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"JUSTICE BE OUR
SHIELD AND
DEFENDER"

LOCAL JUSTICE MECHANISMS
AND FAIR TRIAL RIGHTS IN KENYA

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“JUSTICE BE OUR SHIELD AND DEFENDER”: LOCAL JUSTICE MECHANISMS AND FAIR TRIAL RIGHTS IN KENYA

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CHAPTER 1

1 INTRODUCTION

*O God of all creation
Bless this, our land and nation
Justice be our shield and defender
May we dwell in unity, peace and liberty
Plenty be found within our border*
**Verse One,
Kenya National Anthem**

As Kenya gained independence in December 1963, the importance of the principle of justice in securing the rights of individuals was recognised early on. The first verse of the national anthem asserts, “justice be our shield and defender.” However, in short order, the Executive curtailed the independence of the judiciary as the appointment and removal of judges fluctuated with the political temperament of the ruling party and the Executive.¹ Over the next 47 years the judiciary became an institution where justice was neither guaranteed, nor was it a ‘shield and defender’ for the ordinary civilian. Instead, it became a commodity for sale.² There were incessant complaints of judicial corruption, blatant bias in judgments, inordinate delays in concluding cases, and court files disappearing without a trace among other challenges. These went unaddressed decade after decade and the judiciary never established its credibility as the repository for justice.³

1.1 MARGINALISING CUSTOMARY LAW AND LOCAL JUSTICE SYSTEMS

The formal judicial process was a product of the colonial system. In its establishment, it continued the colonial approach of denigrating local cultures, values and traditions.⁴ The Judicature Act⁵ set out the hierarchy of laws

¹ See Task Force on Judicial Reforms, *Final Report of the Task Force on Judicial Reforms*, Nairobi: Government Printer, July 2010

² See also Mbote, Patricia K. & Migai Akech, *Kenya Justice Sector and the Rule of Law*, Johannesburg: Open Society for East Africa, 2011

³ *Supra* note 1, p. 2

⁴ Along with the judiciary, the police service maintained the colonial domination/ subjugation approach and today it is struggling to institute and implement radical reforms aimed at turning around a chronically poor relationship between the police and the public.

applicable in legal proceedings as: the Constitution, written laws of Kenya as well as specific pre-independence written laws of the United Kingdom, English common law, and doctrines of equity and statutes of general application. At the tail end of the hierarchy, African customary law was applicable to the extent that it applied to both parties and was not repugnant to justice and morality.

The rules of procedure in both criminal and civil cases drew from the English judicial system, including the dress code of wigs and robes. The formal justice system developed into a hostile, complex, intimidating, tedious and slow system. It did not endeavour to decode important precepts, beliefs and understandings of justice from customary laws and incorporate these into a national justice process. It proceeded on the expectation that customary law would in short order become obsolete to dispensation of justice.⁶ Instead, what followed was decades of a judicial service that civilians could not relate to. The judiciary became known for corruption and selling justice. The outcry against the judiciary and its failure to represent the face of justice in Kenya grew in persistence and fervour, but was vehemently resisted by the judiciary.⁷

1.2 DISPENSATION OF JUSTICE AFTER 2010

With the promulgation of the Constitution of Kenya in 2010 (hereafter ‘the Constitution’),⁸ the judiciary is on an unprecedented path of reform driven by the current Chief Justice who took office in June 2011. In the 24 months since the Chief Justice took office, the judiciary has undergone a rigorous vetting that resulted in the impeachment of some judges and the resignation of others. The judiciary has hired a new crop of judges and cleared a backlog of over 420,000 cases that had piled up for years.⁹ There is now less scepticism and more hope in the judiciary. Public confidence in the judiciary jumped from less than 40 per cent in 2010 to over 78 per cent, which respondents in the survey attributed to

⁵ Judicature Act, Chapter 8 of the Laws of Kenya, Article 3.

⁶ See Pravin Bowry, “The Imminent Demise of Customary Law”, in Standard Digital (11 January 2012) www.standardmedia.co.ke/?articleID=2000049782&pageNo=1; Okoth-Ogendo, Hastings, “The Place of Customary Law in the Kenya Legal System: An Old Debate Revived,” in J.B. Ojwang, J.N. Mugambi and G.O. Aduwo (eds.), *The S.M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi: University of Nairobi Press, Nairobi, 1989.

⁷ Previous Chief Justice of Kenya, Bernard Chunga, is remembered for his contemptible dismissal of the findings of a group of Commonwealth judicial experts who visited the country in 2002. They found the judiciary to be “corrupt, incompetent and inefficient.” Justice Chunga’s response was to demand with great contempt, “Experts in what? For what? And about what?” This phrase quintessentially reflected the arrogance and resistance of the judiciary to change at the time (see Juliana Omale, ‘Spotlight on Experts’ (2003) in *Yawezekana: Bomas ‘Agender’*, 29 May 2003 (<http://www.awcfs.org/dmdocuments/bomasagenda/Newsletter6.pdf>).

⁸ The Constitution of Kenya 2010 is a watershed moment in Kenya’s democratic development. Whereas previous reform efforts, though spirited, were quashed by an executive that was too powerful and a judiciary that was too complacent. The 2010 Constitution succeeded in setting Kenya firmly on the path of reform of major institutions, including the judiciary.

⁹ Judiciary Transformation Framework 2012–2016

the reforms in the judiciary.¹⁰ However, local justice mechanisms continue to dominate the means by which Kenyans, particularly in rural areas, seek justice and resolve disputes.

The informal justice systems in Kenya are deeply embedded in community and continue to play a fundamental role in the everyday lives of civilians. They deal with a significant breadth of issues, from simple claims to complex disputes.¹¹ They are often the first port of call and are credible in the eyes of their users. While their prevalence, use and influence is established, several authors have raised queries on the ability of local justice mechanisms to deliver on fundamental human rights in the dispensation of justice. Further, though they have developed over time, they do not have a conscious human rights framework. However, it is a fact that the majority of civilians seeking determination of disputes continually turn to the local justice mechanisms. If they are as unjust and as human rights deficient as authors indicate, it begs understanding why community members continue to use the systems. The UN study on informal justice systems estimates that in developing countries, up to 80 per cent of the population relies on informal justice mechanisms for dispute resolution and dispensation of justice.¹²

1.3 OBJECTIVE OF THE STUDY

This study focuses on the procedures of determining disputes in the local justice system of the Maasai in Kajiado town in order to determine the extent to which fair trial rights exist and are upheld within the process. By exploring how the local justice mechanisms work, it delves into an assessment of the human rights principles associated with fair trials that are visible in the system.

My inquiry departs from the perspective that has been predominant in studies on local justice, which focuses on the gaps of local justice mechanisms and how to improve their compliance with human rights. Given Kenya's history through the judiciary, my study aims to investigate how the systems adhere to fair trial rights. It draws from the observation that ordinary civilians continue to trust and use the local justice mechanisms extensively, which suggests they must be getting some level of satisfaction in their delivery of justice.

A significant volume of the current literature on local justice mechanisms is commissioned by international development actors. A lot of the literature

¹⁰ See South Consulting, Kenya National Dialogue and Reconciliation Monitoring Project Report 2012 and University of Nairobi IDS Afrobarometre Round 5 Survey in Kenya Report, 2012.

¹¹ As will be discussed later, the study found that the Maasai council of elders deals with matters ranging from petty theft to fights resulting in serious injuries and cases of killings.

