do not do so.

## 1.2 STATEMENT OF THE PROBLEM

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<sup>10</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> accessed on 3 March 2015.

<sup>11</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> accessed on 3 March 2015.

<sup>12</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> accessed on 3 March 2015.

<sup>13</sup> Galanter.M, 'Justice in many rooms: courts, private ordering and indigenous Law' *Journal of Legal Pluralism* vol.19, (1981), 3.

<sup>14</sup> Ndulo.M; 'African customary law, customs, and women's rights' *Indiana Journal of Global Legal Studies*, Vol. 18, No. 1 (Winter 2011), 87-120.

<sup>15</sup> Article 2, Constitution of Kenya (2010).

The use of traditional dispute resolution is based on the customary law of the community from which the parties belong.<sup>16</sup> As mentioned above, the nature of customary law favors men and views women as adjuncts to the community rather than equals.<sup>17</sup> Women have little, if any, say in the running of the society, and this includes methods of resolving dispute as it forms an integral part of any community. This is evidenced by the forms of dispute resolution that have been adopted, for example the use of councils of elders. These councils were mainly made up of elderly men.<sup>18</sup> If women were given the opportunity to participate, they had to meet the criteria set up and even then they were few in the councils. Decisions made were therefore bound to be biased against women. There are some communities which had councils made up of women, however, these councils only had the authority to hear and decide on matters concerning women.<sup>19</sup>

Article 27 of the Constitution of Kenya 2010, protects every individual from discrimination and necessitates equality between the sexes. Article 27 (1) states that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 21 bestows on the state the duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights. The ideal situation is that, the use of TDRMs would enhance access to justice for both genders and remedy the problems facing the formal systems of dispute resolution as highlighted earlier.

With this in mind, there is a risk that women who take their grievances to be decided through TDRMs may not get justice; they may also have their right to be treated equally before the law, as prescribed under Article 27, infringed. This would lead to a situation where the TDRMs fail to reach the threshold required under Article 159 (3) and hence affect their viability as a tool to enhance access to justice for women.

### **1.3 RESEARCH QUESTIONS**

The following questions shall guide this study;

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<sup>16</sup> Galanter.M, 'Justice in many rooms: courts, private ordering and indigenous law', 3.

<sup>17</sup> FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in Coast province of Kenya' 2008, 16.

<sup>18</sup> FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in Coast province of Kenya' 2008, 16.

<sup>19</sup> FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in Coast province of Kenya' 2008, 16.

- 1) What effect will the use of TDRMs have on women in accessing justice?
- 2) What are the implications of the use of TDRMs in light of Article 159 (3) of the Kenyan Constitution?
- 3) What are the recommendations to solve the problem?

#### **1.4. RESEARCH OBJECTIVES**

The research objectives are informed by the research questions. The objectives shall be;

- 1) To investigate the effect of the use of TDRMs on women accessing justice.
- 2) To identify the possible implications of the use of TDRMs in light of Article 159 (3) of the Kenyan Constitution.
- 3) To identify recommendations to the infringement of women's rights.

#### **1.5 HYPOTHESIS**

The use of TDRMs will lead to the infringement of women's rights.

#### **1.6 JUSTIFICATION OF RESEARCH**

The Constitution under Article 2 has recognized customary law and goes a step further in Article 159 to recognize the use of TDRMs in dispute resolution. Customary law, which informs TDRMs, is patriarchal in nature.<sup>20</sup> Women are disadvantaged in this system of law. Nonetheless, its use has been resilient even with reforms being put in place to avoid some of its archaic rules.<sup>21</sup> Having in mind that the Constitution is the supreme law in the country, Article 27 expressly states that there must be equality and non-discrimination before the law.

The study assesses these TDRMs and the laws that govern them. Unlike other papers, it shall investigate the position of women in these systems and whether or not women will be able to access justice. In light of these findings, it shall investigate the viability of TDRMs to enhance access to justice for women.

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<sup>20</sup> FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in Coast province of Kenya' 2008, 16.

<sup>21</sup> Available at <http://panafricanthinking.blogspot.com/2011/04/customary-law-and-conflict-resolution.html> on 14th February 2015.

## 1.7 THEORETICAL FRAMEWORK

### 1.7.0: Liberal feminism

This theory claims that the differences between the sexes are not based on biology, and therefore women and men are not all that different. Their common humanity supersedes their procreative differentiation. If women and men are not different, then they should not be treated differently under the law. Women should have the same rights as men and the same educational and work opportunities. The proponents of this theory focus on visible sources of gender discrimination, such as gendered job markets and inequitable wage scales, and with getting women into positions of authority in the professions, government, and cultural institutions.<sup>22</sup>

This theory argues that both men and women have the right to take part in the running of the society.<sup>23</sup> This theory attempts to get rid of all hindrances to gender equality.<sup>24</sup>

In light of these specific characteristics, this theory is directly relevant to the study. This is the basis on which the arguments for the equal treatment of genders and giving of equal opportunities shall be founded on. The view taken is that men and women although different due to physiological aspects, both have the same human dignity that must be respected.<sup>25</sup> This intrinsic humanity makes them equal when it comes to their ability to be given roles in the society. This theory shall be pertinent in the analysis of the arguments given for the patriarchal nature of African customary law.

There are equality issues that arise as mentioned earlier. This is evident in the manner in which TDRMs are organized and the nature of the laws that govern them. The Liberal feminist school is against such a state of affairs; according to this theory both genders have an equal right to take part in the governing of a society and in decision making. The nature of the law that governs TDRMs inhibits such participation by women. In looking at TDRMs from such an angle, this theory supports the hypothesis of this study.

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<sup>22</sup> Lorber.J, 'The variety of feminisms and their contribution to gender equality' available at <http://diglib.bis.uni-oldenburg.de/pub/unireden/ur97/kap1.pdf> on 6 February 2015.

<sup>23</sup> Wendell S. 'A (Qualified) defense of Liberal feminism' *Hypatia*, Vol. 2, No. 2 (summer, 1987) 65-93.

<sup>24</sup> Lorber J, 'The variety of feminisms and their contribution to gender equality' available at <http://diglib.bis.uni-oldenburg.de/pub/unireden/ur97/kap1.pdf> on 6 February 2015.

<sup>25</sup> Lorber.J, 'The variety of feminisms and their contribution to gender equality' available at <http://diglib.bis.uni-oldenburg.de/pub/unireden/ur97/kap1.pdf> on 6 February 2015.

### 1.7.1: Theory of justice

#### Justice as fairness

John Rawls defines justice as fairness.<sup>26</sup> He speaks of an original state where people entered into a contract. He says that in this situation, where there was no division and no man thought themselves better than the other, a contract arrived at would be equal and in each man's best interest.<sup>27</sup> The guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement.<sup>28</sup> They are the principles that free and rational persons who are not driven by their own selfish interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice he calls justice as fairness. He gives two principles of justice. First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second, that social and economic inequalities are to be arranged so that, a) offices and positions must be open to everyone under conditions of fair equality of opportunity and b) they are to be of the greatest benefit to the least-advantaged members of society (the difference principle)<sup>29</sup>

The study shall assume that justice is fairness. Each individual should get the same opportunities and the laws and institutions should therefore ensure that they exhibit the characteristics John Rawls described. They must be based on the basic principles of justice. The rules and systems should be such that were it in an original state (as defined by John Rawls) each individual would enter into such a contract as it benefits them and ensures their interests are considered fully.

The study shall use this point of view to examine TDRMs. The study shall look at the system and its ability to ensure that every individual's interests and rights are considered and protected. It shall also examine whether as mentioned above they are founded on the principles of justice as fairness.

