Traditional Conflict Resolution Mechanisms and Institutions

Kariuki Muigua

Abstract

This paper discusses traditional conflict resolution mechanisms and institutions among African societies, and their relevance in Kenya today. With the constitutional and statutory recognition of these mechanisms as a vital aspect of the access to justice mechanisms in Kenya, it is important to revisit their main characteristics and what makes them worth exploring. Their relevance has been enhanced by the formal recognition and protection of communities' right to indulge in cultural activities of their choice.

These mechanisms are as diverse as the needs of communities in the quest for justice and hence, they may be better suited to satisfactorily address more issues when compared to courts of law.

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Kariuki Muigua*

1. Introduction

This paper discusses traditional conflict resolution mechanisms and institutions among traditional African societies, and their relevance in Kenya today. The paper is based on the view that traditional African communities had institutions and mechanisms which were effective in handling and managing conflicts among the people. This is because they reflected the socio-political orientation of the African people. These mechanisms addressed all the social, political and economic conflicts among the people. Since Africans have always been peace loving people, they led a communal way of life.[1] Even today, Africans value peaceful coexistence. As a consequence they developed certain principles that were ideal in managing conflicts.[2]

With particular respect to mediation, most communities in Kenya have used mediation in resolving their conflicts for centuries only that it was not known as mediation, as it is known today. It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources. They did not have formal courts of law where their conflicts could be dealt with. For instance, the *Kiama* or Council of Elders among the Kikuyu community used to act both as an arbitral forum and as a mediator. These elders and institutions were accessible to the populace and their decisions were respected.[3] The paper critically examines these institutions and mechanisms in the context of making a case for the enhanced use of traditional conflict resolution mechanisms in conflict management today.

2. Background

Before the advent of colonialism, the communities living in Africa had their own conflict resolution mechanisms. Those mechanisms were geared toward fostering peaceful co-existence among the Africans. Existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others is evidence that these concepts are not new in Africa.[4] They

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[1] Makgoro, Y., "Ubuntu and the law in South Africa," *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, Vol.1, No. 1, 1998; Conteh-Morgan, E., "Peacebuilding and human security: a constructivist perspective," *International Journal of Peace Studies*, Vol. 10, No.1, 2005, pp.69-86 at pp.78-81.
[2]Ibid; AFP, "Proposed Law Criticised as Backward and Discriminatory", *Daily Nation newspaper* (Nairobi, 3rd November 2012), p. 29; where President Jacob Zuma argues that African problems need African justice. According to Zuma the nature and the value system of the traditional courts of promoting social cohesion and reconciliation must be recognized and strengthened in the laws.

[3]Interview with Ndungu Mwaura, an 82 year old Kikuyu elder on 16th August 2008, at Kahuhia, Murang'a District.
[4] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," *A draft presented to week-end seminar on Indigenous Solutions to Conflicts held at the University of Oslo, Institute of Educational Research*, 2001, pp. 23-24; See also

are practices that have been in application in Africa for a long period. Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate.[5] However, with the arrival of the colonialists, western notions of justice such as the application of the common law of England were introduced in Kenya. The common law brought the court system which, being adversarial, greatly eroded the traditional conflict resolution mechanisms.[6]

A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life saw the Europeans introduce the western ideals of justice which were not based on political negotiations and reconciliation.[7]

The court system is the main dispute settlement mechanism in Kenya today. There are however many barriers to accessing justice through the court system in Kenya including, *inter alia*, high fees, complex rules of procedure, geographical location of courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society, lack of financial independence and selective application of laws.[8]

Due to the above cited hurdles encountered in accessing justice in the courts, there is a tendency in many African States including Kenya, to adopt traditional dispute resolution mechanisms in their legal systems.[9] The role of culture as the foundation of the nation and the requirement that all forms of national and cultural expression should be promoted is now constitutionally guaranteed.[10] It is worth noting that each of the more than 42 tribes in Kenya had its own conflict management mechanisms. Traditional conflict resolution mechanisms have been effective and their declarations and resolutions have been recognized by the government. This is exemplified, for instance, by the Modagashe Declaration in which community members from Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems and identifying role of peace committees, among others. The Declaration also outlined decisions made by the community

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Ajayi, A.T., & Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.8, No. 2, 2014, pp.138-157.