¹² *Informal Justice Systems: Charting a Course for Human Rights-based Engagement*, UNICEF, UNDP and UN Women, 2012.

therefore presents detailed exposés of the deficiencies of local justice mechanisms in terms of human rights and how human rights assistance by development actors should engage local justice mechanisms towards incorporating key principles of human rights and the formal justice mechanisms.¹³

This inquiry takes a different trajectory and pursues the hypothesis that justice in local justice processes is governed by human rights principles that may or may not be consciously acknowledged.

It is my hope that the study will contribute to strengthening the administration of justice in Kenya in a number of ways:

1. To generate knowledge on local justice mechanisms and access to justice. The judiciary has prioritised local access to justice. I anticipate that the knowledge gained from this study will contribute to discussions on access to justice, including incorporating values and processes derived from local justice mechanisms into the understanding of justice;
2. To deepen the understanding of justice at community level in view of devolved government structures, prioritisation of human rights within the Constitution and the greater reach of the judiciary into communities to contribute more to the dispensation of justice;
3. To contribute to the Centre for Human Rights and Policy Studies' (CHRIPS) research and work aimed at improving local accountability and access to justice;
4. To shape NGO advocacy and government policies towards enabling actors to adopt more an open-minded approach to local justice mechanisms and move beyond stereotypes that have been associated with local justice mechanisms by providing greater insight into their contribution to justice in the community; and
5. To trigger deeper studies on local justice processes and the substantive outcomes of justice processes in the community as well as the formal system. This is important as Kenya endeavours to develop a strong, representative democracy.

¹³ See Giselle Corradi, "Advancing Human Rights in Legally Plural Africa: The Role of Development Actors in the Justice Sector," *Afrika Focus*. See also World Bank studies on informal justice in its 'Access to Justice for the Poor' (www.web.worldbank.org); Centre for Humanitarian Dialogue, "Rule of Law through imperfect bodies?" (www.hdcentre.org); UN and informal justice systems (www.unrol.org; www.undp.org; www.un.org); The Carter Centre, 'Formal and Informal Justice in Liberia' (www.cartercentre.org) 26(1) (2013) 89–98.

CHAPTER 2

2 METHODOLOGY

2.1 STUDY DESIGN

The study is an exploratory study of the local justice mechanisms in Kajiado town, how they operate and how the procedures employed deliver on fair trial rights. Both primary and secondary sources of data informed the study. Primary data collection was done in Kajiado town through interviews and observation. Field notes taken during the data gathering provided important details for the analysis. The secondary data collection entailed a review of the existing literature with particular interest in Maasai social structure and practices, their dispute resolution mechanisms, the concepts of justice and human rights, the development of the formal justice system in Kenya, the place of local justice mechanisms in dispute resolution and promoting human rights.

Primary data collection was facilitated through a focus group discussion (FGD) and three key informant interviews (KI interviews) held in August 2013. A total of 13 respondents participated in the study, eleven men and two women. Eleven of the respondents (nine men and two women) were members of the Council of Elders who adjudicated disputes in the community. One key informant was the chief and the other was the research assistant who was a young man from the community. Figure 1 below presents the study group demographic.

Figure 1 – Representation of respondent demographic

	Female	Male	Total	Code assigned
Elders	2	9	11	Respondents 1–9 (male) Respondents 10–11 (female)
Area chief		1	1	Respondent 12 (male)
Research assistant (area resident)		1	1	Respondent 13 (male)
Total	2	11	13	

The FGD questionnaire and key informant interviews led the inquiry into who may bring cases before the community elders; how the matters are ‘instituted’, heard and determined; and how matters relating to women and men are

handled. The male elders were interviewed separately from the women elders. The women elders were not officially elders but were women identified as providing advice and in some instances dealing with issues affecting women. It is a recent development that is still taking shape and is influenced by the Article 27 Constitutional requirement that all elected and appointed public bodies must not have more than two-thirds of their membership from the same gender.¹⁴ There were only two women on the council and it was important to ensure that the other nine male elders did not drown out their voices. The chief and assistant chief were also part of the FGD, and later the chief was engaged as a KI.

The FGDs were conducted in Swahili and Maasai with interpretation provided by the research assistant and the chief. In addition, elders who were more conversant with Swahili provided interpretation spontaneously during the discussions. The respondents were divided as follows:

The FGDs were organised through the research assistant who lives in the study area. The assistant approached the chief who then worked with him to approach the elders to participate in the FGD. Although three FGDs were initially intended, upon arrival and given the need to be accommodating and to demonstrate respect for the elders, it became clear that it was better to hold only one FGD. Most elders arrived at about the same time at the interview site. The chief's office had been identified as the venue for the FGDs and individual interviews. However, an unforeseen incident arising on the same day required the chief's attention and because of this the discussions were delayed by an hour and a half. It was thus that it became prudent to hold the one group discussion. Furthermore, the elders preferred to have the discussion as one group since they work for the same objectives.

2.2 ETHICS

The research assistant who was responsible for mobilising the respondents informed all the respondents at the time of mobilisation of the purpose of the study, the objectives and the voluntary nature of their participation. Further consent to participate in the FGDs was sought and received orally at the start of the FGD, where the academic nature of the study was made clear. The elders were enthusiastic in their responses and at the end reaffirmed their willingness to share the information sought.

2.3 LIMITATIONS OF THE STUDY

As an exploratory study, the sample size is small and most of the respondents sit on the council of elders. The study therefore does not present a 360-degree view of the local justice process in Kajiado. However, with a focus on the process the

¹⁴ Article 27(8) The Constitution of the Republic of Kenya, 2010

study presents insights that pave the way for a more detailed study of the structural and procedural dimensions as well as the substantive dimensions of justice and human rights through the local justice mechanisms. In addition, the respondents as a council of elders were a representative sample size as adjudicators of local disputes and as such the study provides useful insights from a structural perspective of justice mechanisms in Kajiado town from which sound conclusions may be drawn.

Many of the responses were in the form of narratives, which were shared mainly in Maasai, in a mixture of Maasai and Swahili at other times, and in Swahili only in few instances. The interpretation was not verbatim but was often given as a summary of what a particular respondent had said. Where some details were missed participants of the FGD chimed in to provide missing information. As such, some of the nuances may have been missed in the interpretation. However, the data gathered presents a set of narratives that give a rich picture of how the local justice system works. Some of the data gathered from secondary sources also provided context and detail that may have been missed in the interviews.

CHAPTER 3

3 PROFILE OF THE STUDY REGION



Figure 2 – Map of Kenya highlighting Kajiado County

Source: Wikipedia; (modifications: author)

Kajiado County is located in the southwest region of the country. At 21,901 square kilometres it is the ninth largest county of Kenya's 47 counties. According to the 2009 Kenya Population and Housing Census Report, the county has nearly 690,000 residents while Kajiado town has a population of 14,860 according to the 2009 Kenya Housing and Population Census estimates.¹⁵ It borders Nairobi, Nakuru and Kiambu counties on its northern border, Machakos and Makueni to its east and southeast, Taita-Taveta to its south and Narok to its north and northeast. Although the county is largely associated with the Maasai ethnic community, its immediate proximity to Nairobi and to the large and economically strong counties surrounding it, as well as its being a border county between Kenya and Tanzania, have influenced the demographic significantly. As a single ethnic community the Maasai are the greatest population in Kajiado constituting about 49% of the total. Several other communities combine to make up the rest of the demographic. Many of them reside in the industrial and mining areas such as Kajiado town, Kitengela town as well as urban parts of the county that are now popularly considered the outskirts of Nairobi rather than part of Kajiado County, such as Ngong, Kiserian and Ongata Rongai, among others.¹⁶

3.1 ABOUT THE MAASAI

The Maasai are a group of Maa speakers made up of five main clans. Within the clans, there are 14 to 22 sections spread out across Kenya and Tanzania.¹⁷ Each of these sections occupies a spatially defined geographical area within Maasai country.¹⁸ The Maasai live in households clustered together to form an *enjang*, or a joint residential area. A household may comprise a man and his wives and children, and his adult sons and their wives and children. In the past, an *enjang* had six to twelve families,¹⁹ but as life has become more sedentary for the Maasai, the households that make up an *enjang* can range from one to six. The *enjangs* cohere into a larger neighbourhood unit, which has a council of elders providing leadership and dispute resolution at the community level.

