Pouring Old Wine into New Wineskins: The Alternative Dispute Resolution Movement in The Postcolonial State

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Abstract

Disputes have existed since time immemorial. In any community, it is inevitable that mechanisms need to be put in place to aid in the resolution of these disputes. Before colonialism, there subsisted methods of resolving conflicts in Kenya that dealt with civil and criminal cases which arose among members of any given community. During colonialism, the court system was introduced as a more formal and 'superior' dispute resolution mechanism as a part of the Civilising Mission. In post-colonial Kenya, the court system took root as the mechanism that was suitable to the African circumstances. However, while the court system has had many positive contributions, it is marred with difficulties and suffers from case backlog. This has led to the introduction of Alternative Dispute Resolution (ADR) as a movement that will complement the courts in dispute resolution. This article examines the dispute resolution mechanisms which existed before colonialism and the introduction of the court system in Kenya. The authors argue that the colonial encounter shaped the structures utilized for dispute resolution in the post-colonial state with manifest subjugation of African methods of dispute resolution in favour of Western methods. The article analyses the shortcomings of the court system and argue that in the post-colonial state, its superiority is a fallacy. The authors posit that the introduction of ADR is not a new concept which has been introduced into the Kenyan justice system but is indeed reminiscent of mechanisms of dispute resolution utilized by indigenous institutions. The article concludes that ADR can be viewed ***as***

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repetition being introduced as reform which perpetuates the legacies of colonialism; a shiny new pin which should be adorned even though greater scrutiny reveals that it is indeed, an heirloom.

1. Introduction

Conflict is the condition of opposition or antagonism which arguably emerges in human society due to clashes of varied interests.[1] There are always competing interests for the resources available to a given society resulting in disputes. Equally, humans have sought, as long as there has been conflict, to handle conflict effectively, by containing or reducing its negative consequences.[2] Therefore, conflict resolution is critical to the maintenance of peace and harmony in the community and for the determination of distribution of resources in an equitable manner.

Kenya, during the pre-colonial period, conflicts among the different ethnic communities were resolved using various indigenous conflict resolution mechanisms. The main mechanisms included negotiation, mediation, and arbitration administered by indigenous institutions such as councils of elders. Indigenous conflict resolution mechanisms determined a community's well-being and health in terms of success or failure, competitiveness or non-competitiveness, growth or stagnation, prosperity or decline, survival or demise and superior or inferior performance.[3] African customary law was the law applied by these indigenous institutions in the resolution of disputes.

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[1] Hilal Ahmad Wani, 'Understanding Conflict Resolution' [2011] International Journal of Humanities and Social Science, Volume 1, Number 2, 110.

[2] Ibid.

[3] Jackline Apiyo Adhiambo, 'Indigenous Conflict Resolution Mechanisms Among the Pastoralist Communities in the Karamoja Cluster – A Case Study of the Turkana' [2014] University of Nairobi eRepository, 114, 115

During colonialism, as part of the Civilising Mission, the British introduced the court system as the preferred approach to dispute resolution in Kenya. The court system was deemed to be a formal, superior and more civilized institution compared to the indigenous systems which were in place. African customary law was subjugated and considered an inferior source of law. English law was therefore applied by the courts and was considered to be a more civilized source of law that would be applied to resolve disputes arising among the different communities in Kenya.

In the post-colonial period, the court system subsisted with the use of African approaches of resolving disputes being minimally in use. African customary law was applied in civil cases in which one or more of the parties was subject to or affected by it and so far as it was not repugnant to justice and morality or inconsistent with any written law.[4] This in effect meant that African customary law was inferior to English law which was introduced by the British. However, with time, the court system suffered from a myriad of problems such as delays in resolution of cases leading to backlogs, high legal costs for disputants, too many technicalities in the court procedures *inter alia.* The superiority of the court system was a fallacy as it had its own failures that delayed and derailed the course of justice. The clamor began to search for methods of resolving disputes which could complement the court system and aid in the reduction of the severe backlog of cases.

This led to the Alternative Dispute Resolution (ADR) movement which has emerged to complement the court system in the postcolonial state. The primary ADR mechanisms utilized include negotiation, mediation, arbitration and traditional dispute resolution mechanisms. All these methods are by and large reminiscent of the mechanisms used in Kenya in the pre-colonial period to

[4] Judicature Act, Cap 8, s. 3[2]

resolve disputes. The central argument of this article is that ADR is repetition introduced into the Kenyan justice system as reform. What is termed as ADR largely mirrors the pre-colonial modes of resolving conflicts in Kenya which were indeed more appropriate to the African circumstance. However, its introduction as a new method of resolving conflicts from the West is continued subjugation of African dispute resolution mechanisms and worse, a continued form of colonization in the twenty first century.