[5] See generally, Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit.; See also generally, Mwenda, W.S., "Paradigms of alternative dispute resolution and justice delivery in Zambia," PhD diss., (University of South Africa, 2009). Available at uir.unisa.ac.za/bitstream/handle/10500/2163/thesis.pdf [Accessed on 12/09/2017].

[6] See generally, Penal reform international, *Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems*, (Penal reform international, 2000). Available at http://www.gsdrc.org/docs/open/ssaj4.pdf [Accessed on 12/09/2017]; See also See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace," *Cooperation and conflict*, Vol.43, No. 2, 2008, pp.139-163.

[7] See generally, Penal reform international, *Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems*, op cit.

[8] See *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution,* ICJ Kenya*,* Vol.III, May, 2002; Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *Kenya Law Review Journal,* Vol. 1, 2007, pp. 19-29, p. 29; See also generally, Gloppen, S. & Kanyongolo, F.E., "Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law," *International Journal of Constitutional Law,*Vol.5, No. 2, 2007, pp.258-293.

[9] See Articles 60(1)(g); 67(2)(f); 159 (2) (c) of the Constitution of Kenya 2010, (Government Printer, Nairobi, 2010); See also sec.8(f), Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011); sec. 5 (f), National Land Commission Act, No. 5 of 2012, Laws of Kenya; sec. 39-41, Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016); sec. 20, Environment & Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

[10] Ibid, Article 11.

around these issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.[11]

3. Principles fostering Peaceful Coexistence and Conflict Resolution

3.1 Common Humanity/Communal Living

The principle of *common humanity/communal living* saw Africans consider themselves as one people. Divisions among the members were abhorred. No wonder it is common in Africa to hear people saying "we are all one people, we are all Africans, we are all one community". This is reflected in the southern Africa term "*ubuntu*" and the Swahili term "*utu*" meaning humanness. Peaceful coexistence was emphasized and conflicts in African traditional society were seen as a threat to the existence of the society itself.[12] In essence, they underscored corporate/communal interests as opposed to selfish ambitions or individualistic pursuits. Individualistic ideals were introduced into the African people by the Europeans in propagating the capitalist ideology.[13]

It has been argued that this principle stressed the central value that, despite cultural and ethnic differences, human beings are basically the same and hence the African communal way of life.[14] By living in a communal setting, there was acceptance that every member of the community was entitled to access natural resources, with the result that this principle formed an integral aspect in resolving conflicts involving natural resources such as land.[15]

It has been suggested that there were few environmental conflicts among the Maasai community because land, forest and water resources in the olden days were communally owned. The grazing lands, watering points, hunting grounds and the forests were accessed

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[11] See generally, CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, available at, www.cewarn.org, [Accessed on 15/06/2012].

[12] See generally, Murithi, T., "Practical Peacemaking Wisdom from Africa: Reflections on Ubuntu," *Journal of Pan African Studies*, Vol.1, No. 4, 2006, pp.25-34.

[13] See generally, Walter, R., "How Europe Underdeveloped Africa," *Beyond borders: Thinking critically about global issues* (1972), pp. 107-125; see also Samir, A., "Imperialism and globalization," *Monthly Review*, Vol.53, No. 2, 2001, p.6; See also Bamikole, L.O., "Nkrumah and the Triple Heritage Thesis and Development in Africana Societies," *International Journal of Business, Humanities and Technology*, Vol. 2, No. 2, March, 2012.

[14] See generally, Ezenweke, E.O., & Nwadialor, L.K., "Understanding human relations in African traditional religious context in the face of globalization: Nigerian perspectives," *American International Journal of Contemporary Research* Vol.3, No. 2, 2013, pp.61-70; See also Acquah, F., "The impact of African traditional religious beliefs and cultural values on Christian-Muslim relations in Ghana from 1920 through the present: A case study of Nkusukum-Ekumfi-Enyan area of the Central Region." PhD diss., PhD thesis, (University of Exeter, UK, 2011). Available at https://ore.exeter.ac.uk/repository/bitstream/handle/10036/3473/AcquahF.pdf?sequence=3 [Accessed on 12/09/2017].

[15] Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, [Accessed on 02/06/2012].