¹⁵ Statistics from Kenya Population and Housing Census 2009 cited in CRA, *Kenya County Fact Sheets*. 2nd edition, 20 June 2013, p.16. Available at: <https://www.opendata.go.ke>

¹⁶ Population trends as early as 1999 projected that by 2010, Kajiado County (previously it was a district) would have up to 54% of its population drawn from other ethnic groups. See, Ernestina Coast, "Maasai socio-economic conditions: cross-border comparison", London: LSE Research Online, 2002. Available at: <http://eprints.lse.ac.uk/archive/00000265>; Marinus M.E.M. Rutten, *Selling Wealth to Purchase Poverty: the process of the individualisation of landownership among the Maasai pastoralists of Kajiado district, Kenya, 1890-1990*, Saarbrücken: Verlag Breitenbach Publishers, 1992, available at: www.ascleiden.nl;

¹⁷ Henri ole Saitabau, "The Role of Ceremonies in Preserving Cultural Diversity and Conserving Biodiversity for Sustainable Livelihoods: Exploring Cultural Diversity and Related Indigenous Knowledge Among the Loita Maasai Community," Nairobi: LHCFA and Kenrick NNK, 2011 available at: http://ethnobiology.net/docs/Henri%20ole%20Saitabau_final.pdf

¹⁸ Ernestina Coast, "Maasai Demography", PhD Thesis, London: LSE Research Online, 2001, <http://eprints.lse.ac.uk/archive/00000264> (accessed 12 September 2013); see also Saitabau, 2011;

¹⁹ See Coast 2001.

The Maasai community in and around Kajiado town has maintained a predominantly pastoralist and ranching lifestyle. Before colonisation and for a few years after Kenya became independent in 1963, the Maasai continued active nomadic pastoralism, moving to more fertile pastures from time to time. However, with the strengthening of protection of national parks and wildlife reserves, as well as the sale of group ranches to individuals, the nomadic lifestyle is significantly altered. Now most of the Maasai live in fixed homes. They may move with their animals to distant regions searching for pasture and water, however, they return to the permanent homesteads. However, the importance of livestock remains key for the community and wealth and economic status are measured in terms of livestock owned. On average, a Maasai man and his family may own up to 300 head of livestock.²⁰

In addition to a firm, age-based social structure, the Maasai community is also defined by a strong patrilineal structure. Men are the decision makers in the family and in the society. Girls do not inherit from their patrilineal home as they are considered sojourners on their way to another home when they get married. Councils of Elders are typically made up of men. Women do not have age-sets; they acquire the age-set of their husband.²¹ Polygamy is accepted and widely practiced. Labour is strictly divided with women responsible for the domestic chores. A young girl is early on taught to manage household chores in preparation for marriage and running her house. Soon after initiation in early puberty, Maasai girls are married off to older men. Although the practice has reduced significantly in latter years due to legal pressure and increasing access to education, the practice remains fairly common. In the words of one woman who vied for a political seat, 'Maasai women are nothing' in the eyes of men.

3.2 AGE-SET SYSTEM

The social organisation is defined by an age-set system, which is a powerful horizontal and vertical organising structure for males. It clusters boys and men of the same age bracket, which includes males within a five to ten years age bracket, into groups which form the age-sets and through these age-sets it confers rights, responsibilities and roles on the members. The age-sets groups boys together in a bond of kinship, brotherhood and loyalty that emulates familial bonds. Every age-set will go through a series of rituals and initiation

²⁰ Cattle are generally considered to belong to men as the patriarchs and providers in the family. Inheritance is also passed on to the male members of the household. A woman may be bequeathed animals but this is often a small bequest by comparison. D.W. Nyariki et al. (2009) indicate in their study that in Narok, a Maasai household had on average 320 cows, sheep and goats and an estimated 96 per cent of the population had livestock.

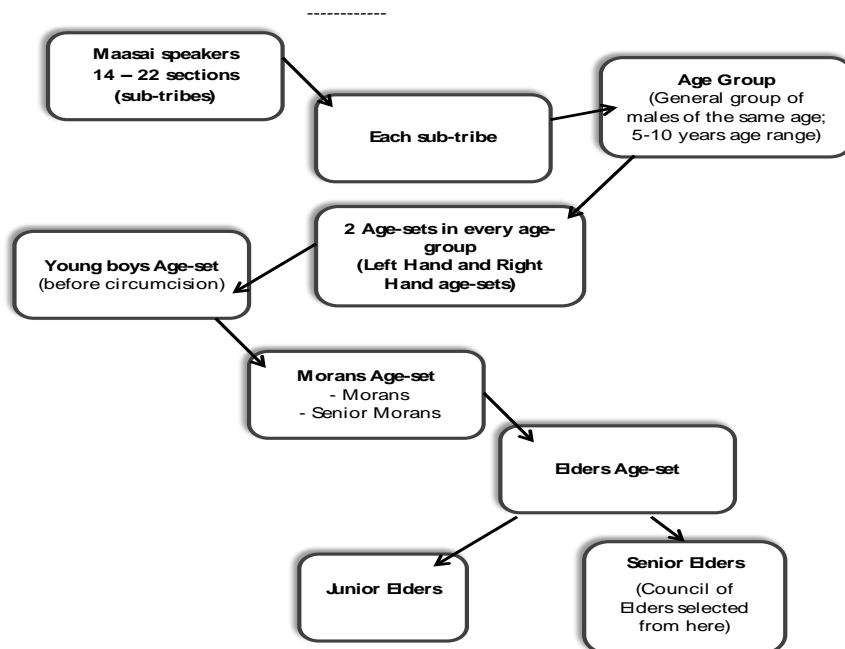
²¹ Maasai Ceremonies and Rituals (www.maasai-association.org/ceremonies.html).

ceremonies marking the various transitions from boyhood to elderhood.²² In addition to laying a foundation for kinship and brotherhood, the age-sets provide parameters that regulate male and female relations as well as hierarchical relations with age-sets of different age-groups.

Emuratare is the circumcision ceremony which is the most important rite of passage for the Maasai, marking the transition from boyhood to manhood and becoming *ilmurrani* (popularly known as *morani* or, in the singular, *moran*) or warriors. *Morani* are the protectors of the community as well as responsible for conducting cattle raids from external communities, or defending their communities against such raids. *Morani* live in separate camps, *emanyatta*, which are made up of houses built specifically for the *morani* where they will live, undergo intense training and learning on Maasai culture, community living as well as warfare and defence skills. While sexual activity with females is permitted in the *emanyatta*, the *murrani* remain unmarried until they complete their *moran* period and transition to elderhood.