Part I of this article examines dispute resolution in Kenya during the pre-colonial period and illustrates the mechanisms which were utilized to resolve criminal and civil cases. The authors argue that there were legitimate mechanisms for conflict resolution before the British set foot in Kenya which were suitable for each community. Part II analyzes the introduction of the court system during empire and the subjugation of indigenous institutions in favor of the western dispute resolution methods. This part also highlights the subjugation of African customary law as a legitimate source of law in favor of English law which was applied by the courts. Part III is an analysis of the post-colonial state and the adoption of the court system as the 'superior' and more appropriate mechanism for conflict resolution. With an increasing litigious society, the shortcomings of the court structures began to come to the light which is arguably indicative that its perceived superiority is, and has always been, an erroneous belief. Part IV evaluates the introduction of Alternative Dispute Resolution, a movement which is increasingly encouraged in the post-colonial state and is aimed at reforming the justice system in Kenya. The authors argue that this movement is reminiscent of the dispute resolution systems in the pre-colonial period, merely old wine being poured into new wine skins. The authors further argue that ADR must be seen for what it is; recognition of the failure of the court system to wholly suit the African circumstance and a re-introduction of a semblance of the African dispute resolution mechanisms which ought to have been deemed as valid in the first place. The authors

conclude that in the post- colonial state, there ought to be a shift in thinking to recognize African conflict resolution mechanisms as legitimate and equal and decolonize notions of the perceived inferiority of the African conflict resolution landscape as this perpetuates the legacies of colonialism.

Part I
Dispute Resolution: The Pre-Colonial Period

The darkest thing about Africa has always been our ignorance of it – George Kimble

Before the British arrived in Kenya, there subsisted legitimate mechanisms for conflict resolution which were akin to the alternative dispute resolution mechanisms which exist in present times. Kenya is a multi-ethnic state with a total of forty three tribes, majority of which have several sub-tribes. Disputes in the pre-colonial period were resolved through various indigenous mechanisms utilized by indigenous institutions which varied from community to community. Despite their diversity, these institutions all applied customary law in the resolution of disputes.

Customary law is the indigenous law of the various ethnic groups of Africa.[5] The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people.[6] It should be appreciated that the use of the term 'African customary law' does not indicate that there is a single uniform set of customs prevailing in any given country.[7] During the pre-colonial period, customary law, both substantive and

[5] Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' [2011] Indiana Journal of Global Legal Studies, Volume 18, Issue 1, 88
[6] Ibid
[7] Ibid

procedural, was applied in the resolution of criminal and civil cases and it reflected the morals of the society at that time. However, each community had its diverse set of customs.

Indigenous institutions used by pastoral communities such as the Turkana were oriented towards emphasis on justice, social change and stressed the necessity of transforming behaviour and improving relationships among the pastoralist communities.[8] The top leadership that included the military, political and religious leaders was involved in various established peace building initiatives like high level negotiations and ceasefires.[9] Indigenous mechanisms used by pastoralists in prevention, management and resolution of conflicts include negotiation, mediation, adjudication among others.[10] Various conflict resolution mechanisms comprising of mediation, dialogue, negotiations, public forums, use of elders and diviners as warning systems were applied in the community.[11]

The Abakuria community also had an indigenous conflict management system comprising of five major arms; *Inchama, Avaragoli, Iritongo, Sungusungu* and *Ihama* which applied customary law in the community to ensure there was rule of law.[12] The roles of *Inchama* and *Avaragoli* in conflict management included protecting the community against evil spirits, administering oaths, ex-communicating errant members, imposing fines, holding reconciliatory

[8] Jackline Apiyo Adhiambo, 'Indigenous Conflict Resolution Mechanisms Among the Pastoralist Communities in the Karamoja Cluster – A Case Study of the Turkana,' [2014] University of Nairobi eRepository, 114, 115

[9] Ibid

[10] Ibid

[11] Ibid

[12] David Mwangi Kungu, Risper Omari and Stanley Kipsang 'A Journey into the Indigenous Conflict Management Mechanisms Among the Abakuria Community, Kenya: The Beauty and the Beast' [2015] European Scientific Journal, Volume 11, Number 16, 214-215.

meetings and making traditional rules.[13] The main task of *Iritongo* was dispensing justice, dispute resolution, conducting investigations, presiding over peace meetings and conducting traditional disarmament.[14] The *Sungusungu* had the role of punishing offenders while the *Inchama* tracked stolen livestock.[15] Negotiation and mediation were mechanisms primarily used in these processes.

