THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

The Effectiveness of Alternative Dispute Resolution Mechanisms in Kenya

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Abstract:
Alternative Dispute Resolution Mechanism (ADRM) is a broad term which is used in conflict resolution such as negotiation, mediation, conciliation and arbitration in conflict management. This article tries to answer the feasibility of ADRM in Kenyan courts and how they need to be incorporated as an alternative way of solving disputes and conflict in Kenya thus reducing the backlog of cases and spending up the judgments. The article tries to explain various theories explaining human rights and how justice should be for all. The article gives case studies of Iritongo, Kuria community from western region; Njuri Nchecke and the Kamba community from Eastern region which explain the practicability of these alternatives methods in most community cases. This article also stresses out on the adoption of ADRM and TDRM mechanisms and how they should be viewed as corresponding methods to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict.

Keywords: *ADRM, arbitration, conflict, conflict resolution, dispute, mediation, negotiation, TDRM*

1. Introduction

Alternative dispute resolution refers to all decision-making procedures other than litigation, that include but are not limited to arbitration, conciliation, enquiry, expert determination, mediation and negotiation. Muigua (2012) further stated that, alternative dispute resolution mechanisms mainly consist of the aforementioned and a series of hybrid procedures. Conflict is bound to be there in a situation where people live together and tend to interact at various levels. According to Etizen (1988), conflict is rather prevalent in society. This is in line with the definition by Mwagiru (2006) that in its most basic of definitions the incompatibility of goals stemming down to the difference of opinions, is what constitutes conflict. Therefore, it is near impossible for people to live in a societal setting and have or be all of similar opinions and goals, thus the endemic nature of conflict.

The international community has increased its engagements in various interventions efforts towards the restoration of peace and provision of humanitarian relief and reconstruction in conflict-prone areas particularly those in developing and underdeveloped countries, to some extent the success of said interventions 'depends on how the problems of "conflict" and "crisis" and the desired goal of "peace" are conceived at a more general level' (Nathan, 2000: 188). This can be mirrored in society in that the aspect of living together leads to ever present differing opinions and goals.

In every society, a huge collection of legal and non-legal, formal and informal, contemporary and customary principles, methods and institutions for the sole purpose of the rectification of wrongs and promotion of feasible solutions. (Michel, 2011) Litigation is just but one amongst many viable alternatives. However, the access to justice has been greatly hindered by legal, institutional, structural, cultural, procedural, social barriers, and practical and various economic challenges.CEDAW(2012)Overemphasis on litigation as the main dispute resolution mechanism is one of the main hindrances to the access of justice in Kenya. This should not be the case. According to Galanter (1981), courts comprise only one half of the world of regulating and disputing.

Alternative dispute resolution mechanisms and the traditional justice systems strengthen and strengthened the Rule of Law and thus contributed greatly to development. (Michel, 2011)

In Kenya, alternative dispute resolution mechanisms and traditional dispute resolution mechanisms are recognized in the law. Article 159 of the Constitution of Kenya (2010), enjoins courts and tribunals in the exercise of judicial authority, to promote alternative forms of dispute resolution including arbitration, mediation, reconciliation and traditional dispute resolution mechanisms. And by extension the alternative dispute resolution mechanisms.Recognition

of traditional dispute resolution mechanisms. and alternative dispute resolution mechanisms processes in the Kenyan Constitution is meant to enhance access to justice as guaranteed in Article 48 thereof. Alternative dispute resolution mechanisms, amongst them; arbitration, mediation and negotiation are also available for use and application in the settlement of intergovernmental disputes. Not just confined to the civil law suits. (Constitution of Kenya, 2010)

Under Order 46 Rule 20, of the Commission on Administrative Justice (2011), a court can adopt and implement of its own motion or at the request of parties. In addition to this, Labour Relations (2007) further elaborates that any other appropriate means of dispute resolution including mediation for the attainment of the overriding objective under sections 1A and 1B of the Act can be adopted forthwith. In line with that according to the National Cohesion and Integration (2008). The overriding objective under the Consumer Protection Act (2012), is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. There are many other laws which provide for the use of ADR mechanisms as stipulated by the Nairobi International Arbitration Centre (2013), suggesting that ADR mechanisms can be employed in a wide array of matters to enhance access to justice and contribute to development in Kenya. To realize fair and efficient access to justice, there is the need for an effective legal and institutional framework at both the national and international levels. This is so because access to justice can only be as effective as the available mechanisms to necessitate and facilitate the same.