²² Interviews held in Kajiado town with the Maasai Council of Elders and with the area chief on 14 August 2013. See also Navaya ole Ndaskoi, "The Root Causes of Maasai Predicament," in *Fourth World Journal*. 7:1, (2006) pp. 28–61; Laura E. Hauff, *The Effects of Development on the Maasai: A Thesis* St. Benedict/St. John's University In Partial Fulfilment of the Requirements for the Distinction, April, 2003 (available at: <http://www.csbsju.edu/Documents/libraries/MaasiThesis.pdf>); Maasai Rituals (www.maasaiinfo.wikispaces.com/Maasai+Rituals); and Maasai Ceremonies and Rituals (www.maasai-association.org/ceremonies.html);

FIGURE 3 – AGE-SET STRUCTURE OF THE MAASAI



3.3 MAASAI ELDERHOOD

At the end of the period as Maasai warriors, the men transition into elderhood, which is defined by three levels: junior elders, senior elders and ancient elders. On average, the Maasai man transitions to elderhood in his thirties, depending on his age when his age-set commenced. The transition is marked in through a ceremony known as *eunoto* where senior *murrani* become junior elders. The ceremony is marked by shaving off the hair of the *murrani* which they have grown and styled throughout the period as *ilmurrani*. As a junior elder, a Maasai man is allowed to get married and set up his own homestead. Junior elders will spend the next 8 to 15 years deeply understanding the cultures, traditions, histories and indigenous knowledge of the Maasai, as well as guiding the younger age-sets as they go through their transitions.²³

In the final rite of passage for age-sets known as *olngesherr*, junior elders transition to senior elderhood marked by an elaborate week-long ceremony. Senior elders are responsible for leadership, administration and guidance within the community. The community's council of elders are selected from the senior elders. Respect for older persons is deeply rooted in social culture. Curses from parents and elders are taken seriously and individuals try to ensure their behaviour does not attract a curse.

²³ See Saitabu 2011

CHAPTER 4

4 THEORETICAL AND LEGAL FRAMEWORKS OF JUSTICE AND FAIR TRIAL RIGHTS

4.1 CONCEPT OF JUSTICE

Justice has at its core the concept of fairness, which embraces the principle that there is a “certain balance between our actions, their motivations and the consequences”.²⁴ It includes the idea of dispute arbitration by a third party who is external to the dispute between two people. In that context it entails determining rights, violations and compensation. The concept of justice allows society to establish the limits of individual and collective rights in order to facilitate social order and harmony as well as individual happiness. This reasoning draws from Thomas Hobbes’ social contract theory as reinterpreted by John Locke and Jean-Jacques Rousseau. The social contract theory propounds that human beings reciprocally surrender the rights they possess in the ‘state of nature’ in order to live within agreed social limits and ensure social harmony. The rights surrendered are yielded to an authority that is better placed to protect and preserve individual rights for all. Hans Kelsen²⁵ applies this reasoning to his interpretation of the concept of justice and suggests that the pursuit of justice is in fact humanity’s pursuit of individual and collective happiness and finding a compromise point between individual and collective happiness. Communities develop justice systems on the basis of agreed principles that mutually benefit members of the community.

Stig Jørgensen argues that substantive justice is often a product of the political and ideological persuasion of the society in which it is rendered.²⁶ At the same time, he suggests that the outrage at injustice in any community, whether the concept of justice is consciously articulated or not, points to a universal human sense of justice and injustice that does not depend on statute law. Justice is an instinctive pursuit for people in community. Nonetheless, following the logic of the social contract theory, justice includes the collective agreement by which people determine claims through a system that adjudicates individual rights, establishes limits of rights, and imposes consequences for violating the rights of

²⁴ Stig Jørgensen, *On Justice and Law*, Aarhus: Aarhus University Press, 1996, p. 91.

²⁵ Hans Kelsen, *What is Justice?* Berkeley, CA: University of California Press, 1957.

²⁶ *ibid*

others. It is a fundamental part of managing human interactions and promoting social harmony. Justice mechanisms are central to social organisation and order.

Justice may be understood as an assertion of equality, worth and fairness, as well as an acquiescence to a common social order that regulates human interaction for the purpose of securing individual and collective happiness.²⁷ Hans Kelsen argues that the concept of social justice is necessarily different from the concept of individual justice. Social order justice seeks to achieve the greatest good for the greatest number and is thus expected to be more objective. As such, the process of dispensing justice by issuing judgements to resolve disputes continuously asserts the values and what has been accepted as good or bad by a society.

The concept of justice in the current international political context incorporates a focus on finding balance between individual rights and state authority. At the same time, the discourse in the international arena takes place against the backdrop of dominant Western political thought and liberal democracy which emphasise “individual freedoms [and stresses] civil and political rights”.²⁸ Sammy Aldeman delivers a robust criticism of modern day essentialism of constitutionalism that merely peddles Western perspectives of pluralism and individualism at the expense of collectivism. He argues that concepts of law, justice and rights, particularly in their assertion of universality, are embedded in Western political thought which prioritises individual rights over all other categories of rights. This is at odds with the social organisation in many communities in Africa where communal living remains a strong organising principle.²⁹

Bonny Ibhawoh takes a different view.³⁰ While admitting that the modern concept of human rights may in fact be a product of the West and Western individualism, he suggests that through globalisation, interdependence, and advances in communication and transnational forces, the concept has become relevant even within specific cultural contexts where clashes exist between

²⁷ See e.g. writings of Hans Kelsen, Jeremy Bentham and other fundamental philosophers of law, morality and justice. Jeremy Bentham posited the utilitarian theory of justice which argued that the value of justice in a society was determined by the consequences of the actions (for the greater good) than the actions themselves – the end is greater than and justifies the means.

²⁸ Inoguchi, Takashi and Edward Newman, *Asian Values and Democracy in Asia*, proceedings of the Conference on Asian Values and Democracy in Asia, 28 March 1997. Part of the First Shizuoka Asia-Pacific Forum, Shizuoka, Japan. <http://archive.unu.edu/unupress/asian-values.html> (accessed 28 November 2013)

²⁹ Sammy Aldeman, “Constitutionalism, Pluralism and Democracy in Africa”, *Journal of Legal Pluralism*, 42 (1998) 73–88; see 73 and 74.

³⁰ Bonny Ibhawoh, “Cultural Tradition and National Human Rights Standards in Conflict,” in Kirsten Hastrup (ed.), *Legal Cultures and Human Rights: The Challenge of Diversity*, The Hague: Kluwer Law International 2001, 85–102.

cultural values and rights and the universally accepted standards of human rights. The debate has moved from a focus on 'the West versus the rest', Ibhawoh argues, and is now focused on "how to strike the delicate balance between the national human rights standards guaranteed by the state and group claims to cultural rights."³¹

Local justice mechanisms are increasingly at the centre of this debate. In most liberal democracies law courts are the centrepiece in the delivery of justice guided by state legal order and standards of human rights. However, the volume of claims that are adjudicated through local justice systems in developing countries certifies the existence of *de facto* legal pluralism even where formal law may rule it out. Miranda Forsyth observes that indeed virtually all post-colonial countries have parallel non-state justice mechanisms.³²

4.2 JUSTICE THROUGH LOCAL JUSTICE SYSTEMS

The research and scholarship on local justice mechanisms has been driven in no small measure by international development actors: from global financial institutions, UN agencies and international NGOs, to foreign development departments and even religious institutions. Having recognised the fact that local justice mechanisms cannot be ignored in the development and delivery of justice and governance in local communities, many studies take the view that local justice mechanisms 'present a number of pitfalls in terms of human rights.' As such, development assistance is focused on reconfiguring their precepts and only then, strengthening their capacities.³³ Several studies propose measures to improve adherence of informal justice mechanisms to human rights standards in international conventions.³⁴

This study takes a different trajectory and explores the hypothesis that local justice processes incorporate important aspects of fair trial rights that may or

³¹ *ibid*, 86

³² Miranda Forsyth, "A Typology of Relationships Between State and Non-State Justice Systems," *Journal of Legal Pluralism* 56, 2007 67–113.