Although the Agikuyu community had no formally recognized courts or judges, elders settled disputes and issued judgments in disputes.[16] The community was divided into three main segments namely, the family (*mbari or nyumba*), the clan (*muhiriga*), and age grade (*riika rimwe*); minor conflicts were resolved by the fathers of each *mbari* or *nyumba*.[17] If they were not resolved at this level, they could be taken to *muhiriga* and after that, to the *kiama,* the council of elders.[18] This system of dispute resolution employed arbitration, mediation, negotiation, conciliation and adjudication.[19] Mediation and negotiation were the most preferred methods of dispute resolution as they were effective in arriving at a win-win outcome thus enhancing relations between disputants.[20]

When negotiation and mediation failed, the *kiama* acted as a court to resolve disputes through arbitration.[21] Disputes were heard in public and every person

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[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Njeri A, Osamba J and Murage J, 'Agikuyu Indigenous Methods of Conflict Resolution- the Case of Tetu Sub-County' [2017] 6 International Journal of Innovative Research & Development, 124.
[17] Drake D, 'Criminal Justice: Local and Global'[2010] 77.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Luongo K, 'Witchcraft and Colonial Rule in Kenya, 1900 – 1955' [2015] Cambridge University Press, 78.

attending was allowed to give their opinion on the dispute.[22] Under the *kiama*, compensation was the main method of remedying wrongs committed by a member of the community.[23] Like modern juridical systems, the *kiama* system entrenched the principle of fair trial and accused persons were entitled to be heard by a fair and neutral bench of elders.[24] The Agikuyu therefore relied heavily on arbitration, mediation, negotiation, conciliation and adjudication to resolve the disputes which arose in their community.

Prior to colonization, the Akamba community had a council of elders known as *Nzama* which was in charge of dispute resolution.[25] But before disputes could be determined by *Nzama,* they would be resolved at the family level where the oldest son of the family was responsible for determining all the disputes within the household.[26] Where a matter fell for determination by *Nzama,* heads of families of the disputants would be required to appear before them for hearing, parties would also be entitled to call witnesses to testify in support of their case and ultimately, the *Nzama* would hand down a judgment which was binding on all parties.[27] Compensation was a standard outcome for almost all cases depending on the magnitude of the offence in question.[28]

The Meru community also had an indigenous institution known as *Njuri-Ncheke* which was the governing council of elders for the entire Meru Community made

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[22] Ibid.
[23] Cagnolo C and others, 'The Agĩkũyũ, Their Customs, Traditions, and Folklore' [2006] Wisdom Graphics Place.
[24] Ibid.
[25] Luongo K, 'Witchcraft and Colonial Rule in Kenya, 1900 – 1955' [2015] Cambridge University Press, 78.
[26] Trujillo MA, 'Re-Centering Culture and Knowledge in Conflict Resolution Practice' [2008] Syracuse University Press, 50.
[27] Ibid.
[28] Ibid.

up of seven sub-groups: Igembe, Tigania, Imenti, Tharaka, Mwimbi, Muthambi and Chuka.[29] *Njuri Ncheke* was the institution whose responsibility was to make laws, issue orders and decrees affecting the entire Meru society.[30] The council enforced the rules and regulations aimed at conserving the environment.[31] It also upheld principles of fair hearing by making trials public, allowing parties to a dispute to call witnesses, to give their perspective of the case and to be represented by third parties.[32] *Njuri Ncheke* is still in operation and helps to resolve disputes, using customary laws, among members of the Meru community as well as between the Meru community and its neighbours. The *Njuri Ncheke* utilized negotiation, mediation and forms of arbitration to resolve disputes.

Councils of elders in various communities were respected as trustworthy mediators because of their accumulated experience and wisdom.[33] The roles of these mediators would depend on traditions, circumstances and personalities and included: facilitation, through clarifying information, promoting clear communication, interpreting standpoints, summarising discussions, emphasising relevant norms or rules, envisaging the situation if agreement is not reached, or repeating of the agreement already attained.[34] The mediators could also remain passive, as they were there to represent important shared

[29] Kirema Nkanata Mburugu, 'Resolving Conflict Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya' [2016] International Journal of Science, Arts and Commerce, Volume 1, Number 4, 20.
[30] Ibid.
[31] Ibid.
[32] Mburugu K and Macharia D, 'Resolving Conflicts Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya' [2016] 1 International Journal of Science Arts and Commerce 24.
[33] Birgit Brock-Utne, Indigenous Conflict Resolution in Africa, University of Oslo http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.460.8109&rep=rep1&type=pdf last accessed 12th January, 2018.
[34] Ibid.