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<sup>26</sup> Rawls J., *'A theory of justice'*, Cambridge, MA: Harvard University Press, 1971, 52-55.

<sup>27</sup> Rawls, *A theory of justice*, 52-55.

<sup>28</sup> Rawls, *A theory of justice*, 52-55.

<sup>29</sup> Rawls, *A theory of justice*, 52-55.

### 1.7.2: Equality

Equality is the assertion that human beings are equal and have equal rights.<sup>30</sup> It is a core tenet in rights' discourses. Equality is pegged on rights or entitlements that all human beings and sovereign states have.<sup>31</sup> Legal rights comprise a cluster of claims, powers and immunities.<sup>32</sup> Article 27 of the constitution states that;

*“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. Article 27 of the constitution states...”*

The same constitution recognizes that every person has inherent dignity and has a right to have that dignity respected.<sup>33</sup>

With this in mind, this paper relies on the assertion that all persons are equal and must be treated equally before the law. Through this lens, TDRMs shall be contextualized and a conclusion arrived at as to whether in their current form, the systems recognize and protect the principle of equality.

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<sup>30</sup> Kameri-Mbote P, *Fallacies of equality and inequality: multiple exclusions in law and legal discourses*, Inaugural Lecture, University of Nairobi, 24<sup>th</sup> January 2013.

<sup>31</sup> Kameri-Mbote P, *Fallacies of equality and inequality: multiple exclusions in law and legal discourses*, Inaugural Lecture, University of Nairobi, 24<sup>th</sup> January 2013.

<sup>32</sup> Kameri-Mbote P, *Fallacies of equality and inequality: multiple exclusions in law and legal discourses*, Inaugural Lecture, University of Nairobi, 24<sup>th</sup> January 2013.

<sup>33</sup> Article 28, Constitution of Kenya (2010).

### **1.8 RESEARCH METHODOLOGY**

This research shall be founded on qualitative data obtained from primary, secondary and tertiary sources. These include but are not limited to; analysis of information from online resources, journal reports and articles, reports from relevant organizations, text books, case law, news articles and statute. Where possible, an analysis of existing case studies will be conducted.

### **1.9 LIMITATIONS**

This study is limited by a number of factors. One of which is that customary law is not properly documented; collecting data on the laws that govern systems of dispute resolution will therefore be difficult.

The time constraints are also a major factor to be considered. The research paper is counted as part of the student grades and clear timelines have been set out by the school. It is therefore necessary to work within these timelines.

The study involves TDRMs which are many and different across the country due to the different tribes and hence, customs followed are also different. There is the requirement to zero in on particular TDRMs to ensure that the scope of the study is not so wide that it becomes irrelevant.

### **1.10 TIMELINE**

The study shall begin when the research proposal is approved. Ideally data should be collected within the first month. After which there shall be the systematic analysis of the data and compilation of the data to come up with a research paper.

### **1.11 CHAPTER BREAKDOWN**

This paper shall be divided into four chapters. The first shall assess the right to access to justice. This includes its definition and the history of this right in Kenya, it shall further show the link between the inclusion of TDRMs in the constitution and enhancing access to justice for people.

The second chapter shall examine TDRMs. This includes the laws that govern them, the structure of the systems and finally the limitations that these mechanisms face that make it difficult for them to enhance access to justice for women.

The third section is an analysis of the data based on the theoretical framework. This will be a detailed breakdown of the highlighted characteristics of TDRMs.

The final chapter gives the findings in relation to the research questions and the research hypothesis. It highlights recommendations and the way forward for TDRMs and gives the conclusion to the study.

## **1.12 LITERATURE REVIEW**

### **1.12.1 Access to Justice**

Muigua highlights the issues that have caused this need to entrench access to justice in the constitution as a right for every individual. In his paper he highlights the factors that have hampered access to justice previously. Some of these factors are the high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves. There is also a lack of awareness of ADR mechanisms. These reasons make access to justice in Kenya difficult to many people.<sup>34</sup> The paper highlights the ways in which ADR and TDRMs provided for in Article 159 of the Constitution, can be implemented and how public participation is essential to this. The paper explores the reasons why the implementation of these two forms of dispute resolution system would enhance access to justice.

In this study, the definition of justice shall be different, justice is fairness. The study will seek to look at how just the use of the TDRMs will be. This will include assessing the systems and the laws that govern these systems.

There is a great outcry and not just from the Kenyan people, for the enhancement of access to justice. It is happening all over the world. S.Q. Sinha focuses on the issues facing Afghan women as they seek justice through traditional justice systems.<sup>35</sup> It is evident that women and the minority in Afghanistan suffer the same dilemma as those in Kenya. TDRMs are used to enhance access to justice. However, traditional mechanisms have been criticized for violating women's rights. Certain customary practice such as *baad* for example, whereby girls or women are forcibly exchanged as brides to settle blood feuds, debts, and other disputes are illegal under both Afghan and international law and contrary to Islamic legal principles, but they are sometimes sanctioned within traditional dispute resolution based on customary practice. Women are also

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<sup>34</sup>Muigua k., 'Access to justice: promoting court and alternative dispute resolution strategies' available at <http://www.kmco.co.ke/> on 3 February 2015.

<sup>35</sup>Sinha S., 'Traditional dispute resolution and Afghanistan's women USIP', available at <http://www.usip.org/> on 3 February 2015.

usually not allowed to sit on traditional dispute resolution bodies or even be present if they are a party to a dispute<sup>36</sup>. This paper is relevant to this study as it shows that issues of discrimination are rampant in many TDRMs not just Kenyan communities and also gives ways in which the state has tried to curb this problem. It also highlights the need for access to justice for women.

This study shall only deal with the TDRMs practiced in Kenya and although it shall be informed by the different methods used to solve this problem by the afghan paper, it shall look for recommendations best suited for this country because the circumstances are different.

### **1.12.2 Informal systems**

Ewa Wojkowska provides a working definition of access to justice adopted by United Nations Development Programme (UNDP).<sup>37</sup>

*“The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”*

This is used in defending the need for societies to embrace the use of informal justice systems. They argue that the disadvantaged members of the society are not able to access the formal systems. The paper advocates for states to embrace the use of informal systems. In this case informal systems refer to the methods that are used to resolve disputes other than the formal systems, courts and tribunals.

There are a number of advantages to using informal systems such as people find them understandable and culturally ‘comfortable’, they focus on consensus, reconciliation and social harmony, informal justice systems can be good partners with the formal justice system, the systems provide swift solutions and finally geographical and financial accessibility for the greater majority of people. Nonetheless the research recognizes the drawbacks to the use of informal systems. One of which is directly related to this paper. The paper identifies that there is the unfair and unequal treatment of women and disadvantaged groups. The recommendations espouse a situation where informal and formal justice systems work together. They give ways in which the state can ensure that there is no discrimination of women or disadvantaged groups

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<sup>36</sup>Sinha S., Traditional dispute resolution and Afghanistan’s women USIP, available at <http://www.usip.org/> on 3 February 2015.

<sup>37</sup>Wojkowska E, ‘Doing justice: how informal justice systems can contribute’ December 2006 UNDP.

such as establishing oversight mechanisms; ensuring representation for disadvantaged groups in local-level institutions; capacity building for informal actors; and building bridges between formal and informal systems. This would be done through formalization of the informal systems to ensure that they are not inconsistent with human right standards.