The Vienna Declaration and Programme of Action (1993)cannot be understated for it states that; all peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their cultural, economic and social development. Notably, Article 19.1 of the Constitution of Kenya (2010) states that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for cultural, economic and social policies.

1.1. Key Statements

Former Kenyan Chief Justice Dr. Willy Mutunga"Litigation will only be commenced after a substantive attempt has been made by the disputing parties to resolve the issues through a compulsory mediation process," (Andae, 2014).These was a statement made by the then incumbent Chief Justice of Kenya Dr. Willy Mutunga. This was in an effort to make arbitration, which is one of the forms of alternative dispute resolution mechanisms, a mandatory step before proceeding to file a law suit. Andae (2014) states that this was in response to the accumulation of cases in the Kenyan courts leading to a backlog of cases in the already overwhelmed Judiciary. In addition to that this was seen to be one of the viable solutions by Justice Willy Mutunga to the collusion of lawyers to lengthen a case in an attempt to get bigger fees from their clients. This was a move that was seen as unethical and portrayed the lawyers in bad light.

As a result to the statement made by the former chief justice, the formation of the Strathmore Dispute Resolution Centre and the Nairobi Centre of International Arbitration Board were formed to see to it that disputes that were stuck in courts particularly the commercial disputes were handled out of court (Andae, 2014)

The judge to citizen ration in the republic of Kenya by the year two thousand and sixteen stood at one is to eighty thousand. In addition to that, the number of pending cases by end of January in the year two thousand and fifteen stood at just over six hundred thousand. That meant that each judge would have to be allocated close to six thousand five hundred cases to clear the backlog. That is without them taking on any new case. (Kakah, 2016)

The viable solutions to this case of piling up cases was one to hire more judges. In as much as this looks like a simple solution that is easy in implementation, it is not self-sustaining if the number of monthly new cases is tabulated. It is perhaps why Chief Justice Willy Mutunga pushed for the alternative dispute resolution mechanisms to be adopted by the people of Kenya as it would kill two birds with one stone. Justice Mutunga within his tenure was seen to advocate for arbitration and mediation which upon implementation would move our judiciary leaps and bounds particularly in the reduction of civil lawsuits. (Kakah, 2016)

JusticeDavid Maraga, the incumbent Chief Justice of the Kenyan Judiciary, advocates for alternative dispute resolution mechanisms to be adopted by the public. Chief justice Maraga stated "Kenyans need to know litigation alone as a form of dispute resolution is no longer sustainable. We need to educate the masses that there are easier and faster ways to resolve disputes." (Ogemba, 2017).Justice Maraga brought to light the fact that there was a backlog of cases in the Kenyan judiciary and that there was so much that the Judiciary could do in an attempt to clear the piling up cases. Chief Justice Maraga also noted that a lot of money is tied up by civil proceedings and this was an amount that was tending to billions. The adoption of alternative dispute resolution was one of the ways in which the predicament that was facing the judiciary could be mitigated.

Four point four billion Kenyan shillings was the amount of money that was tied up then by mediation plausible suits and the Chief Justice stated that the economy stood to benefit if alternative dispute resolution mechanisms were adopted. "Rather than let courts make decisions for parties in dispute, the Judiciary, through mediation, empowers parties to make their own decisions that suit them best and, in the process, foster an environment for reconciliation," (Ogemba, 2017) It cannot be understated that this is also a move that will see to it that families, communities and corporations will be given a chance to work together, foster better relations through the promotion of dialogue as they work towards conflict resolution that does not necessarily need litigation. In addition to that, instead of letting the courts make the decisions, this will create an environment that was conducive for reconciliation that can be a major step forward in the betterment of society particularly in this day and age where individualism is on the rise. (Ogemba, 2017) Dr. Machage alluded to this when he spoke of the kumi kumi which later morphed into the nyumba kumi initiative to try and bring back community policing and the age-old adage of being our brother's keeper into fruition. (Parliament. National Assembly, 2004)

1.2. Negotiation

The term to negotiate, in accordance with the Merriam Webster dictionary refers to the act of conferring with another so as to arrive at a middle ground working towards the settlement of some matter. On the other hand, mediate, is to take a middle position or act in an intervening role in the search of a middle ground. By these definitions one is seen as a hybrid of the other or one as a basic version of the other. Mediation is a negotiation that has a neutral third party that helps the conflicting parties reach to an understanding (Merriam-Webster's collegiate dictionary,2012).