values; there was no predetermined model, so they are entitled to change their roles from time to time as they perceive needs at various times.[35]

These are but a few illustrations of the pre-existing indigenous institutions in the pre-colonial period. Many Kenyan communities had different indigenous institutions which utilized mechanisms which would be referred to as ADR in the postcolonial state such as negotiation, mediation and arbitration. Indigenous institutions effectively applied customary law to resolve disputes that were presented before them. This means that the African methods of resolving conflict were neither primitive nor barbaric. On the contrary, they were legitimate and effective. While these mechanisms might have appeared foreign to the British, they were and continue to be legitimate methods of resolving disputes.

Even with changes in the forms of these institutions in the postcolonial state, the mechanisms utilized remain valid. However, when the British arrived in Kenya, these institutions and mechanisms were subjugated and as part of the Civilizing mission, the court system was introduced into the country's justice system. This was because the court system was the Western perception of a legitimate dispute resolution and was deemed to be a superior system. English law was to be applied by the courts in preference to customary law. The latter was also subjugated as it was viewed as an inferior source of law.

[35] Ibid

Part II
The Western Approach: Introduction of The Court System

If you don't like someone's story, you write your own – Chinua Achebe

Effective colonization in Africa demanded a legal system to maintain control of a country and resolve disputes within it.[36] Everywhere the colonial metropoles established their own systems of law and dispute resolution, disregarding pre-existing mechanisms of conflict resolution as primitive or appropriate for 'natives' only.[37] Kenya was no exception. With colonization came the subjugation of customary law in favor of English law and the introduction of the court system in preference to indigenous institutions and mechanisms.

The reason for this subjugation was that it was part of the Civilising Mission. Unlike the European idea of justice, which was fought on an adversarial contestation of evidence with a view to determine right from wrong and penalise the party in the wrong, the African outlook implored the accused to confess in order to start a healing process of reconciliation.[38] The colonial administration of justice also sought to act as a deterrent and had, in its arsenal, structural violence that included the death penalty, whipping, severing body parts, confiscating property in fines, forced labour and imprisonment.[39] The purpose of hearing a case under many indigenous African justice systems was mainly to establish where the truth rested in order to help the community

[36] Sandra F. Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' [2001] Political Science Faculty Publications, 2, 3
[37] Ibid
[38] Peter Run, Reconsidering the Crisis of Confidence in Indigenous African Conflict Resolution Approaches: A Post-Colonial Critique,' The Journal of Pan African Studies [2013] 30
[39] Ibid

restore peace and harmony.[40] The introduction of the court system was therefore in line with European notions of justice.

The subjugation of indigenous institutions and mechanisms was also part of the European justification of the colonization of Africa - that it was its moral duty to 'uplift' Africans from their primitive state.[41] The Civilising Mission was to ensure that the so-called 'dark continent' was brought into the light. The indigenous mechanisms and application of customary law was viewed as primitive and needed to be substituted with the seemingly more sophisticated court system which would apply English law. The African conflict resolution methods therefore began to be eroded.

The history of the Kenyan Judiciary, as it exists today, can be traced to 1895, when Kenya became a British Protectorate.[42] Kenya's judicial experience in the colonial days started with a pluralistic court system, with separate arrangements for Africans, Muslims and Europeans.[43] In 1895, the East Africa Protectorate was established with a Consular court to serve the British and other foreign persons.[44]

The East Africa Order in Council, 1897, established a tripartite division of subordinate courts namely, native, Muslim, and those operated by

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[40] Ibid

[41] Vincent Khapoya, 'The African Experience: An Introduction' Routledge, 4th edition, 106

[42] Njeri Thuki, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' [2013] Annual Survey of International and Comparative Law, Volume 19, Issue 1, 51-52

[43] Ibid

[44] The Judiciary, 'Our History' https://www.judiciary.go.ke/about-us/our-history/ last accessed May 2, 2018

Magistrates.[45] In addition, it established a dual system of superior courts; Her Majesty's Court for East Africa (later renamed 'the High Court of East Africa') and the Chief Native Court which served Europeans and Africans, respectively.[46] This system lasted in effect for five years before reorganization in 1902.