Although this paper has discussed the limitation faced by the informal sector, they have assumed that oversight mechanisms and formalization of the informal systems would completely solve the issue of discrimination against women and minority groups. This is something that this study seeks to investigate for a number of reasons. The first is that the informal sector is based on customary law which is very rigid. The customary law especially in African countries tends to be biased against women; oversight and formalization might not help in ensuring that these misguided beliefs are dealt with. The use of these laws has been going on even with the push to ensure equality. With this in mind, the study will look at the viability of these systems if the customary law that underpins them is so rigid in its patriarchal nature. It will undertake a comparative study to establish whether formalization of TDRMs in other countries has solved the issue of discrimination against women.

In light of the new Constitution, The International Commission of Jurists (ICJ) evaluated the place of ADR (Alternative Dispute Resolution) and TDRMs in the country.<sup>38</sup> They identify the institutions advocating for the use of informal dispute resolution mechanisms. The paper is instrumental in that it gives a background to the use of informal systems in the country and expounds on the resilience of the customary law. It also recognizes that some of the laws may lead to discrimination and inequality due to their archaic nature. They propose solutions to these problems. The main idea for this paper is that the systems should be made slightly formal. This includes documenting all forms of TDRMs and giving basic rules that must be adhered to by all TDRMs.

This study shall go a step further and analyze the systems and highlight the rights that are bound to be infringed. It will also investigate the formalization of TDRMs and whether this is a valid solution to the discrimination against women.

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<sup>38</sup> The International Commission of Jurists - ICJ report on the interface between formal and informal justice systems in Kenya, 2011, 32.

Muigua identifies the background to the use of TDRMs and highlights some of the common TDRMs in the country.<sup>39</sup> He recognizes that there is greater recognition of the use of TDRMs as a viable means of resolving disputes. This paper also identifies the nature of customary law and the potential of discrimination against women and other disadvantaged groups. He provides as a solution to the issues of discrimination the establishment of a legal and policy structure to effectively link TDRMs with the formal court systems.

This study seeks to go a step further and investigate the role of women in these TDRMs and investigate the rights that would be infringed if there was continued use of TDRMs.

An extensive research on the use of TDRMs in Kenya especially by the communities in the coast province was conducted by FIDA Kenya.<sup>40</sup> The paper identifies the patriarchal nature of the systems and customary law. It however, identifies situations where there were councils made up of women. There are limitations placed on these councils, such as they could only deal with issues concerning women and could not deal with grievous matters such as theft or burglary. They identify that even where women could be part of the council of elders a number of things were expected from them unlike the men in the same council. The paper gives solutions such as ensuring that customary laws followed are not repugnant to justice and to ensure the active participation of women.

The paper did not take into account the resilient nature of customary law. The paper has also not delved deeper into the issues brought out against women. It has also not analyzed the viability of TDRMs to enhance access to justice through an analysis of what is required by the law and international standards.

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<sup>39</sup> Muigua K.; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>40</sup> FIDA Kenya, 'Traditional justice systems in Kenya: A study of communities in Coast province of Kenya', 2008, 18.

### **1.12.3 Equality**

There are a number of principles of liberal equality.<sup>41</sup> This theory espouses that we should be treated equally and discrimination should not be based on aspects of ourselves that we have no control over.

The article shall be used when arguing that although men and women are different biologically, their intrinsic human dignity and value make them equal. Thus, they should be treated equally before the law.

There are different forms of feminism and each has contributed to gender equality<sup>42</sup>. This paper is written through the eyes of a liberal feminist. Therefore, this paper shall be used to defend the use of liberal feminism as the study's theoretical framework and why other theories were not suited to this particular study.

### **1.12.4 Customary law**

Customary law is the indigenous law of the various ethnic groups of Africa. The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people. In its application, customary law is often discriminatory in such areas as bride price, guardianship, inheritance, appointment to traditional offices, exercise of traditional authority, and age of majority. It tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals. There is a huge debate as to whether customary law is compatible with human rights norms contained in international conventions and national bills of rights in national constitutions.<sup>43</sup> This paper highlights the nature of customary law. It recognizes that although most African constitutions have a bill of rights in their Constitution, they still recognize the practice of customary law and fail to resolve the dispute between customary law norms and human right provisions. This paper examines the place of African customary law in an African legal system, and tensions that exist between African customary law and both domestic and international human rights norms. It shall be essential to the study as it brings out the major issues that must be addressed when dealing with customary

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<sup>41</sup>Becker L., *Elements of Liberal equality: Introduction to Kirp, Hochschild, and Strauss*, 34 *Wm. & Mary L. Rev.* 89 1992.

<sup>42</sup>Lorber J, 'The variety of feminisms and their contribution to gender equality' available at <http://diglib.bis.uni-oldenburg.de/pub/unireden/ur97/kap1.pdf> on 6 February 2015.

<sup>43</sup>Ndulo M. 'African customary law, customs, and women's rights', 87-120.

law. However, its scope is much larger than that of this study. The study shall zone in on Kenyan and the specific laws that govern the systems of dispute resolution. The specific rights infringed shall also be highlighted.

Colonization left a complex legal arena in sub-Saharan Africa in which customary and public law coexist and sometimes conflict. Customary law is a body of rules in many parts of Africa governing personal status, communal resources, and local organization. Customary dispute resolution mechanisms have been recognized as a valid means of accessing justice due to their accessibility, local knowledge, low cost, and speed when contrasted with national court systems and public law.<sup>44</sup> The paper recognizes that this may seem like the best means of resolving dispute for women especially due to the history they have with formal systems. However, the most positive assessments of women's property rights in customary tenure systems note the necessity for women to negotiate their social relationships in order to sustain access to land through changing life circumstance. Difficulties in ensuring women's access to land have been noted as a problematic feature of customary institutions of dispute resolution. The paper assesses the effectiveness and accessibility of customary systems of dispute resolution in solving property disputes in Kisii especially for women. This will be instrumental for this study as it gives an example of the dispute resolution mechanisms. However, it is limited to property disputes the research paper will deal with other forms of disputes.

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<sup>44</sup> Henrysson E. and Joireman S., 'On the Edge of the Law: Women's property rights and dispute resolution in Kisii, Kenya' *Law & Society Review*, Vol. 43, 2009, 39-60.

## CHAPTER 2: ACCESS TO JUSTICE IN KENYA

### 2.0 DEFINITION AND APPLICATION OF ACCESS TO JUSTICE

The term access to justice defies precise definition. It is most commonly referred to as the ability of a person to seek and obtain a remedy through formal or informal institutions of justice for complaints in harmony with human rights standards. There cannot be access to justice where citizens, especially marginalized groups, fear the system and view it as a foreign concept or where the justice system is financially inaccessible or where individuals have no lawyers or where they do not have information or knowledge of their rights or where there is a weak justice system.<sup>45</sup> UNDP views access to justice as normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement and civil society oversight. Therefore access to justice can be said to have two dimensions; the first is concerned with procedural access which is the right to a fair hearing before a tribunal and the second deals with substantive justice which is the right to receive a fair and just remedy for a violation of one's rights.<sup>46</sup>

Access to justice is important in ensuring sustainable development in the society.<sup>47</sup> It is a tool through which other rights are promoted and protected and an essential element to eliminate poverty and strengthen social justice, human development, security and democratic governance.<sup>48</sup> The right of access to justice is a reaction to and a protection against legal formalism and dogmatism.<sup>49</sup>

In 1994 commonwealth governments appointed the Access to Justice Advisory Committee.<sup>50</sup> This Committee recognized that access to justice has three main elements.<sup>51</sup> First is equality in the access of legal services, that is, all individuals have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights. Second is national

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<sup>45</sup>UNDP, 'Strengthening Judicial Integrity through Enhanced Access to Justice', 2013, 5.

<sup>46</sup> *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

<sup>47</sup> UNDP, 'Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices' 2013, 12.