No matter how diverse negotiations may be in procedure or content, there is an element that is common to all types of negotiations. (Spector, 1977) Persons, who take up the roles of negotiators, are required to make demands and concessions, communicate positions, respond to various changing signals, and arrive at outcomes that suit both parties. At this level of analysis, however micro, negotiation can be viewed as a set of interpersonal and personal dynamics that result in outcomes of varying levels of acceptability to the participants of the process.

Spector (1977) argued that from a rather microlevel perspective, through negotiation, the resolution of differing and conflicting interests is usually motivated by a few factors that include; persuasive mechanisms that are employed to modify the bargaining positions and values of the opponent to achieve a more favorable convergence of interests; personality compatibility among negotiators that are representing parties in conflict; the personality needs of negotiators, at an individual level and negotiator expectations and perceptions of the opponent that is his or her weaknesses and strengths, his or her goals and intentions, and his commitments to positions is of importance. The success of a Negotiation largely depends on the bargaining variables (Gaibulloev & Sandler, 2009). These are also referred to as bargaining power in which they influence the position of the negotiators.The process of negotiation is perhaps an understated and greatly underappreciated aspect of promoting adherence to and respect for international law. Dean (2015) argued that, the act of negotiation lends durability and effectiveness to international law, particularly where proposed international agreement, before negotiations commence, during the course of the talks, and prior to conclusion of the agreement. This is because the process includes a thorough legal review to ensure that states are in a position to implement the obligations that would be reflected in the various final agreements that are under deliberation.

1.3. Mediation

Kenyans, more often than not, need to wait for justice due to an overwhelmed judicial system. Cases in the Kenyan civil courts take an average of 24 months to come to conclusion, and this is largely because of the limited number of judges and magistrates available to hear the filed cases. In addition to that the wait is also because of the long distances between courts and the places where most Kenyans reside. As a result, Kenya's judiciary has a huge backlog of civil cases, and it forces them to explore viable alternatives to mitigate the problem at hand (World Bank, 2017).

The Court Annexed Mediation Project (CAMP), is an initiative that was introduced in April of 2016. (World Bank, 2017) The World Bank's Judiciary Performance Improvement Project (JPIP), supports Court Annexed Mediation. It has led to its adoption in many countries around the world, but in Kenya, the origin of it can be traced back a few years to 2010 when Kenya's revised Constitution was promulgated. This opened the door for the judiciary to explore and promote alternative dispute resolution mechanisms, including mediation, negotiation and arbitration.Nicholas Menzies, the World Bank Task Team leader for the US$120m Judicial Performance Improvement Project, stated that the World Bank is very happy and enthusiastic to support the judiciary's ongoing transformation, Court Annexed Mediation being a part of it. (World Bank, 2017)

1.4. Why Does Mediation Work?

According to the World Bank (2017), mediation, has a potential to address quite complex cases, including those involving various companies in conflict. Mediation is not bound by litigation rules. This allows for the allocation of more space and latitude for a creative resolution to the conflict or dispute at hand. It is a solution by the parties, for the parties and it creates a win-win sort of situation. Most disputes are observed to be not about facts, but they are more about injured emotions. Mediation allows the aggrieved parties to convey their emotions This in turn allows them to feel heard and listened to.

1.5. Arbitration

The time taken for an arbitration proceeding in Kenya varies depending on the difficulty and complexity of the matter at hand, the efficiency and cooperation of the parties, the agreed upon schedules of the subject parties and the arbitrator and finally the efficiency of the arbitrator.

In general, arbitration proceedings in Kenya take between half a year to thirty-six months.Within its discretion, a court can intervene in arbitration proceedings but, the instances and level of intervention are limited(Omondi, 2016). The instances in which a court may intervene in arbitration proceedings, in accordance with the Arbitration Act include: the setting aside of the appointment of an arbitrator; assistance in taking and presenting of evidence; determination of the ability to enforce an arbitration agreement; the determination and hearing of appeals, where the right of appeal from the decision of an arbitral tribunal lies within the mandate of the court; the granting of measures of protection on an interim basis of course; appointment of an arbitrator where none was previously appointed and the removal of an arbitrator. (Omondi, 2016)