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equally by the members of the particular clans that possessed them. Thus, the scarcity or abundance of a resource was never a source of conflict as such.[16]

3.2 Reciprocity

Reciprocity is the other principle that created an ideal environment for conflict resolution. A mutual exchange of privileges, goods, favours, obligations, among others, existed among African communities thus fostering peaceful coexistence and consequently eliminating the likelihood of wars and conflicts. If a community was facing a calamity, say famine or death of livestock, other communities would come to the aid of that particular community.[17]

Reciprocity thus nurtured a culture of communal life which fostered relationships. Reciprocity emphasized sharing and also sustained a sense for collective security through a social set up which supported an egalitarian social living.[18] Reciprocity enhanced harmonious relationships by putting communal interests above individual pursuits. Through this principle individual norms were transformed into social welfare security schemes and thus a sense of justice and fairness was embedded in it as mutual trust became an overriding value.[19]

The principle of reciprocal obligations was firmly anchored in the Agikuyu way of life. The Agikuyu believed that if you assist the neighbour in domestic chores, gardening or during times of adversity, that neighbour would do the same for you in future. Those who do not reciprocate acts of neighbourliness were looked down upon and could not be assisted when faced with difficulties.[20] Anchored on this principle, conflict resolution mechanisms in the traditional African society had to be responsive to conflicts by mending broken or damaged relationships to restore justice, restore conflicting parties into the community and continue with the spirit of togetherness.[21]

3.3 Respect

Respect towards parents, elders, ancestors and the environment was cherished and well entrenched in the customs, traditions and taboos. Strong traditions, customs and norms fostered

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[16] Interview with William Ole Munyere, a 97 year old Maasai elder on 6th June, 2009, at Oloirien Inkarusa village, Ngong Division, Kajiado District; See also, Tarayia, G. N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," *Arizona Journal of International & Comparative Law,* Vol. 21, No. 1, 2004, pp.183-913.

[17] See Opening Remarks by Lotte Hughes (Open University), "Session One: Presentation on the research project 'Managing Heritage, Building Peace: Museums, memorialisation and the uses of memory in Kenya'", Heritage workshop Nairobi, 27-28 May 2011. Available at http://www.open.ac.uk/Arts/ferguson-centre/memorialisation/events/ukc-workshop/Lotte-presentation-NBO-wkshop-FINAL%20_2_.pdf [Accessed on 20/10/2017]; See also generally, Toulson, T., "Europeans and the Kikuyu to 1910: a study of resistance, collaboration and conquest," PhD diss., (University of British Columbia, 1976). Available at https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0058350 [Accessed on 20/10/2017].

[18] See generally, Agulanna, C., "Community and Human Well-Being in an African Culture." *Trames: A Journal of the Humanities & Social Sciences*, Vol.14, No. 3, 2010; See also Buckmaster, L., & Thomas, M., *Social inclusion and social citizenship: towards a truly inclusive society*. (Canberra, Parliamentary Library, 2009).

[19] See generally, Tarayia, G.N., "The Legal Perspectives of the Maasai Culture, Customs, and Traditions," op.cit.

[20] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), pp.38-41.

[21] Nora, F. & Fernando, .T., *The Importance of Training on ADR in the Creation of a Justice of Peace in the Community of Portuguese-Speaking Countries*, A Paper presented at the International Congress on Mediation, Lisbon, Portugal, 7-9 October 2010, available at www.gral.mj.pt, [Accessed on 15/05/2012].

respect and wayward members of the community faced disastrous consequences, such as, the imposition of fines and other penalties. This way, religion played a central role in shunning conflict-causing conduct.[22]

In the traditional African society, respect for the elders, parents and ancestors was highly regarded. It was a virtue well entrenched in the customs, traditions and taboos. Respect was codified in taboos and the concept of social distance which regulated "*what one could do, whom to talk to and how to relate to one another according to one's sex, age and status.*" In this way, social conflicts were avoided and resolved through respect that people had for one another, parents, elders, the ancestors and even to the environment.[23]

According to the Agikuyu traditions, norms and customs, no man could dare to remove his neighbour's boundary mark, for fear of his neighbour's curses and out of respect for him. Boundary trees and lilies among the Agikuyu were ceremonially planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it. If they could not agree as to the actual positioning of the mark, they invited one or two elders who, after conducting a ceremony, replanted the tree or lilies.[24] Respect inculcated through such traditions, norms and customs thus ensured that neighbours lived harmoniously and could not engage in boundary disputes.