<sup>48</sup> UNDP, 'Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices' 2013, 12.

<sup>49</sup> *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR.

<sup>50</sup> Access to Justice Advisory Committee, 'Access to justice: an action plan', 1994.

<sup>51</sup> Access to Justice Advisory Committee, 'Access to justice: an action plan', 1994.

equity which means ensuring that all persons enjoy equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy. Third, there should be equality before the law which means ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in such fields as education, employment, use of community facilities and access to services.<sup>52</sup>

In *Dry Associates v Capital Markets Authority and another*<sup>53</sup>, the court stated that;

*“Access to justice is a broad concept that defies easy definition. It 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 of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”*

In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>54</sup>

The right of access to justice requires an effective legal and institutional framework not only internationally but also nationally.<sup>55</sup> Access to justice can only be as effective as the available mechanisms to facilitate the same.<sup>56</sup>

People's evaluations of legal procedures, both formal and informal, are strongly shaped by issues of procedural justice, which are central to the discussions on the rule of law.<sup>57</sup> The following

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<sup>52</sup> Access to Justice Advisory Committee, *‘Access to justice: an action plan’*, 1994.

<sup>53</sup> Nairobi Petition No. 328 of 2011 (Unreported)

<sup>54</sup> Available at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/) on 2 January 2016.

<sup>55</sup> Muigua K., *ADR: The Road to Justice in Kenya*, March 2014 available at <http://www.ciarkkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>56</sup> Muigua K., *ADR: The Road to Justice in Kenya*, March 2014 available at <http://www.ciarkkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

criteria for determining procedural fairness is used: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story. Second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say. Third, people watch for signs that the decision maker is trying to treat them in an even-handed and fair manner. And finally, people value a process that accords them dignity and respect.<sup>58</sup>

The existence of laws, not just locally but also in international instruments, which recognize the right to access justice is proof of the overwhelming support this right has received. These laws include Article 48 of the Constitution of Kenya and Article 8 of the Universal Declaration of Human Rights. Therefore, in a very literal way, irrespective of the problems in terminology and actualization of this right, it is now well settled that access to justice is a fundamental freedom owed to all persons.<sup>59</sup>

## 2.1 HISTORY OF THE RIGHT TO ACCESS TO JUSTICE IN KENYA

Accessing justice in Kenya has been difficult for many people.<sup>60</sup> The challenges facing access to justice encompass; legal, institutional and structural challenges; institutional and procedural obstacles; social barriers; and practical and economic challenges.<sup>61</sup> Related to this are the high court fees, geographical location, complexity of rules and procedure and the use of legalese. The

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<sup>57</sup> Muigua K., *ADR: The Road to Justice in Kenya*, March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>58</sup> Muigua K., 'ADR: The Road to Justice in Kenya' March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>59</sup> Wabuke E., 'Enhancing Access to Justice in Kenya: The Imperative of Adopting the Alternative Dispute Resolution Approach' available at <https://www.academia.edu> on 3 January 2016.

<sup>60</sup> Muigua K., 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' <http://ciarbkenya.org/assets/access-to-justice.pdf> on 1 January 2016.

<sup>61</sup> Muigua K., 'ADR: The Road to Justice in Kenya' March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

court is also limited in its role. It is dependent on the civil procedure and the litigious courses taken by the parties themselves.<sup>62</sup>

Justice had been perceived to be a privilege reserved for a select few in society, who had the financial ability to seek the services of the formal institutions of justice.<sup>63</sup> This is because many people viewed litigation as the major conflict management channel and was widely recognized under the laws as a means to accessing justice.<sup>64</sup> The absence of an efficient system to facilitate the rule of law also contributes to this situation as people are usually out of touch with the existing legal and institutional frameworks on access to justice.<sup>65</sup>

Litigation is in most cases, slow and too expensive and may also lose the practical credibility required in the corporate world.<sup>66</sup>

## **2.2 ACTUALIZATION OF THE RIGHT TO ACCESS JUSTICE**

The Kenyan Constitution has recognized the importance of the right to access justice. The state has the obligation to ensure access to justice to all persons and ensure that any fee required shall be reasonable and shall not impede access to justice.<sup>67</sup> Article 22 (1) gives every person the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied or infringed or threatened. Article 22(3) further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that: formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any

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<sup>62</sup> Muigua K., 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' <http://ciarbkenya.org/assets/access-to-justice.pdf> on 1 January 2016.

<sup>63</sup> Muigua K., 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' <http://ciarbkenya.org/assets/access-to-justice.pdf> on 1 January 2016.

<sup>64</sup> Toope S. J., 'Legal and Judicial Reform through Development Assistance: Some Lessons' *McGill Law Journal / Revue De Droit De McGill*, Vol. 48, 2003, 358-412.

<sup>65</sup> Toope S. J., 'Legal and Judicial Reform through Development Assistance: Some Lessons', 358-412.

<sup>66</sup> Muigua K., 'ADR: The Road to Justice in Kenya' March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>67</sup> Article 48, Constitution of Kenya (2010).

person to commence court proceedings under this Article, and to have the matter heard and determined by a court. Article 159 requires that in the exercise of judicial authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities. Article 27 (1) states that all persons are equal before the law and has the right to equal protection and equal benefit of the law. Article 27 (2) further elaborates what equality includes which is, the full and equal enjoyment of all rights and fundamental freedoms.

These provisions in the constitution prove that there has been a push to enhance access to justice. As mentioned earlier, pre-2010 the emphasis was on litigation which, as shown above, faces a large number of challenges. For the constitutional right of access to justice to be actualized, there has to be a framework based on the principles of: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies.<sup>68</sup>

Recognition of traditional dispute resolution mechanisms is thus grounded on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal settings) and conflicts are to be resolved expeditiously and without undue regard to procedural difficulties that plague the court system.<sup>69</sup>

During the colonial era, the colonialists recognized that TDRMs were cheap, efficient and effective.<sup>70</sup> TDRMs persisted even after the introduction of western-based dispute resolution systems. This is attributed to the incomplete reach of the state's legal structures, due to the weak nature of most African states, people face geographical and financial constraints in accessing the formal justice systems. Most courts are situated at the administrative headquarters and are therefore not easily accessible to individuals. It is apparent that local people perceive TDRMs as:

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<sup>68</sup>Muigua K., 'ADR: The Road to Justice in Kenya' March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>69</sup>Muigua K; 'Traditional Dispute Resolution Mechanisms under article 159 of The Constitution of Kenya 2010' available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>70</sup>Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

incorruptible, familiar, accessible at all times, affordable, beneficial as it utilizes local resources, having decisions based on consensus, and as a system that seeks to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred.<sup>71</sup>

Access to justice is an essential component of the rule of law.<sup>72</sup> Its importance in society cannot be undermined and it is therefore essential for a government to promote it by any means possible. It is, therefore, upon this background that the Constitution in Article 159 provides for the use of TDRMs as a form of dispute resolution. The use of TDRMs allows those who are unable to access the formal court system to have their grievances heard and determined.

However, even as we recognize that access to justice in the court system is difficult, the use of TDRMs brings up other concerns. A study conducted by the International Commission of Jurists-Kenya demonstrates that most TDRMs are male dominated and that women often face the challenge of lack of access to fair justice.<sup>73</sup> As a consequence, most women prefer accessing formal justice systems in spite of its many bottlenecks.<sup>74</sup> Further, all TDRMs surveyed had little or no knowledge of the provisions of existing human rights instruments.<sup>75</sup> The analysis of TDRMs in the subsequent chapters is based on its ability to ensure access to justice as described in this chapter is achieved for women.