³³ See Giselle Corradi, "Advancing Human Rights in Legally Plural Africa: The Role of Development Actors in the Justice Sector," *Afrika Focus* 26(1), 2013: 89–98.

³⁴ Among several other authors, see Nainar, Vahida, In Multiple Systems of Justice in Uganda, Whither the Justice for Women, Kampala: FIDA Uganda, 2011; Hinz, Manfred O and Clever Mapaire (eds.), In Search of Justice and Peace: Traditional and Informal Justice in Africa, Windhoek: Namibia Scientific Society, 2010; Chopra, Tanja, Building Informal Justice in Northern Kenya, Nairobi: Legal Resources Foundation Trust, 2008; Wojkowska, Ewa, Doing Justice: How Informal Justice Systems can Contribute, Oslo: UNDP Oslo Governance Centre, December 2006; Rikke, Jensen et al, Universal Human Rights and Diversity- the Challenges and Possibilities of Legal Pluralism, Master's Thesis, Roskilde University, October 2004; World Bank studies on informal justice in its 'Access to Justice for the Poor' (www.web.worldbank.org); Centre for Humanitarian Dialogue, "Rule of Law through imperfect bodies?" (www.hdcentre.org); UN and informal justice systems (www.unrol.org; www.undp.org; www.un.org); The Carter Centre, 'Formal and Informal Justice in Liberia' (www.cartercentre.org) 26(1) (2013) 89–98.

may not be consciously acknowledged. They carry important lessons in the dispensation of justice that the formal justice system in Kenya would benefit from.

4.3 FAIR TRIAL RIGHTS

The right to a fair trial is well established and protected in several international legal documents as well as in domestic legislation in Kenya. It is now accepted jurisprudence that the right to a fair trial applies to both civil and criminal proceedings. Article 10 of the Universal Declaration on Human Rights (UDHR) asserts the right of every individual to a fair, public hearing in the determination of his or her rights and obligations and any criminal charges against the person. The African Charter on Human and People's Rights in Article 7 also endorses the right to a fair trial and hearing. Article 6 of the European Convention on Human Rights and Article 8 of the American Convention on Human Rights expound on the right as it relates to both criminal and civil cases. Articles 14 and 16 of the International Covenant on Civil and Political Rights (ICCPR) focus on the rights relating to criminal procedures. Read together, these articles highlight key principles of justice and fair hearing.

Several principles have been established internationally as fundamental in securing the right to a fair trial.³⁵ The principles continue to evolve as case law related to the right grows. The Office of the High Commission for Human Rights notes that the right to a fair trial is the most violated right and is most frequently the subject of claims brought before the Human Rights Committee.³⁶ It encompasses rights that accrue before, during and after trial.

This study focuses on three key principles of fair trial: equality, impartiality and the right to representation.

a) Equality

The principle of equality is fundamental to ensuring fair trial rights are realised. It has several key elements. First, the principle asserts the right to equality before the law or the principle of non-discrimination.³⁷ The General Comments of the

³⁵ General principles of equality, independence, impartiality and public hearing among others apply to both civil and criminal hearings. However, the principles that govern criminal trials are more detailed as criminal trials could potentially result in loss of freedom of the accused person as well as curtailment of their exercise of certain citizenship rights. For a detailed discussion, see Office of the High Commissioner for Human Rights and International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, New York and Geneva: United Nations Publications, 2003. Chapters 6 and 7 in particular focus on the fair trial principles and rights. Available at: <http://www.ohchr.org/EN/PublicationsResources/Pages/TrainingEducationtwo.aspx>

³⁶ Chapter 6: The Right to a Fair Trial, Part I, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* 2003, 213–250.

³⁷ *ibid*, 217

UN Human Rights Committee elucidates that the principle protects a person from treatment that leads to distinction, exclusion, restriction or preference on the grounds of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status where such distinction has the purpose or effect of impeding their rights on equal footing with others.³⁸

However, the principle of non-discrimination is distinguished from differentiation in treatment which must be based on reasonable and objective criteria.³⁹ Affirmative action is an example of treatment based on reasonable and objective grounds. Affirmative action entails differential treatment targeted at a person or category of persons with the intention of mitigating existing disadvantages. These disadvantages are such as to occasion and perpetuate discrimination against the person or group of persons.⁴⁰

The principle of equality also includes the right to equality of arms, which addresses the balance between the prosecution or plaintiff and the defence.⁴¹ It arises most often in criminal proceedings and includes the right to adversarial proceedings.⁴² This means that an accused person is informed promptly of the charges filed against him or her; he or she is given adequate time to prepare a defence; has the opportunity to confront his or her accuser and to examine any evidence presented against him or her, including to question witnesses.

Equal access to courts is an integral part of the principle of equality under the right to a fair trial. It simply requires all persons to have equal access to the courts.

b) Impartiality

The Bangalore Principles of Judicial Conduct, 2002, indicate that judicial impartiality exists where the decision and the process of arriving at the decision are without favour, bias or prejudice.⁴³ International human rights conventions assert that every person has the right to have their claim heard before an

³⁸ Para. 7, UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html> (accessed 4 December 2013).

³⁹ There are numerous commentaries on these principles. See United Nations Office of the High Commission on Human Rights writings on the subject, including *Human Rights in the Administration of Justice* manual (see n34); also, Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, Research Notes Series of the Norwegian Centre for Human Rights, University of Oslo, 2004. Available at: <http://www.corteidh.or.cr/tablas/R08121.pdf> (accessed 30 Nov 2013).

⁴⁰ See also Chapter 13, *Human Rights in the Administration of Justice* manual, 2003.

⁴¹ See UN Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007).

⁴² *Chapter 7, Human Rights in the Administration of Justice* manual, 2003.

⁴³ Value 2 of the Bangalore Principles.

independent, competent and impartial tribunal established by law. The Statute of the International Criminal Court elucidates on the principle of impartiality further. In Article 40, judges are required to avoid any conduct that is likely to interfere with their judicial functions and affect the confidence in their independence. The article underscores an important aspect of impartiality of justice mechanisms. First, impartiality has to do with both action and public perception. Courts and tribunals must give people confidence in their ability to deliver justice impartially. Second, beyond the procedures for the administration of justice, the individual conduct of judges and adjudicators is relevant to the principle of impartiality.

c) Right to representation

It is not mandatory for a person with a claim before a court to take up legal representation. However, ensuring that everyone is afforded the opportunity to do so is an important principle of the right to fair trial. Article 14 of the ICCPR secures the right of a person charged with a crime to represent himself or herself in court or, the alternative, to secure legal representation of his or her choosing. In its guiding comments the Human Rights Committee exhorts states to ensure the right to legal representation is secure in any case that imposes the death penalty upon conviction.