4. Institutions of Conflict Management

4.1 The family

The family has been a key institution in conflict management.[25] Among the Pokot, a family consists of the husband, his wives and children. The husband is the head of the family and his authority is unquestionable. He is the overall administrator of family matters and property including bride price, inheritance and where applicable, land issues.[26]

4.2 Extended family and Neighbourhood

The extended family comprising of the aging parents, in-laws, relatives and other dependants is the basic socio-political and hence, the first institution in the management of conflicts. For instance, Turkana people regarded the extended family as the first institution of conflict management. Disputes that transcend the nuclear family could be determined by the

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[22] Acquah, F., "The impact of African traditional religious beliefs and cultural values on Christian-Muslim relations in Ghana from 1920 through the present: A case study of Nkusukum-Ekumfi-Enyan area of the Central Region," op cit.

[23] Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa,* op.cit.

[24] Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op. cit, pp.38-41.

[25] See Osei-Hwedie, K., & Rankopo, M. J., 'Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana,' *IPSHU English Research Report Series*, Vol.29, 2012, pp.33-51.

[26] See generally, Muli, E. (ed), *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Practical Action, Nairobi, 2006).

extended family and the neighbours among the Pokot thus acting as a conflict management institution. [27]

4.3 Clan

The clan is another institution in the management of conflicts traditionally.[28] Both the Turkana and the Agikuyu consider it one of the most important socio-political organizations that knit together distant relatives, facilitating a feeling of rendering mutual support in all important matters in the interest of the clan.[29] Clan members are also guided by certain rules and regulations that are key in avoiding conflicts, for instance, that member of the same clan cannot inter-marry but can marry from other clans.[30]

4.4 Council of Elders

This is a common institution in almost all communities in Kenya. Their role differed from community to community ranging from cultural, economic, socio-political organization to conflict management in the community. Among the Pokot and Marakwet the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise elderly men who are knowledgeable in the affairs and history of the community.[31] The council of elders among the Agikuyu community was referred to as the 'Kiama' and used to act as an arbitral forum or mediator in dispute resolution. These elders and institutions were accessible to the populace and their decisions were respected.[32] This notion is in consonance with the earlier assertion that mediation has been practiced by Kenyan communities for centuries only that it was not known as mediation. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of resources. This informality is best illustrated by mediation in the political process[33].

4.5 The Tribe

Tribe is at the top of the hierarchy of most traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also

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[27] See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities,* (ITDG, Nairobi, 2004).

[28] See generally, Sewanyana, L., "The Use of Traditional Communications in Conflict Management: the case of Uganda," *Africa Media Review*, Vol.11, No. 3, 1997, pp.40-69; Murithi, T., "Practical peacemaking wisdom from Africa: Reflections on Ubuntu," *The journal of Pan African studies*, Vol.1, No. 4, 2006, pp.25-34.

[29] See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, op cit.; Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District.

[30] Ibid, p.44.

[31] Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities,* p.63.

[32] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District.

[33] *Mediation in the political process* is informed by resolution. Resolution of a conflict is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. As such mediation in the political process allows the parties to have autonomy over the choice of the mediator, the process and the outcome. (Cloke, K., "The Culture of Mediation: Settlement vs. Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005.)

brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements. [34]

4.6 Age-Set/Age-Grade

The *age-grade (rika)* is another common institution for conflict resolution. It is a structure of social organization among many communities in Kenya. Belonging to a certain age-group demanded observance of the rules, duties and rights arising from such membership. Age-mates respected one another and observed the rules of that *rika* and as such conflicts among age-mates were unheard of, as they were considered taboo. Parents of the age-mates were expected to be peace-makers whenever conflicts arose among their children or relatives. [35]

Among the Samburu, the age-set is a ritual of passage that doubles as a form of socio-political organization of the community. People in a given age set regard themselves as brothers and sisters respectively and are expected to behave in a certain way in the community. The age set is supposed to regulate its members and where necessary punish troublemakers.[36] In this way, age-sets were essential features in preventing conflict-causing conduct in the traditional communities.