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<sup>71</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 8.

<sup>72</sup> Muigua K., 'ADR: The road to justice in Kenya' March 2014 available at <http://www.ciarbkenya.org/assets/paper-on-adr,-the-road-to-justice--in-kenya.pdf> on 2 January 2016.

<sup>73</sup> The International Commission of Jurists – ICJ, report on the Interface between formal and informal justice systems in Kenya, 201130-38.

<sup>74</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008,8-15

<sup>75</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 8-15.

## CHAPTER 3: TRADITIONAL DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE

### 3.0 TRADITIONAL DISPUTE RESOLUTION MECHANISMS

These systems are culturally specific and therefore there is no definition that has been adopted across the board.<sup>76</sup> Hence concepts like Community Justice System (CJS), traditional, non-formal, informal, customary, indigenous and non-state justice systems are often used interchangeably in different contexts to refer to localized approaches by communities to attain justice.<sup>77</sup> Although these definitions are used interchangeably, they are not the same.

Community justice systems are broader and encompass customary and traditional justice systems.<sup>78</sup> The normative content of community justice systems may not be African customary law. However, the normative content for traditional and certain customary justice systems is the African customary law of the different ethnic groups.<sup>79</sup>

In this paper, TDRMs have been defined as dispute resolution mechanisms based on customary laws of a particular ethnic group practiced since time immemorial.<sup>80</sup> However, these customs tend to change over time. This paper shall not examine this, rather it shall focus on the feature of TDRMs that causes discourse which is the use of customary law to solve the disputes. The

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<sup>76</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 2.

<sup>77</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 2.

<sup>78</sup> Kariuki F., 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> on 5 December 2015.

<sup>79</sup> Kariuki F., 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> on 5 December 2015.

<sup>80</sup> Kariuki F., 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> on 5 December 2015.

research is aimed at determining whether the customary law applied in the running of these systems could in fact inhibit access to justice for women.

### 3.1 CUSTOMARY LAW AND TDRMs

Customary law is a body of rules in many parts of Africa, governing personal status, communal resources, and local organization.<sup>81</sup> It is used by various ethnic groups for their internal organization and administration. It is recognized by the courts and exists as a body of law governing citizens in countries of sub-Saharan Africa.<sup>82</sup> It has the greatest control over people in rural areas, but it also affects urban dwellers through the regulation of marriage and inheritance.<sup>83</sup> It has been resilient even after decades of neglect.<sup>84</sup> The famous SM Otieno case is a testament to the hold customary law has on the people. The widow Wambui Otieno asserted that she had the right to bury her late husband on his property that was not in his homeland. However, his family clan argued that customary law must be applied and therefore he was to be buried in his homeland. The court ruled that customary law did apply in this case regardless of the fact that SM Otieno had “left” his customs by embracing Christianity and western civilization. The court argued that the issue was not governed by any Kenyan statute and therefore customary law would apply.<sup>85</sup>

Customary law provides a system of rules for the allocation and adjudication of property rights.<sup>86</sup> It is used as a tool through which traditional leaders (chiefs, elders, or headmen) can evaluate claims to property and resolve disputes regarding land and other matters.<sup>87</sup> The aim of customary law is to ensure that community rights are protected rather than focusing on individual rights, it is focused on harmonious living. This means that customary legal decisions tend to be

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<sup>81</sup> Henrysson E. & Joireman S.F., ‘On the edge of the law: Women’s property rights and dispute resolution in Kisii, Kenya,’ 40-42

<sup>82</sup> Henrysson E. & Joireman S.F., ‘On the edge of the law: Women’s property rights and dispute resolution in Kisii, Kenya, 40-42.

<sup>83</sup> Henrysson E. & Joireman S.F., ‘On the edge of the law: Women’s property rights and dispute resolution in Kisii, Kenya, 40-42.

<sup>84</sup> Muigua K; ‘Traditional Dispute Resolution Mechanisms under article 159 of The Constitution of Kenya 2010’ available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>85</sup> *Otieno v Ougo & another Civil Case No 4873 of [1986]*.

<sup>86</sup> Henrysson E. & Joireman S.F., ‘On the edge of the law: Women’s property rights and dispute resolution in Kisii, Kenya, 41-42.

<sup>87</sup> Henrysson E. & Joireman S.F., ‘On the edge of the law: Women’s property rights and dispute resolution in Kisii, Kenya, 41-42.

compromises rather than clear decisions for one party against another as is the case in the judicial system. For example, anyone making a claim to land in a customary legal system will be making it in the context of the relationships that form the social system of their community.<sup>88</sup>

From the inception of colonial rule, customary law was applicable on the conditions that it was not repugnant to justice, equity, or good morality and that it was not in conflict with any written law.<sup>89</sup> Countries have been apprehensive about the use of customary law since colonization and acceptance of western systems of government.

The Kenyan formal justice system has had a torturous relationship with customary law under which TDRMs are formed.<sup>90</sup> This originated in the colonial period where customary law and hence TDRMs were treated as inferior to the formal justice systems. Nonetheless, the colonialists realized that they would be unable to completely do away with customary law and its dispute resolution mechanisms. The colonialists therefore allowed for the use of customary law to deal with the disputes arising among natives while still pushing the English justice system agenda. Upon independence there was a move to try and unify the two systems.<sup>91</sup>

However, this was not done efficiently and led to customary law being used sparingly. TDRMs were still used but up to the year 2010 they had not been formally recognized as a system of dispute resolution. The new Constitution marked a new era, it recognized customary law as a legitimate source of law in as far as it does not contravene the constitution.<sup>92</sup> It goes a step further by requiring the judiciary to promote alternative dispute resolution methods, including TDRMs.<sup>93</sup> The Judicature Act states 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

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<sup>88</sup> Henrysson E. & Joireman S.F., 'On the edge of the law: Women's property rights and dispute resolution in Kisii, Kenya', 40-42.

<sup>89</sup> Ndulo M. 'African customary law, customs, and women's rights', 87-120.

<sup>90</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>91</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>92</sup> Article 2 (4), Constitution of Kenya (2010).

<sup>93</sup> Article 159 (2), Constitution of Kenya (2010).

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.<sup>94</sup>

Kenyan law, therefore recognize the existence and applicability of customary law. The laws also recognize that these laws may be repugnant to justice and caveats have therefore been put in place regarding the applicability of these laws. It is no surprise then, that with the recognition of TDRMs as a valid method of solving disputes, the Constitution has put in place the repugnancy test.<sup>95</sup> It seems that although the lawmakers recognize that TDRMs are very helpful for the vast number of people who are unable to use the formal judicial system, they also recognize that customary law may go against the bill of rights.

### 3.2 CUSTOMARY LAW AND WOMEN

Customary law has existed successfully for a long time. It however, tends to give women less power than men.<sup>96</sup> It has been faulted for viewing women as accessories to the group to which they belong, such as a clan or tribe, rather than essential and equal members of the society.<sup>97</sup> Over the years, it has continuously been unfairly discriminate between family members on the basis of their status in the family and their gender.<sup>98</sup> There are certain aspects of customary laws that do not conform to human rights standards. However, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws.<sup>99</sup> This is mainly because, TDRMs follow this notoriously patriarchal and discriminatory law.<sup>100</sup> Decisions

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<sup>94</sup> Section 3 (2), Judicature Act (Chapter 8).

<sup>95</sup> Article 159 (3), Constitution of Kenya (2010).

<sup>96</sup> Available at <http://www.section27.org.za/wp-content/uploads/2010/04/09Manual.pdf> on 4 December 2015.

<sup>97</sup> Ndulo M. 'African customary law, customs, and women's rights', 87-120.