4.4 LEGAL FRAMEWORK OF FAIR TRIAL RIGHTS IN THE FORMAL JUSTICE SYSTEM

The protection of fundamental rights and freedoms is prioritised in the Constitution. This is a marked departure from the previous Constitution.⁴⁴ In Article 20 courts are required to apply an interpretation of rights that most favours the enforcement of rights and fundamental freedoms, and to apply interpretations that help to develop the law where it fails to give effect to a right or fundamental freedom. In addition, the Constitution incorporates ‘the general rules of international law’ as part of the law of Kenya.⁴⁵

Article 25 of the Constitution, protects the right to a fair trial as a fundamental right that cannot be limited under any circumstances. In this way, the Constitution seeks to secure the rights of individuals and assert the obligation of courts to ensure procedural fairness in dispensation of justice. It emerges from a

⁴⁴ Kenya’s Independence Constitution of 1963 was arbitrarily amended no less than six times during the successive governments of Jomo Kenyatta and Daniel arap Moi in order to consolidate power in the executive, water down the separation of powers and limit individual rights. As a result, all the rights guaranteed in the Bill of Rights were subject to derogation. The right to a fair trial was among the most qualified, giving the executive sweeping powers to delay habeas corpus in some circumstances and to detain without charge, in others. The entire chapter on the Bill of Rights was more detailed in defining exceptions to the rights than to guaranteeing the rights. As such, the Bill of Rights was ironically dubbed “the Bill of Exceptions.”

⁴⁵ Article 2.

history in which courts have been used as political tools to curtail rights and freedoms. Now, several provisions in the Constitution focus on securing both procedural and substantive fairness in courts and tribunals and in administrative hearings.

Article 50 takes the approach of international conventions in securing the right of fair hearing in both civil and criminal cases. It states: “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.

In addition, the Constitution declares ‘human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised’ as foundational national values and principles of governance that must guide the conduct of public affairs.⁴⁶

Echoing the wording in Article 26 of the ICCPR and Article 3 of the ACHPR, the Constitution guarantees equality before the law in Article 27, which states: “Every person is equal before the law and has the right to equal protection and equal benefit of the law”.

In Article 159, courts and tribunals established in accordance with the Constitution are given judicial authority. The article proceeds to give governing principles of justice. These are: justice shall be provided to all persons regardless of their status; justice shall not be delayed; procedural technicalities should not impede the administration of justice; courts are to be guided by the purposes and principles of the Constitution. The fifth principle found in Paragraph 2(c) states “...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to [paragraph] 3”.

Paragraph 3 of the article states that traditional dispute mechanisms are not to be used in a way that contravenes the Bill of Rights, conflicts with the Constitution and other written laws, and is not repugnant to justice and morality. Importantly, in this paragraph the Constitution indicates that neither the procedure nor the outcomes of the process of local justice mechanisms should be repugnant to justice and morality.

The technical procedures of the Kenyan court system aim to secure the right of equality before the courts. As a matter of principle, parties approaching the courts will be heard and their cases determined on the basis of the claims

⁴⁶ Article 10.

presented. In practice, the courts have a history of political interference in civil and criminal trials that impairs the rights of equal access to the courts, equality of arms and equality before the courts. At the same time, the challenge of corruption and bribe-taking made judicial proceedings unequal and unfair between the parties. Today, the Constitution and the judicial reform process launched under it have improved public perception of the courts. However, there is a perception that the reform measures are taking place at a high level, focusing on the judges, procedures in the higher courts and among top judiciary staff officers. The reforms have not sufficiently percolated down to the lower court processes where the vast majority of court cases, particularly in the communities, are heard.

Despite the existence of criminal procedure rules, in practice the criminal justice system has for a long time been subject to the largely unfettered discretionary powers of the police, magistrates and judges as well as court staff who service the judicial processes. According to Mbote and Akech,⁴⁷ the arbitrary exercise of discretion has led to 'criminalisation of poverty and persecution of citizens.' Citizens are facing arrest, trial and conviction for charges that are often ill-supported with evidence, or under circumstances where non-custodial sentences would do. The complex nature of proceedings and the hostile environment in which justice is rendered, exacerbated by the high cost of legal representation, leaves many accused persons at the mercy of an unfriendly judicial process. The question of equality is skewed even before the judicial process commences.

The court procedures remain complicated and a party is at a significant disadvantage if he or she does not have legal representation. The costs of litigation are also very high. In addition to court fees for civil claims, lawyers' fees are guided by the Advocates (Remuneration) Order of 2009, which indicates a minimum fee of KES 10,000 (USD 120) when a client retains the lawyer.⁴⁸ In practice, legal fees are hardly ever below KES 25,000 (USD 295) in simple, non-contentious matters. Where the service includes court representation, the fees are calculated by hours spent on the case and the costs escalate. By way of context, the minimum monthly wage in Kenya for unskilled labourers in urban areas stands at KES 9,781 (USD 115).⁴⁹ The Order prohibits lawyers from charging fees below the minimum fee prescribed. The actual legal fees charged include a percentage of the value of the subject matter of the suit. The intention was to do

⁴⁷ Mbote and Akech, *Kenya Justice Sector and the Rule of Law*, 2011.

⁴⁸ A distinction must be made between using legal services such as commissioning and notarising documents, which do not require retention of the lawyer to represent the client. The fee limits contemplated here apply to circumstances where the client retains the lawyer to represent and act on his or her behalf, whether in court proceedings or in concluding contracts, etc.

⁴⁹ Unskilled labourers include sweepers, cleaners, domestic workers, day security guards, and others. This is the minimum wage as per the August 2013 Regulation of Wages (General) Order.

away with undercutting in the legal fraternity, but it has had the effect of making legal services unaffordable for the majority of Kenyans.

In criminal processes, although the accused person does not pay a court fee, more often than not he or she is unlikely to succeed without hiring a lawyer, as the proceedings are complicated. Furthermore, he or she may not know what evidence to adduce and when to challenge the prosecution for violating procedural rules. Presently, legal aid in Kenya is neither well known nor well understood. The government avails legal aid to persons charged with murder and to children facing criminal charges in court. NGOs provide legal aid to communities, but they are restricted by their organisational mandates and resources available. The Law Society of Kenya, the umbrella body for registered legal practitioners, provides periodic legal aid in the form of legal advice through periodically scheduled events. It is available to persons charged with murder and to children accused of crimes.⁵⁰ However, important reforms are underway. The Constitution in Article 50(2)(h) secures the right of an accused person to have legal representation at the expense of the state. It says:

Every accused person has the right to a fair trial, which includes the right ... to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

The Constitution does away with the previous criteria by which legal aid was provided on the basis of the offences charged. Instead, it uses the yardstick of 'substantial injustice' to grant this right. This means that in any criminal case a person has the right to claim legal representation at the instance of the state if he or she is likely to suffer substantial injustice. Furthermore, the state must be proactive in informing every accused person of this right. Legislation is now pending in Parliament aimed at making legal aid clearer and more predictable. The Kenya Legal Aid Bill 2013 sets out the guiding principles and circumstances for legal aid and establishes a coordinating body, namely, the National Legal Aid Service. The Bill is likely to be passed in 2014.

4.5 THE CONSTITUTION AND LOCAL JUSTICE MECHANISMS

Whereas previously local justice systems operated below the eye level of the law, the Constitution brings their operation within full view of the law. Article 159 not only recognises but also encourages the use of alternative dispute resolution mechanisms in the formal justice system, including traditional dispute

⁵⁰ See a further discussion of legal aid in Kenya in DIHR and EALS, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors," Copenhagen: Danish Institute for Human Rights, (December 2011); Mbote and Migai, *Kenya Justice Sector and the Rule of Law*, 2011.

resolution mechanisms, insofar as they are not repugnant to justice and morality nor do they conflict with the Bill of Rights, the Constitution and written laws.