1.6. Case Studies and Examples

1.6.1. Iritongo

The Iritongo is a communal based traditional setting that was established to deal with and settle various disputes and or conflicts within the community. (Osband, 2012) The Iritongo is a staple of the Kuria people that are found in the western region of the Republic of Kenya. In a parliamentary debate in the year two thousand and four, the then Member of parliament of Kuria constituency one Dr. Wilfred Machage spoke of the efforts and impact of the Iritongo in his constituency in the establishment of order since it plays and played a major role in the resolution of disputes. This was seen as a positive community policing activity that was of great benefit in Kuria district. (Parliament. National Assembly, 2004)The Kuria people or the AbaKuria are a Bantu community that is located near the Lake Victoria and are predominantly surrounded by Nilotic communities both the plain and the river lake. The AbaKuria transverse all the way to Tanzania in the Serengeti region. The community was involved in a number of cattle raiding and rustling feuds with their neighbors and intra conflicts as well where clans would raid each other. This was one of the issues that necessitated the formation or increase in use of the Iritongo since solutions to their problems needed to be found (Heald, 2006).

According to Tobisson (1986), the fact that one could state "I am Kuria" was seen to transcend the common cultural identity. This fact of belongingness was held in high regard and it is perhaps why it translated vertically to the communal heads who were accorded their leadership status and respect by this merit. This also would explain why the Iritongo was highly respected (by the AbaKuria and by extension the high court of Kenya Tobisson, 1986). In addition, Dr. Machage also drew parallels from the Njuri Ncheke that were a similar body but located in the Mount Kenya region. Dr. Machage hails the Njuri Ncheke, like the Iritongo for offering an alternative form of dispute resolution that is cheaper for the state in a time of budgetary crisis and the ever-increasing monetary needs for the state. (Parliament. National Assembly, 2004)

1.6.2. Njuri Ncheke

The Njuri Ncheke is a council of elders among the Ameru people that was seen to have been completely wiped out during the colonial period. This council however rose from the ashes and has been a pillar of the Ameru community to the extent that despite the resolution of disputes, most of which are land related, it is seen to influence the political decisions of the leaders that emanate from that region and makes sure that the interests of the Ameru people are placed first as opposed to those of the individual leader in question (Orvis, 2001).

To show the power and influence of the Njuri Ncheke, in 1939, Parson (2012) elaborated that, the Agikuyu community had encroached upon land that belonged to the Ameru community. This was a time in which Kenya was facing colonial rule and the Agikuyu seemed like the biggest thorn in the imperialists foot. In order to gain some mileage in neutralizing the morale of the Agikuyu community whilst at the same time enticing the Ameru, the Njuri Ncheke saw its mandate changed or adjusted to become a quasi-administrative formation and to add to this, Lambert and other senior members of the imperialists, empowered the cooperative Meru leaders so that they could quell the Agikuyu's expansionist agenda (Parsons, 2012).

1.6.3. Akamba Council of Elders

Among the Akamba community there were various types of disputes that were prevalent at all so various rates in society. There were various disputes that were witnessed in the society and among them were; assault, herding misunderstandings, or if animals from another owner strayed into your farm and damaged your crop, the issue of divorce, murder or killing of an individual intentionally (with intent), death occurring at an individual's hands but accidentally or unintentionally better known as man slaughter, theft in its various amalgamations that included cattle rustling and looting, defilement and rape, child assault to their parent and cases of parent(s) mistreating their children.

In the case of animals going into a neighbor's farm and destroying crop, according to one Mr. Francis Katu (2018, May 29. Personal interview), the person who had been wronged, that is the individual whose crop had been damaged, would send for the perpetrator (in most cases send the perpetrator) [in that the herder would be sent to report that the animals had strayed and that they should come to view the damage that had been done in the farm] to come on a certain day, preferable the next morning with elders for example three and the person who had been wronged would be waiting for them with three elders from his side so that the case could be tabled. Once they meet and sit there would be an interrogation session from both sides directed towards the perpetrator so that they could establish preliminary information that would aid in the determination of the case.

Once the interrogation session is over the perpetrator would be requested to leave the sitting of the elders to allow room for deliberation between both sides towards judgement or a solution. As an extra step the elders would go to the farm and assess the damage done even if it meant physically counting the ears of corn vis a vis other factors such as checking if the farm was fenced so that they can accurately decide what was to be compensated and in what amount. After all that, both sets of elders would agree on the compensation and the perpetrator, owner of the animals and owner of the farm would be informed thus ending the case after the owner is tasked by the council of elders what and when to pay (Katu, 2018, May 29- Personal interview).