The East Africa Order in Council of 1902 established a more unified judicial system comprising of Her Britannic Majesty's Court of Appeal for East Africa and the High Court for the East Africa Protectorate.[47] The former had appellate jurisdiction over Uganda and the East Africa protectorate while the High Court had jurisdiction over 'all persons and things in the protectorate.'[48]

Subsequently, the East Africa Native Courts Amendment Ordinance of 1902 introduced special courts constituted by the collectors or assistant collectors of districts declared special.[49] With these developments, the place of traditional institutions remained controversial. The Village Headman Ordinance empowered the Commissioner to appoint official headmen of villages or groups of villages who were mandated with maintaining order in those villages.[50]

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[45] Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 130

[46] Mbondenyi & Ambani, The New Constitution of Kenya: Principles, government and human rights (LawAfrica Publishers, 2013) 140

[47] Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 132

[48] East Africa Order in Council [1902] Number 661.

[49] Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 133

[50] Ibid

The 1907 Native Courts Ordinance recognized traditional dispute settlement systems as tribunals.[51] Pursuant to the Ordinance, three classes of subordinate courts were established that is, first-class courts - held by Resident magistrates and Provincial Commissioners, exercising jurisdiction over provinces; second-class courts - held by District commissioners, and third-class courts - held by District officers.[52]

The Ordinance further drew a distinction between these subordinate courts and the subordinate native tribunals as the latter were presided over by headmen or elders appointed by the Governor.[53] The Native Tribunals Rules enacted in 1911 provided that the powers of headmen or elders could only be exercised by a council of elders in accordance with customary law recognized by the Governor.[54] Appeals from subordinate Courts lay with the Supreme Court.[55]

The enactment of the Africa Courts Ordinance marked an important step towards restructuring of the judicial system.[56] The Ordinance abolished the existing tribunals and created the office of the Chief Justice and Registrar of the Supreme Court to head the judiciary and to carry out administrative duties, respectively. The new courts were presided by experienced judges and

[51] Native Courts Ordinance, [1907]
[52] Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 134.
[53] Ibid, 135
[54] Ibid, 136.
[55] The Judiciary, 'Our History' https://www.judiciary.go.ke/about-us/our-history/ last accessed May 2, 2018
[56] The African Courts Ordinance, [1950]

magistrates.[57] A Chief Kadhi was appointed to head Muslim courts, which were categorized as subordinate courts.[58]

In 1920, Kenya officially became a colony and, to assist them, the British used the laws they had brought from Great Britain to India and finally took these same laws to Kenya.[59] The British set up two types of courts in Kenya, native and colonial; the former dealt with matters involving African parties and customary claims; while the official courts applied English law and statute law.[60] However, customary law remained an inferior source of law. Throughout the colonial period, the court system was the main system of dispute resolution and English law was applied by these courts. African indigenous institutions and African customary law were subjugated and deemed to be less civilised, ergo inferior.

Upon Kenya's independence in 1963, the judiciary was further reconstituted in line with the country's changing circumstances.[61] The Judicial Service Commission (JSC) was established as the independent appointing authority for judicial officers and the Court of Appeal was established following the renaming of the Supreme Court as the High Court in 1964.[62] A number of statutes were enacted to aid the process of restructuring the judiciary. Notably,

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[57] Mbondenyi & Ambani, The New Constitution of Kenya: Principles, government and human rights (LawAfrica Publishers, 2013) 141.
[58] Mbondenyi & Ambani, The New Constitution of Kenya: Principles, government and human rights (LawAfrica Publishers, 2013) 140.
[59] Njeri Thuki, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' [2013] Annual Survey of International and Comparative Law, Volume 19, Issue 1, 51-52
[60] Ibid
[61] Mbondenyi & Ambani, The New Constitution of Kenya: Principles, government and human rights (LawAfrica Publishers, 2013) 141.
[62] Mbondenyi & Ambani, The New Constitution of Kenya: Principles, government and human rights (LawAfrica Publishers, 2013) 142.

The Judicature Act,[63] the Kadhis Courts Act,[64] and the Magistrates' Court Act[65] were enacted. The court system and the application of English law and statutes were embraced in the postcolonial state as the preferred system of dispute resolution. The pre-existing indigenous institutions and African customary law, although still in use, were pushed to the periphery.

Part III
The Fallacy of Superiority: The Postcolonial State

When your conqueror makes you ashamed of your culture and your history, he needs no prison walls and no chains to hold you – John Henrik Clarke

Colonisation did not simply impose institutions where none had previously existed; nowhere was there an institutional *tabula rasa*, particularly in the area of dispute resolution.[66] The court system was introduced by the imperialists and it led to subjugation of existing indigenous systems. Yet, the court system was adopted in the post colonial state as it was deemed to be a superior and more civilized system of conflict resolution. It was seemingly more appropriate and English common law was applied in preference to African customary law.