In a recent case, *R v. Mohamed Abdow Mohamed*,⁵¹ Kenya witnessed the first instance of a superior court incorporating the decision of a local justice process in the formal justice system. The case has triggered a strong outcry from the legal community and the Director of Public Prosecution's office.⁵² In the case, the defendant, Abdow who is a Somali man, killed another Somali man. He was charged with murder. However, in the hearing his community submitted to the judge that Abdow and his family had paid a penalty for the killing, relevant rituals had been performed and that the matter was settled in the community. In May 2013 the High Court judge hearing the matter accepted the community's resolution on the grounds that Article 159 of the Constitution allowed courts and tribunals to be guided by alternative dispute resolution mechanisms. The judge was also of the view that the ends of justice would be served by discharging the accused person.

Though considered controversial, the ruling indicates a high level of endorsement not only of customary law, but also of the outcomes of dispute resolution under local justice mechanisms. It opens the door for further debate on the legal justice process, access to justice, dispensation of justice and the position and influence of local justice mechanisms. This study is therefore timely and relevant to the discourse.

⁵¹ Nairobi High Court Criminal Case No. 86 of 2011.

⁵² See Pravin Bowry, "High Court Opens Pandora's Box on Criminality," in the *Standard Digital*, 12 June 2013. Available at: <http://www.standardmedia.co.ke/?articleID=2000085732> (accessed 4 December 2013).

CHAPTER 5

5 FINDINGS

a) The council of elders

Elderly Maasai women and men are viewed as the custodians of the culture of the community. Their interpretations of culture and opinions are valued and hold great sway in decisions made by individuals and families as well as the larger community. The council of elders is drawn from the senior elders' age-set. Emphasising the role of age-sets in identifying council members, respondent 13 stated: "The age-set system is important in identifying elders. The leader in every age-set is known as the Olaiguanani who often goes on to form part of the council of elders when his time comes."

Respondents 5, 6 and 9 pointed out that the elders are observed over time through the age-set transitions and their conduct is scrutinised. They are considered to be of good standing, wise counsel, knowledgeable, fair, insightful, well-versed in Maasai customs, impartial in making decisions, and their opinions and views are often sought and respected. Age-set peers as well as community members play a significant role in identifying who can serve as an elder on the council. They listen to and help to resolve disputes in the community, including issues related to marriage, family affairs, property, animal ownership, crime and other concerns.

The council of elders not only plays a role in dispute resolution within the community, they also comprise the nerve centre of decision making for the community. Every neighbourhood has a council of elders. Disputes localised to the sub-clan or sub-tribe are resolved internally. Where there are disputes or matters arising that involve two or more sub-tribes in a region, the sub-clan will constitute a joint council of elders with representation from all the sub-clans in order to resolve the issue collectively.

Respondent 4, noting the changes that have happened over time in how the community is organised presently and the selection of elders, said:

We are now emulating Tanzania. People are not moving the way we used to. The elders are selected to be representatives of the villages [*enkang* or neighbourhoods]. The [*enkang*] are not divided into a uniform number; it depends

on the location, the number of households in the area and how far apart they are. The elder representatives of the villages form part of the council of elders. The role is voluntary; we don't pay the elders. But they must still be men who are of good character and much respect in the community.

b) On 'instituting' claims

When asked who may bring a claim before the council of elders, the respondents indicate that where a dispute arises between two parties, either of the parties may approach the council elders in their locality. A day and time will be arranged when the two parties and those connected with the issue may be heard by the council of elders. The dispute hearing and determination is inquisitorial in character. The focus is to get to the truth and thereby resolve the issue, allowing both parties to move past the incident. Once a matter is brought to their attention, the elders are proactive in setting a time when the matter can be heard.

On hearing and determining disputes

The council attends to diverse issues, ranging from personal issues between a husband and wife, to fights leading to injuries and killings and murder cases. The council of elders is proactive in the conduct of the hearing. Unlike a formal, adversarial process, the dispute resolution takes the format of a discussion before arbitrators. It is inquisitorial in nature focusing on uncovering the truth, identifying how and why the dispute has arisen, providing opinion and guidance and concluding with the levy of a fine if the situation warrants it.

According to the respondents, representation is not a requirement or a typical way of conducting the sessions. This is because the focus is to establish the truth of the incident as it happened between the parties. Respondent 7 pointed out that where the parties speak for themselves, sometimes it is possible to uncover what is a simple misunderstanding between parties rather than a dispute. Each party is given the opportunity to present their version of the situation. As the parties are questioned, the elders may ask for specific witnesses or individuals who have more information on the same or similar situations to give further detail during the hearing.

The majority of disputes arise in the context of marriage and familial relations. There are intra-familial measures for addressing problems between a husband and a wife, for example, involving the families of either side of the couple. As such, not every dispute will be brought before the council of elders. Sometimes the *Olaiguanani* of an age-set may be asked to sit with council of elders as they listen to a dispute. His opinion may be sought and he may be periodically asked to share his perspective.

Once the elders hear all the relevant parties connected with a dispute, they deliberate among themselves and by consensus they come to a decision. They will communicate their decision to the parties including any fines imposed. This may happen within the same day or over the course of a few days depending on the issue. All the proceedings and decisions are oral. The council is guided by the Maasai laws, customs and principles in determining disputes.

The respondents pointed out that the only matters that they do not hear are incidents of rape. This is considered a serious offence and is handed over to the police for prosecution in court. When asked why rape in particular, the respondents simply said, "this is a big case requiring the intervention of the law". Further, they were of the view that in these changing times with many sexually transmitted diseases having a devastating effect on families, they prefer to take rape straight to the police.

The respondents also indicated that in more recent times there has been less compliance with the decisions of the council of elders, particularly in the more cosmopolitan parts of Maasai country. In such cases the elders will let the matter proceed to the criminal process of the judicial system.

c) Disputes involving women

When asked about how the elders deal with cases involving women, respondents 6, 9 and 10 explain that the elders listen to and respond to any and all issues the community may bring before them. Both women and men may approach the council of elders. Respondent 9 mentioned that being fair was a requirement of the council of elders and the community expects them to be fair in how they dealt with matters. Culture provides a guide on rights and responsibilities and justice is guided by cultural values. Respondents 11 and 12 indicated that most concerns women face arise in the context of their marriages and their families.

The respondents observed that at present, the community is trying to keep up with the times. Nationally there has been a strong move to include women in governing bodies and the council of elders today will include some elderly women who are respected.

Respondent 8 mentioned that there are issues which women may not be comfortable presenting before men and it is helpful for the women to approach older women in the community to seek help in the issues. The older women may then approach the council of elders and participate in resolving the issue. Sometimes the women will resolve issues among themselves. He gave the example of cases where a woman in the community who was pregnant has had sex while in the advanced stages of pregnancy and it has led to loss of the baby.

This is considered an abortion. The other women will come to such a woman and cane her. They will inflict a small cut on her forehead which will remain as a scar, marking the incident, the action they took collectively and indicating that the incident has been concluded and forgiven. Thereafter there will be a ceremony for forgiveness and cleansing and blessing to restore her. He emphasised that there must be a blessing to conclude the incident. This incorporation of corporal punishment as a part of providing community justice is problematic and hardly gives the woman an opportunity to defend herself. It is also possible that such incidents are evidence of mixed interpretations of culture.