Age-set system was an effective conflict management institution among the Maasai.[37] Among the Maasai, the panel to mediate the matter comprised mainly leaders of the offender's age set, who were chosen in their youth and led that particular age group for their life time. The aggrieved party would lodge a complaint with the offender's age group leader who would then call upon the offender to appear before his/her peers.[38]

These age group leaders were known as *Oloibor-enkene* (loosely translated to mean 'holder of the white rope' or leader) and the venue for conflict resolution, known as *Orkiu loo Ilpayiani* (meaning 'a tree for the elders') would usually be in the forest under a tree which was viewed as neutral ground. Each party would then state its case and the age group members would try and have the parties resolve the conflict. The offender, if found guilty, would be asked to apologise and told to desist from encroaching on the complainant's watering hole or some other resource unless it was with his permission. If the offender failed to obey this reprimand, he would be taken away by his peers and made to stand trial where an appropriate

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[34] See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities,* op. cit, p.45; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op. cit.

[35] Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op. cit, pp.95-124.

[36] See generally, Spencer, P., The *Samburu: a Study of Gerontocracy in a Nomadic Tribe*, (Routlege Library Editions-Anthropology and Ethnography, 2004), available at http://books.google.co.ke, [Accessed on 16/05/2012].

[37] See generally, Morton, R.F., "The Structure of East African Age-Set Systems," *Pula: Botswana Journal of African Studies*, Vol.1, No. 2, 1979, pp.77-102; See also Krätli, S., & Swift, J., *Understanding and managing pastoral conflict in Kenya: A literature review*, (1999). Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.505.7930&rep=rep1&type=pdf [Accessed on 20/10/2017].

[38] Interview with William Ole Munyere, op.cit.

punishment was meted out on him/her. Punishment ranged from canning, penalties or a fine to the offender's family or his clan.[39]

This form of conflict resolution is admirable in that it was premised on the need to maintain relations within the community and the decisions reached were respected. This system had worked for generations and still exists in some form within the community.[40]

5. Mechanisms for Conflict Resolution

In view of the African style of living, certain mechanisms had to be employed in resolving conflicts. Africans used most of the mechanisms popularly known as Alternative Dispute Resolution (ADR), only that they had not been tagged as such. They used negotiation, mediation, Med-Arb[41] and conciliation in resolving their disputes. It could happen informally by people sitting down and agreeing to resolve their differences. The mechanisms they used include kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood. Most of these mechanisms resembled modern day ADR mechanisms such as negotiation, mediation, reconciliation and arbitration.

5.1 Kinship System

By *kinship system it* was believed that relatives or kin never really fight as "*blood is thicker than water*." Through kinship ties and group identities people could make statements such as, "*we are all part of the same village, we are all of the same ethnic group, we are all Africans*". These relations were geared towards preventing conflict and to create or restore relationships that could have been damaged by conflict. That is why whenever there was a conflict between different parties or communities, the first thing that is done is an attempt at rebuilding and fostering the broken relationships. Kinship system among the Agikuyu was formed by family group (*mbari* or *nyumba*) and the clan (*muhiriga*). The family group (*mbari*) brought together all those related by blood such as a man, wife or wives, children, grand and great-grandchildren while the clan (*muhiriga*) knits together distant relatives, facilitating a feeling of rendering mutual support in all important matters in the interest of the clan. Kinship ties were further fortified by the age-grading which united and solidified the whole tribe in all its activities.[42]

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[39] See Osamba, J., "Peace building and transformation from below: Indigenous approaches to conflict resolution and reconciliation among the pastoral societies in the borderlands of eastern Africa," *African Journal on Conflict Resolution*, Vol.2, No. 1, 2001, pp.22-28.

[40] Interview with William Ole Munyere, op.cit.

[41] Mediation Arbitration (Med-Arb) is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. (Osborne, C., *Civil Litigation 2007-2008: Legal practice course guides; 2007-2008*, (Oxford University Press, 2007), p. 461; Lowe, D., & Leiringer, R., (eds), *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p. 238).

[42]Interview on 16th August 2008 with Ndungu Mwaura at Kahuhia, Murang'a District; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op. cit, pp. 3-20.