The late Professor Okoth-Ogendo recounted how, as the colonial era drew to a close in the 1950s and 1960s, British legal scholars organised a series of conferences to discuss the future of customary law in Africa and the need to construct a framework for the development of legal systems in the emerging

[63] The Judicature Act, Cap 8 Laws of Kenya.
[64] The Kadhis Courts Act, Cap 11, Laws of Kenya.
[65] Magistrates' Court Act, Cap 10 Laws of Kenya.
[66] Sandra F. Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' [2006] Political Science Faculty Publications, 5

states.[67] These initiatives assumed that the indigenous legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.[68] These scholars must have felt vindicated when, upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's 'general ambivalence as regards the applicability of indigenous law'.[69] English common law was therefore adopted by the courts and African customary law was restricted to limited use as an inferior source of law.

Kenya embraced the English common law system because there were vested interests in sustaining the same legal system that had been established in the colonial era and it was seen as one of the privileges of independence and citizenship that all Kenyans now had full access to common law courts.[70] There was a sentiment of inclusiveness that the common law would no longer be restricted in its application to the privileged classes and that the citizens were all now Kenyans and not categorised as Muslims, Christians or animists each with their own set of laws.[71]

Over the years, as the court system was fully embraced and English common law applied by judges in resolving disputes, cracks began to emerge in the narrative that the court system was a superior system of conflict resolution. The court system was marred with a myriad of challenges. After taking over as head

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[67] Wilmien Wicomb and Henk Smith, 'Customary Communities as 'Peoples' and Their Customary Tenure as 'Culture': What We Can Do With the Endorois Decision' [2011] 11 African Human Rights Law Journal, 424, 425

[68] Ibid

[69] Ibid

[70] Sandra F. Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' [2006] Political Science Faculty Publications, 14, 15

[71] Ibid

of Kenya's judiciary, former Chief Justice Willy Mutunga delivered a speech outlining the challenges which the country's court system faced stating that, "we found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail."[72] This statement echoes the host of issues faced by the courts.

By the year 2010, there were over a million cases pending in the Kenyan courts. A case audit and institutional capacity survey undertaken in 2013 revealed a case backlog of 316,441 cases, while that of February, 2016 showed a case backlog of 338,498 out of which 62,505 cases were over ten years old and 75,274 cases were between five to ten years old.[73] As at December 2016, there were a total of 505,315 pending cases in the court system up from 494,377 cases at the beginning of the 2016/2017 financial year.[74] The severe backlog of cases has been attributed to a number of factors. This includes factors such as cases taking a very long time to be finalized, the unpreparedness of litigants and advocates leading to delays in hearing of cases, missing files and corruption.

In addition, the court system is faced with other challenges such as the fact that the litigation process is expensive which limits access to justice. In practice, legal fees continue to be too high for many disputants even though in theory, the State is constitutionally mandated to ensure access to justice for all persons and if any

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[72] Maya Gainer,'Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015' Princeton University https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/MG_OGP_Kenya.pdf last accessed 12th January, 2018

[73] The Judiciary, 'Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021' 21 *http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf* last accessed 3rd May, 2018

[74] Ibid

fee is required, to ensure that it is reasonable.[75] Further, the court process is usually a public process which does not afford litigants privacy in the hearing of their matters.

Court cases also tend to be acrimonious and can lead to the breakdown of relationships between parties as the outcomes tend to be zero sum results which leave one party disgruntled. The courts are therefore not suitable for all cases especially where parties want to maintain their business or family relationships beyond the duration of the case.

There have also been incidents of missing files which delays cases, lack of representation for parties and allegations of bribery and corruption among judicial officers which undermines the integrity of cases. The Task Force on Judicial Reforms mentioned unethical conduct on the part of judicial officers and staff as being an impediment to fair and impartial dispensation of justice citing unethical practises such as the practice of payment of bribes to hide files, abuse of office and bribing the judges, prosecutors and clerks for favorable judgment.[76] Yet judicial officers should ideally not be under the control or authority of any person or institution in order to carry their mandate effectively and ought to hear cases without fear or favor.

In the postcolonial state, the superiority of the court system over African mechanisms of dispute resolution is clearly a fallacy. As enumerated above, the court faces a lot of challenges which the judiciary is working hard to surmount. While the court system has its advantages, it is not a perfect system. This means that Kenya was quick to adopt colonial ideas of dispute resolution which are now proving to be problematic and not wholly suitable to the African

[75] Article 48 of the Constitution of Kenya, 2010

[76] Ethics and Anti-Corruption Commission, 'A Study on Corruption and Ethics in the Judicial Sector,' [2014] 41

circumstance. The court system has its advantages and disadvantages but should not be treated as superior to those mechanisms which have their roots in Africa.