<sup>98</sup> Available at <http://www.section27.org.za/wp-content/uploads/2010/04/09Manual.pdf> on 4 December 2015.

<sup>99</sup> Muigua K; 'Traditional Dispute Resolution Mechanisms under article 159 of The Constitution of Kenya 2010', available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>100</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 4-8.

arrived at through TDRMs tend to be less favorable for women as compared to formal systems especially concerning the protection of property rights.<sup>101</sup>

### 3.3 STRUCTURE, COMPOSITION AND JURISDICTION OF TDRMS

TDRMs are based on customary laws, traditions and customs of ethnic groups. Their main purpose is to safeguard and restore the relationships in the community. They rarely focus on the allocation of individual rights.<sup>102</sup> This means that the decisions arrived at are mostly compromises rather than clear decisions for one party against another. The protection of the community may take precedent over individual rights.<sup>103</sup>

TDRMs members are predominantly elders drawn from the community. Whenever a conflict arises negotiations are done by the disputants. In other instances, the Council of elders or elderly men and women could act as third parties in the resolution of the conflict.<sup>104</sup> This paper focuses on the most common form of TDRMs, which is the use of a council of elders. The Digos have their kayas, Ker among the Luos; the Merus have 'Njuri Ncheke', the Kikuyu have "Kiama" among others. These councils hear and decide on matters that are brought before them. The councils apply the customs and traditions of the people to come up with a decision.<sup>105</sup> They are mainly made up of men, although there are a few systems made up of both men and women with men comprising the majority.<sup>106</sup> There are two exceptional cases, the Had Gasa of the Orma community and the Kijo of the Pokomo community, which are made up of women only.<sup>107</sup> Members are older, married, residents of the area, knowledgeable and respected in the community. The council made up of women deals with matters related to women's sexuality, for

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<sup>101</sup> Henrysson E. & Joireman S.F., 'On the edge of the law: Women's property rights and dispute resolution in Kisii, Kenya', 43-46.

<sup>102</sup> The International Commission of Jurists - *ICJ report on the Interface between formal and informal justice systems in Kenya*, 2011, 32.

<sup>103</sup> Henrysson E. & Joireman S.F., 'On the edge of the law: Women's property rights and dispute resolution in Kisii, Kenya', 39-42.

<sup>104</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010', available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>105</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12.

<sup>106</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12

<sup>107</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12

example rape or defilement, as well as social issues such as HIV/AIDS and female genital mutilation (FGM).<sup>108</sup>

### 3.4 TDRMS LIMITATIONS

#### a. Nature of laws

TDRMs are based on unwritten laws, rules and procedures which are at best vague and leave the system open to manipulation by the elders and heads in the system.<sup>109</sup> Some of the laws, rules and processes governing TDRMs are impossible to implement in modern society. There are some punishments like flogging, banishment from the community, payment of fines in the form of livestock which fall under this category of impractical punishments.<sup>110</sup>

#### b. Nature of matters handled

The current mechanisms deal with matters across the board, this includes civil and criminal matters.<sup>111</sup> Grievous offences such as sexual offences and murder are given lenient punishments.<sup>112</sup> The mechanisms are also disadvantaged in that, they may be unable to deal with modern problems such as cybercrime.

#### c. TDRMs and human rights

TDRMs may reflect patriarchal views which often are to the detriment of the women in the society. An example is the encouragement by elders for women to persevere domestic abuse.<sup>113</sup>

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<sup>108</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12.

<sup>109</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>110</sup> The International Commission of Jurists - *ICJ report on the Interface between formal and informal justice systems in Kenya*, 2011, 32.

<sup>111</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>112</sup> The International Commission of Jurists - *ICJ report on the Interface between formal and informal justice systems in Kenya*, 2011, 32.

<sup>113</sup> FIDA Kenya, *Traditional justice systems in Kenya: A Study of communities in Coast province of Kenya*, 2008, 7-12.

Some customary law norms undermine women's dignity and are used to treat women as second class citizens.<sup>114</sup>

Majority of the common TDRMs do not meet the threshold for fundamental freedoms and human rights as prescribed by the Constitution and International Human Rights instruments. The mechanisms fail to abide by the basic principles such as due process, fair trial, equality and non-discrimination.<sup>115</sup> These mechanisms allow for actions that are otherwise considered violations by the law. This includes but is not limited to; summary executions, infanticide, condemning people unheard, forced marriage and discrimination.<sup>116</sup>

TDRMs, as defined in this paper, are based on customary laws. Consequently the recognition given to traditional dispute resolution mechanisms in Article 159 (2) (c) of the Constitution is thus a restatement of customary jurisprudence.<sup>117</sup> These laws tend to discriminate against women. The systems themselves are made up of men with the exception of some councils that have accepted women and those that are wholly made up of women.<sup>118</sup> However, even in councils that are only made up of women, their jurisdiction is limited to matters concerning women.<sup>119</sup>

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<sup>114</sup>Ndulo M. 'African customary law, customs, and women's rights', 87-120.

<sup>115</sup>Ndulo M. 'African customary law, customs, and women's rights', 87-120.

<sup>116</sup> The International Commission of Jurists - *ICJ report on the Interface between formal and informal justice systems in Kenya*, 2011, 32-34.

<sup>117</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010', available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>118</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12.

<sup>119</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 7-12.

## CHAPTER 4: IMPLICATIONS OF TDRMS ON WOMEN'S RIGHT TO ACCESS JUSTICE

### 4.0. THE ISSUE OF JUSTICE

The guiding theory in this paper is that justice is fairness. This theory holds that the principles of justice that form the basic structure of society are a result of the original agreement. These principles are arrived at by free and rational persons in a situation where they are all equal. These principles regulate all further agreements such as the forms of governments that can be established and agreements concerning social cooperation.<sup>120</sup>

The principles of justice agreed upon are made beneath a veil of ignorance. Parties are described as rational and mutually disinterested. This ensures that people make decisions not based on what is best for their situation but rather what is fair for all. Therefore, the principles of justice are agreed to in an initial state of fairness.<sup>121</sup>

John Rawls further elaborates that the persons involved in this decision making process would eventually arrive at two main principles. The first principle requires equality in the assignment of basic rights and duties. This first principle is concerned with aspects of the social system that define and secure the equal liberties of citizenship. These liberties are all required to be equal since citizens of a just society are to have the same basic rights.<sup>122</sup>

The second principle holds that social and economic inequalities are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.<sup>123</sup> It is not necessary that the wealth and income be distributed equally, rather, it must be to everyone's advantage, and at the same time, positions of authority and offices of command must be accessible to all.<sup>124</sup>

Therefore, having looked at the theory of justice as fairness and having based this paper on this, it is right to assume that the assertion that equality is a necessary aspect of justice is correct. The main principles highlighted by John Rawls recognize that a society can only function if the rights

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<sup>120</sup> Rawls J., *Theory of justice*, 3-40.

<sup>121</sup> Rawls J., *Theory of justice*, 3-40.

<sup>122</sup> Rawls J., *Theory of justice*, 47-57.

<sup>123</sup> Rawls J., *The Theory of justice*, 47-57.

<sup>124</sup> Rawls J., *Theory of justice*, 47-57.

of every individual are protected and people given equal opportunities. In this paper, therefore, a system could only be seen as promoting and ensuring justice if it's based on these two principles.

However, as mentioned in the previous chapter, there seems to be inequality in the current structure of TDRMs. The customary law that governs the system, is patriarchal and tends to treat women as inferior to men in the same society. Women are not treated equally contrary to the principle espousing that all should be given access to positions of authority, the TDRMs rarely appreciate the participation of women in decision making. Although the system may efficiently solve cases, the mistreatment of women is against the theory of justice as fairness.