5.2 Joking Relations

Joking relations is a typical African social phenomenon employed to avoid conflicts between neighbouring ethnic groups through verbal exchanges, attitudes, behaviours, sometimes with "violence" and "aggressiveness", but always with a joking tone.[43] In most communities, they were a daily practice, a kind of "agreement" between the numerous ethnic groups, aimed at banning anger and hatred which are sources of conflicts. In some cases, joking relationships were established after social conflicts or wars, as a way of saying "no more" war.[44] Those resolving conflicts could thus invoke these ties to show that there were established relations and hence no need for war. In modern conflict resolution parlance, therefore, joking relations can be an effective mode of settling ideological differences which cannot be resolved using bargaining skills. Joking relations would be successful in mitigating and resolving such conflicts since they are premised on forgiveness and tolerance. They also provide the mediator with power, influence or control over the conflicting parties and ensure disputants observe decorum in view of their relations to the same community. This implies that in the African context, the third party had more resources to use in resolving the conflict.[45]

5.3 Consensus Approach

Another mechanism used was the *consensus approach,* where resolutions were attained on the basis of consensus rather than on winner-takes-all approach. Consensual outcomes were highly regarded as they created confidence and parties had autonomy over the process. Thus, the decision of the elders was effective, durable and long lasting. An agreement reached through consensus could be communicated to the whole community and affirmed as a social contract in a ritual way. This was done to pass the news of the satisfactory conclusion of the conflict resolution process. In terms of implementing the agreement, the parties and the entire community followed up to confirm compliance with the agreement.[46]

5.4 Third Party Approaches

Third party approaches arose when the help of the extended family, clan or council of elders was sought to resolve a conflict.[47] This approach was employed to minimize tension by

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[43] See generally, Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," *Cahiers d'études africaines,* Vol. 4, 2006, pp.835-859.

[44] Available at, www.library.thinkquest.org [Accessed on 02/07/2012].

[45] See Davidheiser, M., "Joking for peace: Social organization, tradition, and change in Gambian conflict management," op cit.; Wegru, J.Y., "The Dagaaba-Frafra Joking Relationship," *Folklore,* Vol.14, 2000, pp.86-97; Parkin, R., "The Joking Relationship and Kinship: Charting a Theoretical Dependency," *Journal of the Anthropological Society of Oxford,* Vol.24, 1993, 251-263; Davidheiser, M., "Special Affinities and Conflict Resolution: West African Social Institutions and Mediation," *Beyond Intractability* (2005). Available at https://www.researchgate.net/profile/Mark_Davidheiser/publication/265063587_Special_Affinities_and_Conflict_ Resolution_West_African_Social_Institutions_and_Mediation/links/5621990a08aed8dd1943e828.pdf [Accessed on 21/10/2017]; De Jong, F., "A joking nation: conflict resolution in Senegal," *Canadian Journal of African Studies/La Revue canadienne des études africaines,* Vol.39, No. 2, 2005, pp.391-415.

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

[47] Bukari, K.N., "Exploring indigenous approaches to conflict resolution: The Case of the Bawku Conflict in Ghana," *Journal of Sociological Research,* Vol.4, No. 2, 2013, p.86;

the disputing parties not addressing each other face to face but through the third party. This practice was and is still widely used in marriage negotiations among the Gikuyu people.[48]

5.5 Age-Grade

Virtually all tribes in Kenya had the *age-grade* as a structure of social organisation. Among the Agikuyu, it was referred to as the *riika* and among the Maasai it was referred to as the *moran*.[49] In the age-groups, the teachings of social obligations are re-emphasised thus binding those of the same status in ties of closest loyalty and devotion. In the *riika* among the Agikuyu, when a man of the same age-group injures another, it was considered a serious magico-religious offence.[50] As such, belonging to an age-group demanded observance of the rules, duties and rights in the various communities. Because members of the age-group respected one another and observed the rules of that *riika,* conflicts among age-group members were rare as such were considered taboo. Parents of the age-mates were expected to be peace-makers whenever conflicts arose among their children or relatives.[51]

5.6 Role of Male and Female Elders in Conflict Resolution

The Role of male elders as mechanisms of conflict resolution was as a result of the wide powers, knowledge, wisdom and the respect they were accorded in the society.[52]

Women elders also played a key role in resolving conflicts.[53] For instance, it is said that among the traditional Igbo society in Eastern Nigeria, women are the sustainers and healers of human relationships.[54] Chinua Achebe buttresses this point further in his renowned novel, *Things Fall Part,* where he asserts as follows:

> *"…when a father beats his child, it seeks sympathy in its mother's hut. A man belongs to his father when things are good and life is sweet. But when there is sorrow and bitterness, he finds refuge in his motherland. Your mother is there to protect you".[55]*

This is true in virtually all the other African communities. The role of the Luo women, for instance, is also well documented in various stages of peace processes in their community.