In the case where an individual beat up another also known as assault, the same procedure as in the herding dispute would ensue. Elders, from both sides, would meet and sit and there would be an interrogation process where they would ask the person that is being blamed of the crime questions that would go a long way in establishing whether he or she is guilty or innocent. The assaulted would also be summoned and interrogated and in addition to that to show the

elders the amount of damage that had been inflicted on him. After all that then the elders would pass judgement or come up with a solution.

Note, the person that was found guilty was tasked with providing a goat to be slaughtered and eaten by the elders in that sitting that pertained the case. And upon him being found guilty and the payment or punishment being agreed on, the perpetrator would take a piece of skin from the dead goat and tie it on to the assaulted's hand as an acknowledgement of guilt and as a proclamation that they will pay was agreed upon(Katu, 2018, May 29- Personal interview).

There were instances where there was death of an individual. If death was ruled as a murder in that the killer did the act intentionally then the same procedure of elders convening to form what can be deemed as an amalgamation of the court setting we have today was in order and in this case the penalty was 14 cows and in the case of what is deemed manslaughter today or death occurring at a person's hand but by accident then they would pay the family only 7 cows (Mulyu, 2018, May 30- Personal interview).It is important to note that, sentencing was predominantly in payment form as opposed to punishment.

Kalundu (2018),in a personal interview explained that there were the issues of a parent and a child being at loggerheads. For example; if the son is a young man and works hard and buys a goat but when the father has visitors, he slaughters the son's goat and leaves his own for his visitors to indulge. The son in such a case having an issue with the father was a dispute in that one views it as a sign of disrespect but on the other side the father views everything that is under his roof as his property. In such a situation, it being domestic un nature, the mother was the immediate mediator in that she did not want the conflict to grow so she would speak to the husband to avoid such so as not to discourage the efforts of the son who was working towards amassing some property whilst on the other side asking the son to forgive his father (Kalundu, 2018, May 30 - Personal interview).

The Akamba people are known to be and have been a social based people thus they lived in societies and communities and interacted as well as depended on each other for various needs. As a result, one's reputation in society was always sought after to be as high as possible in that a good name came with a lot of respect and the opinions of such an individual were valued and sought after. Thus, the character of an individual influenced in big part the decision of the elders for the moral standing of an individual in society was held in high regard and could indicate if he was guilty or innocent.

1.6.4. Theoretical Link

Johan Galtung spoke about the theory of Conflict Transformation. As the proponent of the theory, he articulated that any conflict if left unchecked goes on to eventual violence more often than not. (Galtung, 1967) It is upon the state and key stake holders the individuals in positions of leadership and those that are able to influence policy, to take it upon themselves to rather transform various conflicts and disputes to manageable situations. Galtung says that the basic human needs, fundamental freedoms, and rights, are trampled by violence (Galtung: September 2007). As a result, conflict will forever be endemic in society. In this line of thought, since we cannot ideally live in a conflict free world, practically, the solution would be a way to mitigate the issue. This is where we embrace the Conflict transformation theory by one Johan Galtung (Galtung, 2000). Alternative and traditional dispute resolution mechanisms are some of the ways in which conflict can be transformed from being negative or violent to a manageable form of conflict (Galtung, 2010a).

2. Conclusion

In conclusion, we have to come to terms with the fact that a utopia is not feasible thus we have to have peace amidst the various disputes that are prevalent in society. This can be attained by the adoption of these alternative dispute resolution mechanisms in that they above all things open up the door for dialogue. In my opinion, if I get to sit and hush out a problem I have with my neighbor and we come to a workable solution; which will mean that we will have met at some middle ground, it leads to the creation or an increase in mutual respect for one another.

In addition to that, the door to negotiation will remain open to the two if they ever differ in future. This cannot be said for the cases of a court ruling that leaves one individual feeling as the winner and the other the loser thus fosters descent particularly from the loser to the winner. Court ruling usually end up in a win lose situation as opposed to the win-win situation created by the adoption and use of alternative dispute resolution mechanisms.

The international community has increased its engagements in various interventions efforts towards the restoration of peace and provision of humanitarian relief and reconstruction in conflict-prone areas particularly those in developing and underdeveloped countries, to some extent the success of said interventions 'depends on how the problems of "conflict" and "crisis" and the desired goal of "peace" are conceived at a more general level' (Nathan, 2000: 188). This can be mirrored in society in that the aspect of living together leads to ever present differing opinions and goals.

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