These illustrated shortcomings led to the clamor for the introduction of alternative dispute resolution (ADR) in Kenya as an alternative to the court system. ADR has been promoted in order to complement the court's mandate as well as aid in the reduction of the backlog of cases.

Part IV
Alternative Dispute Resolution: Repetition as Reform

Until the lions have their own historians, the history of the hunt will always glorify the hunters – Chinua Achebe

Alternative Dispute Resolution is a movement that is increasingly taking root in the Kenyan justice system. Negotiation, mediation, arbitration, traditional dispute resolution mechanisms and hybrids of these processes are being lauded as methods which complement the court system and aid in the expeditious resolution of conflicts. These mechanisms have been entrenched in the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by various principles which include that they ought to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[77] While this position rings true, and reduction of the backlog of cases in the courts is always welcome, this 'new' movement of resolving disputes is arguably repetition being introduced as reform. By packaging ADR as a movement that is from the West and being introduced into Kenya, this perpetuates the legacies

[77] Article 159 (2) Constitution of Kenya, 2010

of colonialism and continues to subjugate the African mechanisms of dispute resolutions which were pre-existing and ignored in favor of the court system.

Postcolonial legal theories are not about legal processes in the time after colonialism, when a former colonised state gains independence and presumably a measure of self-determination.[78] Rather, postcolonial legal scholarship underscores that even when colonialism has officially ceased to exist, the injustices of material practices endure over time and in many ways frame emergent legalities and legal consciousness.[79] Therefore, it is not the fact that Kenya now has self-determination and its people have the agency to determine which conflict resolution systems fit its circumstance. Rather it is that despite being an independent state, there is a need to shift the thinking from adopting Western ideas of conflict resolution as manifestly superior to that which is indigenous and understanding the legitimacy of African ideas of dispute resolution. It is also about understanding narratives that continue to entrench the thinking that African methods of dispute resolution such as traditional dispute resolution mechanisms as being manifestly inferior and inconsequential.

Post-colonialism is concerned with the worlds which colonialism in its multiple manifestations, confused, disfigured and distorted, reconfigured and finally transformed.[80] The effects of colonisation are felt from the moment of the first colonial impact and post-colonialism constitutes as its subject the way colonised societies adjusted and continue to adjust to the colonial presence: sometimes that presence was regarded as genuinely enriching; more often it was seen as

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[78] Eve Darian-Smith, 'Postcolonial Theories of Law' [2013] Reza Banakar, Max Travers (ed.) Law and Social Theory, Hart Publishing, Oxford 249

[79] Ibid

[80] Anthony Chennels, 'Essential Diversity: Post-Colonial Theory and African Literature' Brown University [1999] 110

demeaning and impoverishing.[81] In terms of dispute resolution, colonialism subjugated indigenous institutions and mechanisms and transformed African thinking into viewing them as inferior modes of dispute resolution. The court system was presented as a more sophisticated and manifestly superior system of resolving conflicts. This thinking was not restricted to the colonial times, but still persists today.

Customary law is deemed to be an inferior source of law in comparison to English law. Traditional dispute resolution mechanisms continue to exist in the periphery and are not given the respect which would be afforded to the court system since the latter is a creature of the colonial encounter. Negotiation, mediation and arbitration, although in different hybrid forms, do have roots in African societies but there is no recognition of this and a single, dangerous narrative persists that it is a movement blowing in from the West to complement the Kenyan court system. There is a need to decolonize the idea that there were inferior and barbaric pre-existing mechanisms in Kenya for dispute resolution and that empire resulted in 'civilization' of the country's justice system. There is also need to decolonize the idea that African societies did not practice ADR and it is a Western notion being introduced into Kenya and the idea that African customary law is primitive and inferior – these are false narratives which perpetuate legacies of colonialism today.

Post colonialism also challenges the superiority of the dominant Western perspective and seeks to re-position and empower the marginalized and subordinated 'Other'.[82] It pushes back to resist paternalistic and patriarchal foreign practices that dismiss local thought, culture and practice as uninformed,

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[81] Ibid

[82] Jim B. Parsons and Kelly J. Harding, 'Post Colonial Theory and Action Research' Turkish Online Journal of Qualitative Inquiry, Volume 2(2), [2011] 2

barbarian and irrational.[83] It identifies the complicated process of establishing an identity that is both different from, yet influenced by, the colonist who has left.[84] Negotiation, mediation and arbitration were mechanisms utilized by indigenous institutions in various local communities. This was not a 'primitive' form of alternative dispute resolution but a different type that took into account the local needs of the community and was effective in maintenance of law and order. It is a form of ADR that is subordinated to western notions and structures of the same concepts. The dispute resolution methods in Kenya which applied customary law take the shape of the marginalized 'Other' and are persistently, to date, dismissed as irrational or inadequate in comparison to western ideologies.