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[48] Kinuthia, J.W., et al, "Gendered Identities in Gikuyu Marriage Negotiation Discursive Domain," *International Journal*, Vol.3, No. 2, 2015, pp.135-146; Sobania, N.W., *Culture and customs of Kenya*, (Greenwood Publishing Group, 2003). Available at http://www.sahistory.org.za/sites/default/files/file%20uploads%20/neal_sobania_culture_and_customs_of_kenya _cultubook4you.pdf [Accessed on 21/10/2017].

[49] See generally, Morton, R. F., "The Structure of East African Age-Set Systems," *Pula: Botswana Journal of African Studies*, Vol.1, No. 2, 1979, pp.77-102.

[50] Interview on 13th January 2012 with Nelson Nyamu at Kagio, Kirinyaga District; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, op.cit, pp.95-124.

[51] See generally, Morton, R. F., "The Structure of East African Age-Set Systems," op cit; See also Ferraro, G. & Andreatta, S., *Cultural Anthropology: An Applied Perspective*, (11th Ed., Cengage Learning, 2017).

[52] See generally, Boege, V., Potential and limits of traditional approaches in peacebuilding. *Berghof Handbook II: Advancing Conflict Transformation*, 2011, pp.431-457.

[53] Ibid.

[54] Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13.

[55] Achebe, C., *Things Fall Apart*, (William Heinemann Ltd, London, 1958) (As quoted in Brock-Utne, B., "Indigenous conflict resolution in Africa," op cit., p.13).

They could directly or indirectly intervene through elders and women networks within the warring factions to bring peace.[56]

A critical look at the cultures of most of the other African communities reveals that the role of women as compared to men in conflict management activities was and is still negligible.[57] For instance, among the Pokot and the Marakwet, women act as reference resource people but cannot challenge or influence decisions adopted by the male-dominated council of elders, the *Kokwo*. Among the Samburu, women are supposed to merely convey their suggestions through their male relatives. Such information may or may not be conveyed at all to the council of elders.[58]

Consequently, traditions, cultural norms and practices that may be considered repugnant and contrary to written laws and that hinder the participation of women in conflict management, should be discarded. Women empowerment is essential to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts.

Their role as carriers of life and agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace, either directly or through creation of peace networks, among warring communities.[59] Their participation in conflict resolution should thus be enhanced.

Peace building generally goes beyond conflict management measures, as it involves developing institutional capacities that alter the situations that lead to violent conflicts.[60] As already pointed out, in traditional African society, people engaged in activities that promoted peace through the various activities they engaged in. Resort to courts searching for justice when peace is what is needed may thus destroy relationships rather than build and foster them in the Kenyan case. In such cases, reconciliation, negotiation, mediation and other traditional mechanisms would be the better option.[61]

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[56]Brock-Utne, B., *Indigenous Conflict Resolution in Africa*, op cit.

[57] See Alaga, E., *Challenges for women in peacebuilding in West Africa*, (Africa Institute of South Africa (AISA), 2010); Cf. Ibewuike, V. O., African *Women and Religious Change: A study of the Western Igbo of Nigeria with a special focus on Asaba town*, (Uppsala, 2006). Available at https://uu.diva-portal.org/smash/get/diva2:167448/FULLTEXT01.pdf [Accessed on 20/2017].

[58] See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities,* op.cit, p.96.

[59] See generally, De la Rey, C., & McKay, S., Peacebuilding as a gendered process. *Journal of Social Issues*, Vol.62, No.1, 2006, pp.141-153; See also Paffenholz, T., et al, "Making Women Count - Not Just Counting Women: Assessing Women's Inclusion and Influence on Peace Negotiations," (Geneva: Inclusive Peace and Transition Initiative (The Graduate Institute of International and Development Studies) and UN Women, April 2016).Available at http://www.inclusivepeace.org/sites/default/files/IPTI-UN-Women-Report-Making-Women-Count-60-Pages.pdf [Accessed on 20/10/2017].