It would therefore be a valid conclusion given the facts above, that in their current state, TDRMs that are wholly run by customary laws cannot be said to promote justice.

#### **4.1 ENHANCING ACCESS TO JUSTICE FOR WOMEN**

UNDP defines 'access to justice' as: the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.<sup>125</sup> The enactment of the 2010 Constitution marked a milestone in Kenya's fight to enhance access to justice for all people.<sup>126</sup> There are now several Articles that express the need for access to justice and providing for this through, public participation, ADR and traditional dispute resolution mechanisms and the overhaul of the judicial system.<sup>127</sup> These steps were taken due to the history that plagued the formal system such as the high court fees, geographical location, complexity of rules and procedure and the use of legalese that had hindered access to justice for many.<sup>128</sup>

Currently, access to justice is enshrined in the Constitution as a right held by all persons.<sup>129</sup> The scope of this right has been said to be far reaching, infinite and encompasses and includes but is not limited to; the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access to all of judicial mechanisms for such protection;

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<sup>125</sup> Wojkowska E., 'Doing justice: how informal justice systems can contribute', 8-10.

<sup>126</sup> Muigua Kariuki: 'Access to justice: promoting court and alternative dispute resolution strategies', available at <http://www.kmco.co.ke> on 5 March 2015.

<sup>127</sup> Muigua Kariuki: 'Access to justice: promoting court and alternative dispute resolution strategies', available at <http://www.kmco.co.ke> on 5 March 2015.

<sup>128</sup> Muigua Kariuki: 'Access to justice: promoting court and alternative dispute resolution strategies', available at <http://www.kmco.co.ke> on 5 March 2015.

<sup>129</sup> Article 48, Constitution of Kenya (2010).

the respectful, fair, impartial and expeditious adjudication of claims in the judicial mechanisms, equal right to the protection of one's rights by the legal enforcement agencies and easy entry into the judicial justice system.<sup>130</sup> The Constitution has recognized the use of TDRMs in an effort to protect this right.<sup>131</sup>

Access to justice maybe impeded by a number of factors some of which are; long delays, severe limitations in existing remedies provided either by law or in practice, gender bias and any other barriers in the law, lack of de facto protection especially for women and children and lack of adequate information as to what is meant to exist in the law.<sup>132</sup>

The use of TDRMs is synonymous with the infringement of women's rights.<sup>133</sup> Afghanistan women's rights advocates fear that ongoing financial and political support from NGOs and foreign governments validates TDRMs, despite their reputation for inequality. Some women even allege that donor support for TDRMs bodies might empower them to further discriminate against women, because any infusion of political capital and financial resources may increase their capacity to suppress women's rights.<sup>134</sup>

TDRMs have been recognized because people recognize the active role the systems play in a society where many people are not able to access the formal dispute resolution mechanisms.<sup>135</sup> Scholars have largely agreed that courts only deal with a fraction of all the disputes that take place in society.<sup>136</sup> These mechanisms have been very effective in resolving conflicts especially

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<sup>130</sup> Muigua Kariuki: 'Access to justice: promoting court and alternative dispute resolution strategies', available at <http://www.kmco.co.ke> on 5 March 2015.

<sup>131</sup> Article 159, Constitution of Kenya (2010).

<sup>132</sup> Available at [http://www.unrol.org/files/Access%20to%20Justice\\_Practice%20Note.pdf](http://www.unrol.org/files/Access%20to%20Justice_Practice%20Note.pdf) on 10 February 2015.

<sup>133</sup> Sinha S.Q.: 'Traditional dispute resolution and Afghanistan's women USIP', available at <http://www.usip.org> on 3 February 2015.

<sup>134</sup> Sinha S.Q.: 'Traditional dispute resolution and Afghanistan's women USIP', available at <http://www.usip.org> on 3 February 2015.

<sup>135</sup> Muigua Kariuki: 'Access to justice: promoting court and alternative dispute resolution Strategies', available at <http://www.kmco.co.ke> on 5 March 2015.

<sup>136</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010', available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

natural resource-based conflicts among the pastoralist communities in Kenya.<sup>137</sup> However, even with these benefits to the community, there is still the oppression women face. These limitations can be said to limit a woman's access to justice. Factors such as decisions that are discriminatory against women and lack of equality among the genders is a clear sign that TDRMs in their current form would not lead to access to justice for women at all times. Nonetheless, the benefits of TDRMs make it impossible to completely disregard them. Steps have to be taken to incorporate this system and still ensure that these negative aspects of the systems are dealt with. This brings into light the need to modify TDRMs so as to eliminate the aspects that may go against the bill of rights an idea that will be expounded on in the next chapter.

#### **4.2 EQUALITY BEFORE THE LAW**

Equality is the affirmation that human beings are equal and have equal rights. It is a core tenet in rights' discourses. Equality is pegged on rights or entitlements that all human beings and sovereign states have. Legal rights comprise a cluster of claims, powers and immunities.<sup>138</sup> The Constitution states that all persons are equal before the law and that all persons have freedom from discrimination. This equality includes the full and equal enjoyment of all rights and fundamental freedoms. The Constitution further states that men and women shall be treated equally and they shall be given equal opportunities in political, economic, cultural and social spheres.<sup>139</sup> This is simply an obligation on the state to ensure human rights are applied without 'distinction', 'discrimination', 'exclusion', or 'restriction' as between men and women.<sup>140</sup> International instruments also recognize the need for equality, making this an international norm. The Charter of the United Nations in its Preamble states that:

*"We the peoples of the United Nations determined ... reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have agreed..."*

The Universal Declaration of Human Rights of 1948 states concisely in Article 2 that:

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<sup>137</sup> Muigua K; 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010', available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>138</sup> Kameri-Mbote P, *Fallacies of equality and inequality: multiple exclusions in law and legal discourses*, inaugural lecture, University of Nairobi, 24<sup>th</sup> January 2013.

<sup>139</sup> Article 27, Constitution of Kenya (2010).

<sup>140</sup> UN Women, *Discussion paper: gender equality and human rights*, 2015, 3-12.

*“Everyone is entitled to all the Rights and Freedoms set forth in this declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origins, property, birth or other status.”*

Regionally, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.<sup>141</sup> In almost all cases, women occupy a disadvantaged position under customary law. This is because traditional African societies are governed on the basis of patriarchal structures where women’s individual interests were under the interests of the group. Therefore, customary law contains various traits that often contradict principles of gender equality and non-discrimination espoused in both domestic and international human rights instruments.<sup>142</sup> This state of affairs has caused a debate between human rights activists and traditionalists centered on whether customary norms are compatible with human rights norms.<sup>143</sup>

For there to be equality, all human rights must be afforded to all persons equally with no discrimination as mentioned above. The right to a fair trial is a fundamental right that cannot be limited.<sup>144</sup> A fair trial is a neutral trial conducted to accord each party to the proceeding their due process rights. The right to a fair trial applies to civil and criminal proceedings.<sup>145</sup> Article 10 of the Universal Declaration of Human Rights also recognizes all the rights associated with this right. This right is further elaborated in the Constitution under the right to a fair hearing.<sup>146</sup> This encompasses the availability of an impartial decision making body.<sup>147</sup> The theory of equality asserts that both men and women should be guaranteed these rights without any discrimination. However, the composition of the councils of elders and the patriarchal nature of customary law

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<sup>141</sup> Muigua Kariuki: ‘Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010’, available at <http://kmco.co.ke/index.php/publications/111-traditional-dispute-resolution-mechanisms-under-article-159-of-the-constitution-of-kenya-2010> on 3 March 2015.