This mentality continues to be perpetuated in the postcolonial state, not because of political colonization, but due to continued colonization of the mind. As Ngugi wa Thiong'o stated, the biggest weapon wielded and actually daily unleashed by imperialism is the cultural bomb – the effect of annihilating a people's belief in their names, in their language, in their environment, in their heritage of struggle, in their unity, in their capacity and ultimately in themselves.[85]

This collective death wish to distance ourselves from the 'African' dispute resolution methods is denouncing our authentic selves and our rich heritage as a country. It is the belief that concepts such as 'traditional dispute resolution mechanisms' and 'customary law' are terms that the sophisticated litigator or practitioner of ADR in today's world should distance themselves from as they are inferior and irrational. It is the belief that the 'savior' succeeded in his

[83] Ibid

[84] Ibid

[85] Ngugi wa Thiong'o, 'Decolonising the Mind: The Politics of Language in African Literature' London: Portsmouth [1938] 3

Civilizing Mission and granted the country a perfect legal system that should be the center of our focus and ignores the fallacy of the superiority of the court system.

In the postcolonial state, ADR ought to be embraced as an alternative to the court system which complements its mandate and helps to reduce case backlog. However, it is redolent of African history and tradition and is far from a new concept in Kenya. Kenyan societies have long embraced negotiation, mediation, arbitration and traditional justice systems. The subjugation of African indigenous institutions and African customary law was unwarranted as the superiority of the court system and English law is a misleading notion. While the imperialists introduced this annihilation of African culture, as Kenyans we continue to believe it to date which means that even though we are politically free, we remain mentally in chains.

2. Conclusion

Indigenous institutions and mechanisms utilized for resolving disputes in Kenya which existed in the pre-colonial period were legitimate and suitable for dispute resolution. They also mirrored what is known as ADR today in many respects. With colonialism, the court system was introduced as a sophisticated system of dispute resolution which was deemed to be superior and more civilized. African customary law was subjugated in favor of English law. This was part of the Civilising Mission to bring light into the 'Dark Continent' and civilize Kenyans from their perceived 'primitive' modes of dispute resolution. The court system which applied English law therefore became the mainstream dispute resolution system in Kenya.

After colonialism, in Kenya, the use of the court system subsisted as the main conflict resolution system only for its superiority to be revealed as a fallacy. Kenya wholly embraced the colonial framework and indigenous institutions

remained subordinate. The court system has made many positive contributions but suffers from a myriad of flaws such as severe case backlog, missing files, unprepared litigants and advocates, lengthy and expensive cases, corruption in the judiciary, *inter alia*. Despite these issues, the court system is still looked upon as a 'refined' system of conflict resolution as it is a Western notion so ingrained in our systems and in our psyche that litigants and dispute resolution practitioners alike distance themselves from that which is labelled 'traditional' or 'customary.'

The ADR movement has also gained momentum as an alternative to the court system introduced from the West. ADR is embraced as a resolution to the case backlog and delays in the justice system. This perception of ADR as a western concept is a continued form of subjugation of pre-existing African modes of dispute resolution in the twenty first century. To perceive traditional justice systems as the only 'African' methods of resolving disputes while negotiation, mediation and arbitration as western ideas is continued colonization. These notions of ADR have long been embraced and utilized by African societies even before empire.

While this is not a 'do away with the courts' anthem, we ought to desist from the refrain that all things African are inferior and subordinate to Western notions. If we do not, as a country, then we are not truly independent. The court system is a system that has had many positive contributions and will continue to do so. It is, however, a creature of the colonial encounter. ADR is a great complement to the court system to address its shortcomings but it is far from a new movement of resolving disputes from that has swept in from the West.

The authors therefore argue for a shift in thinking; a decolonization of the mind and a rejection of narratives which erode African systems and thoughts. In this context, ADR has roots in indigenous institutions, in our communities and in

our culture and should be embraced as such. African customary law is just as legitimate as English law and ought to be embraced. Traditional justice systems should take their rightful place at the dispute resolution table. The authors argue that ADR and the court system are legitimate and equal and one is not inferior to the other; that ADR has roots in Africa and indigenous institutions and mechanisms should not be looked down upon. Repetition masked as reform is merely perpetuation of the legacies of colonialism and should be rejected.