[60] See Maiese, M., 'Peacebuilding,' September 2003. Available at http://www.beyondintractability.org/essay/peacebuilding [Accessed on 20/10/2017].

[61] See generally, Huyse, L., "Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences." (2008). Available at 174.129.218.71/resources/analysis/upload/paper_060208_bis.pdf [Accessed on 15/09/2017]; See also Bar-Tal, D., "From Intractable Conflict through Conflict Resolution to Reconciliation:

5.7 Traditions, customs and norms

The *traditions, customs and norms* of a particular community played a pivotal role in conflict resolution.[62] Traditions, customs and norms were highly valued and adhered to by the members of the community.[63] Disregard of some of these beliefs could attract the wrath of the gods, ridicule and reprimand from members of the society hence ensuring that persons shunned conflict-causing conduct.[64]

6. Conclusion

Realising access to justice for all Kenyans by the enhanced application of the traditional forms of dispute resolution is essential. Reforming the judiciary to conform to the spirit of the constitution is also timely and vital. Realization of the fact that in some parts of the country, the demographic changes, cultural, economic and socio-political orientation of the people has not changed greatly is of essence. Kenya is still a cultural society. This is its foundation as a state. Each of the more than 42 tribes have their own cultures which have to be valued, respected and recognized and the good elements thereof utilized for the good of the nation.[65] The constitution recognizes this in Article 11 by stating that culture is the foundation of the nation and that all forms of national and cultural expression should be promoted.

Kenyans, as a people, have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts. This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms may achieve both. They are still a part of the Kenyan society and hence their constitutionalisation.

Cultural, kinship and other ties that have always bound communities together as one people have not died. Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and for the environment. This explains why we still have the cooperative movement, *harambee*[66] and other schemes that are a communal endeavour.

As seen above, negotiation, mediation and reconciliation have deep roots in traditional African communities' conflict resolution mechanisms. They are not alien concepts. It is thus correct to say that these were informal processes. For instance, the informality of mediation as a

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Psychological Analysis." *Political Psychology*, Vol.21, No. 2 (2000); see also Bloomfield, D., et al, (eds.), *Reconciliation after violent conflict: A handbook*, (International Idea, 2003).

[62] See generally Kassa, G.N., "The Role of Culture and Traditional Institutions in Peace and Conflict: Gada System of Conflict Prevention and Resolution among the Oromo-Borana," Master's thesis, 2006. Available at http://urn.nb.no/URN:NBN:no-17988 [Accessed on 20/10/2017]; See also Mengesha, A. D., et al, 'Indigenous Conflict Resolution Mechanisms among the Kembata Society,' *American Journal of Educational Research*, Vol.3, No.2, 2015, pp.225-242.

[63] See generally, Nussbaum, B. "African culture and Ubuntu," *Perspectives*, Vol.17, No. 1, 2003, pp.1-12; See also Idang, G.E., 'African culture and values,' *Phronimon*, Vol.16, No.2, 2015, pp.97-111.

[64] Idang, G.E., 'African culture and values,' op cit. p.103.

[65] See National Cohesion and Integration Commission (NCIC), *Kenya Ethnic and Race Relations Policy*, available atwww.cohesion.or.ke, [Accessed on 15/04/2012].

[66] *Harambee* literally means "all pull together" in Swahili or 'Community getting together to collectively solve problems'.

conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable.

The informal processes address the underlying causes of conflicts thus preventing them from flaring up later on. These positive attributes of negotiation, mediation and reconciliation can only be realized if they are conceptualized as informal processes as they were in the traditional African society. Mediation especially should thus not be used in managing conflicts in the context of the legal environment, as in the case of court annexed mediation, as it will not resolve conflicts but will rather settle the same.[67]

Traditional Conflict Resolution Mechanisms and institutions should thus be given due consideration in any meaningful conflict discourse.

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[67]In a conflict, a settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. A settlement takes place when conflict-generating behaviour notably of the damaging, violent or destructive kind is neutralized, dampened, reduced or eliminated. A settlement is criticized since it is a damaging half-measure which leaves the causes of the conflicts to smoulder beneath the surface before erupting again. (Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p. 296.) In the mediation discourse, resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. (Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153 at p.153.)

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