<sup>142</sup> Winifred Kamau: ‘Customary law and women’s rights in Kenya’, available at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> on 10 November 2015.

<sup>143</sup> Ndulo M. ‘African customary law, customs, and women's rights’, 87-120.

<sup>144</sup> Article 25, Constitution of Kenya (2010).

<sup>145</sup> Available at <http://definitions.uslegal.com/f/fair-trial/> on 15 December 2015.

<sup>146</sup> Article 50, Constitution of Kenya (2010).

<sup>147</sup> Article 50, Constitution (2010).

means that the system is not impartial. In the current state of affairs, women are exposed to the likelihood that they shall not be afforded a fair trial.

The analysis of these systems proves that as it is now, women are treated like second class citizens.<sup>148</sup> Some of the decisions arrived at may be to the detriment of those women who bring matters to the TDRMs. Again it seems that the systems are popular and do help solve many disputes but they need to be streamlined to align themselves to the Constitution.<sup>149</sup> According to liberal feminism, the differences between sexes are not based in biology and therefore women and men are not all that different, their common humanity supersedes their procreative differentiation.<sup>150</sup> It seeks to eliminate all hindrances to gender equality.

Looking at TDRMs through this context exposes the many issues that face the system as it is now. There is a great likelihood that the principles of equality and access to justice may be disregarded, leaving women at a great disadvantage. This would be a clear violation of the requirements that have been so clearly stated in Article 159 (3).

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<sup>148</sup> Ndulo M. 'African customary law, customs, and women's rights', 87-120.

<sup>149</sup> Article 2 (4), Constitution of Kenya (2010).

<sup>150</sup> Lorber.J, 'The variety of feminisms and their contribution to gender equality', available at <http://diglib.bis.uni-oldenburg.de/pub/unireden/ur97/kap1.pdf> on 6 February 2015.

## **CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION**

### **5.0 FINDINGS**

The use of TDRMs has been resilient even with the emphasis being placed on the court system as the main means of solving disputes. It has proved to be an essential means of solving disputes where people lack access to courts. Areas such as North Eastern Kenya are proof of this use. The Kenyan judicial system was becoming inefficient due to case backlogs, use of legalese, geographical restrictions and the expenses associated with the use of the court system.

Therefore, in an effort to enhance access to justice TDRMs were recognized as suitable means of dispute resolution. This was to increase the number of avenues through which an individual could air their grievances. Even with this recognition the constitution acknowledges the risk that the use of TDRMs may cause infringement of the bill of rights, hence, a repugnancy test has been put in place.

The TDRMs examined prove that women are at a disadvantage. Women have little, if any, role to play in the mechanisms. It is largely accepted that they are to be represented by the men in their families. The constitution requires equality before the law, however, the treatment of women is such that they are adjuncts to the group. The decision making bodies are mainly made of men. This limits the ability of these bodies to ensure that women have fair trials. Lastly, the systems are governed by customary law which is notoriously patriarchal in nature. This means that the men are given a higher stand in society and therefore, any decisions made will be to the detriment of women. Customary law also focuses more on community rights rather than individual rights. Therefore, persons seeking redress in these systems tend to have to compromise on their individual rights to ensure harmony in the community.

These findings affirm the hypothesis of this paper. TDRMs may, in many circumstance, hinder access to justice for women.

## 5.1 RECOMMENDATIONS

The Constitution under Article 159 captures the desires of the people of Kenya. In this Article it not only states that judicial authority emanates from the people, it also commands the judiciary, in exercise of its judicial authority, to promote the use of alternative forms of dispute resolution including traditional dispute resolution mechanisms.<sup>151</sup>

The Judiciary in 2015, launched the court-annexed African Justice System (AJS), also known as TDRMs, Pilot Programme. The Pilot Programme will serve as a source of data that will lead to generation of knowledge to inform the Judiciary the appropriate Policy, measures and practice it should adopt on the question of AJS. The Chief Justice recognized the role that TDRMs play in the society and the need to acknowledge them.<sup>152</sup> He further emphasized that due to the case backlog in the courts, it was necessary for the judiciary to embrace new methods of dispute resolution. He recognizes that the judiciary has a mandate under the Constitution to involve TDRMs. However, the history of its application and the nature of customary laws are major hindrances that are yet to be tackled.<sup>153</sup>

It is clear that the judiciary has taken a proactive approach to the implementation of TDRMs. Nonetheless, they have only started the program as a means to collect data that will be used to come up with regulations to govern the court-annexed AJS. The following are recommendations as to the appropriate policy, measures and practice with regards to TDRMS so as to ensure that women and other marginalized groups' right to access justice is not infringed, ought to be considered.

### 1. Documentation

This recommendation is two-fold. The first aspect deals with customary law. Elders in the communities should be elected to form a committee responsible for documenting the customary

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<sup>151</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>152</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

<sup>153</sup> Chief Justice Dr. Mutunga W., *Remarks at the formal launch of the isiolo law courts' court-annexed alternative justice system and formal launch of the task force on alternative justice system*, held at sportsman arms hotel, Nanyuki, 2015.

laws that govern TDRMs. This will ensure that there is a reference point and avoids situations where decisions are made without any backing. It shall also ensure that any laws that contradict the constitution are not relied on. The second aspect deals with the documentation of the cases dealt with by the TDRMs. This is a way to form precedence and ensure uniformity in the decisions that are made. It also serves as a way for the judiciary to inspect cases and ensure that the principles of natural justice were adhered to.

## **2. Involving marginalized groups**

One of the main challenges facing TDRMs is the inequality in this system. Women, children and other marginalized groups are not given equal opportunities to participate as compared to men. The pilot program seeks to have councils of elders that are appointed by the community. The community should then be instructed to vote in persons who shall represent all members of the society. This includes women, the youth and other marginalized groups. Each individual in the council should have an equal say and an equal vote in any of the matters brought before them. Although the councils use customary law in their decisions, the Constitution is the supreme law. Therefore, if any customary law contradicts the Constitution, it shall not be applicable. The court should therefore only work with councils that have met this criteria.

These marginalized groups of people should also be given opportunities to bring suits and defend them before these revamped councils.

## **3. Educating the participants**

There must be a push to educate people who participate in TDRMs of their rights. This includes the right to a fair trial, the right to access justice and the right to be treated equally before the law.

## **4. Limitation on cases to be handled**

The judiciary should set out the cases that may be resolved through the use of TDRMs. This should include petty crime and civil matters. Serious offences such as sexual offences should not be dealt with by the council to avoid any discrimination.

## **5. Partnership between the TDRMs and the court system**

Any of the councils that meet the criteria set forth should work hand in hand with the courts. The courts may refer cases to TDRMs. Upon reaching a decision, TDRMs may forward the documentation to the court which may approve it if it is in line with the principles of natural justice. Once approved the decision has the full effect of an order of the court.

### **5.1 CONCLUSION**

Traditional Dispute Resolution mechanisms play a major role in our society. They are a means through which access to justice may be enhanced for all persons. However, even with positives such as flexibility, low costs and easy availability in many rural areas, it is plagued with many challenges especially for women. They tend to have a patriarchal way of doing things that may lead to infringement of women's rights. Very few women participate in these systems and those that do, are limited in the scope they can handle.

The author recognizes that the current situation, which is over emphasis on the court system has led to a dissatisfied population. The need to expand the legal means through which one can air their grievances has become one that can no longer be ignored. Therefore, because of the accessibility of these systems, it is possible to eliminate those features that are repugnant to justice. Upon doing this, TDRMs will be a viable means through which access to justice can be enhanced for all persons.

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