It was noted that the respondent narrating this situation that takes place among women and involves only women, was a male member of the community. I was unable to delve for deeper interpretations from females during the study.

d) Fines

There is a system of levying fines depending on the issue before the elders. This knowledge is passed on from elder to elder and within the community. Respondent 3 indicated that where a married woman conceives a child with someone outside the family union, a fine must be given. The woman will be fined a young female calf and she will also take care of the cow. This is followed by a blessing ceremony in which the child is 'brought into the home' or formally adopted as part of the household and the matter rests there.

Where a marriage has broken down irretrievably, the council of elders will preside and where the dissolution of the marriage is accepted, the wife's family must return the dowry that was paid at the time she was getting married.

Respondent 2 explained that succession and inheritance issues are guided by the principle that the first son of a man inherits his property while the last son inherits the property of his mother. By extension, the first son is expected to take responsibility to care for the father in his older years and the last son cares for his mother in her older years. Women traditionally do not inherit property from their fathers although they may acquire property through gifts, fines paid to them, or through trade and purchase.

In the event of a fight between two people where serious injuries occur such as broken teeth, fingers injured, joints sprained or twisted, bones broken or some measure of maiming, the council of elders has a schedule for what fines are levied. For example, the fine for breaking or knocking out teeth during a fight is one sheep. Where both persons are found at fault, they are both fined according to the harm suffered which they will pay to each other. They will then be tasked to acquire and roast a goat, which they will eat together with the elders. The two

are then asked to take an oath between them so that the issue is considered concluded and the fight ends.

Where there is theft of animals, the person who stole the animal must return the animal and, as a penalty, an additional animal for each animal stolen. If the offending party has already sold the animal or it has been slaughtered and consumed, he or she must pay back seven animals of the same kind if it was female, or five of the same kind if it was male.

In the case of murder, revenge murder is not permitted. Where the victim is a man, the person at fault will be fined 49 cows. Where it is a woman, the fine will be 80 goats. A cow is of significantly more value than a goat; hence the fine of 49 cows is greater than the fine of 80 goats. A cow is valued at approximately \$400–\$450, while a female goat would fetch \$115 to \$170. However, murder, as the respondents pointed out, is a rare occurrence. There is a strong belief in the curses and misfortune that would follow a person who murders another.

e) Enforcing fines

Where fault is determined after the hearing, fines are levied in addition to a ceremony intended to reconcile the two sides. Depending on the offence, the fine is often exacted from an item that has significance to the offending party in order to deter him or her from repeating the offence. In their responses, the respondents emphasised that Maasai culture promotes reconciliation and amicable resolution of disputes.

Respect and good standing in the community are highly prized. These are maintained through fulfilment of one's obligations, dealing honestly with members of the community, carrying out the roles of the age-set honourably and not transgressing social mores. Councils of elders are held in high regard and are expected to behave honourably in discharging their duties. Respondent 8 mentioned that "the community trusts the council of elders because unlike the court system, we are not focused on punishing, torturing, or making a person suffer".

The respondents shared the view that the principle of respect for each other is a fundamental teaching throughout the youthful stages of initiation. It governs the manner of greeting, familial interactions, interactions among peers, between younger and older members of the community and between males and females. Community obligations and expected behaviour may be merely implicit but the culture of respect provides a strong impetus for compliance. In addition, prioritising the welfare of the Maasai community is promoted and discarding habits of selfishness, egotism and pride is encouraged. As boys and girls transition into adulthood, they learn that community respect is highly valued and

live with the aim of gaining and maintaining respect among their peers, older and younger persons, from their households and from the community as a whole.

Respondent 13, a young man living in the community pointed out that in his recollection, the virtues of respect, honesty in dealings with others and living with honour are instilled deeply in the Maasai even as modern social life and interaction with other ethnic communities exert pressure on the integrity and continuity of the Maasai way of life. Honour and being bound by your word are taught from an early age as defining values of being Maasai.

There is a strong belief in the stemming of the curse that follows from paying the fine and making right the broken relationship with the other party. A person who is known to have failed to pay a fine levied by the council of elders is shamed in the society. The respondents were of the view that the deep sense of respect as a virtue instilled early on in the Maasai people is a significant reason for complying with decisions of the council of elders.

A time is set for paying, usually a short period. The person is also keen to do away with the curse and bad luck that is believed to follow such an action.

f) Perceptions of the formal justice system (courts)

When asked if the council of elders saw any use for the courts, opinions voiced by four respondents replying to the question faulted the formal court system, noting that it is only concerned with determining innocence or guilt and punishing the person, and not with reconciling the parties or restoring stolen or destroyed property.

The formal justice system often determines an issue based on the best and most eloquent argument. The person with the cleverest lawyer will win. There is little focus on the truth and instead there is focus on representation, arguments and strict rules of evidence. Respondent 5 stated that the judicial system is not about justice. Contrasting the council of elders approach and the court approach, the respondents emphasised that the council focuses on reconciling disputing parties and restoring good relations, which benefits the whole community. When a person is jailed, they simply stay in jail but the broken relationship is never mended. There will be anger, bitterness and ill feeling between the two parties which can also affect other community members and create feuds that endure for years.

The length of time it takes to conclude an issue and the cost involved was identified as a challenge of the formal justice system. The respondents also mentioned that too often community members going to court did not understand the process or the language and terminology used in courts.

The council of elders felt, however, that the formal system demonstrates respect for the Maasai dispute resolution system. The police will sometimes refer people to the council of elders to resolve an issue rather than immediately taking a matter to court. In addition, respondent 6 recalled that sometimes in petty criminal matters before the formal court, the police allow the parties to withdraw the matter and resolve it with the council of elders rather than following the formal criminal process which will end in fines or even a jail sentence.

The elders mentioned that there are some members of the community who refuse to adhere to the decisions of the council of elders. In the view of respondent 8, "*wanakuwa wajeuri*" (they become insolent). In this case, the council of elders will let the matter proceed to the formal court. They felt that the court is helpful in such circumstances.

CHAPTER 6

6 DISCUSSION OF FINDINGS

6.1 THE COUNCIL OF ELDERS

Although the process of identifying elders to serve on the council is not done through a formal process of vetting, the persons identified as elders have also been scrutinised over a long period of time. From the respondents' indications, the ability to be impartial is an important quality of the elders. Their knowledge of Maasai customs, way of life and values is also required. The community also places a high premium on the quality of being trustworthy. Although community members may not be directly involved in the final selection, they have significant influence over the persons identified as potential elders who will sit on the council as they observe and recommend individuals in the community.

The character and values that the elders espouse are also important because the council of elders is not only involved in resolving disputes; they also engage politically with other communities, negotiating land use, grazing rights, access to water and other rights for their communities. Presently, they also have significant influence on political leadership in the formal governance structures. Political aspirants will often seek the endorsement of the council of elders for the various seats for which they vie.

The structure of the council of elders is still predominantly male, based on a patrilineal approach to social organisation among the Maasai. Men are seen as tasked with the responsibility to provide for their households, make decisions affecting all the households under their care, provide military protection for the community, and lead interactions and negotiations with other communities. They are considered the public decision makers in the public sphere; hence a natural outcome is that the councils are composed of men only. The council of elders in this study mentioned that due to a change in the national arena and the increased pressure to have women in public decision-making bodies, there was an incorporation of women in the council of elders. However, it appeared that this incorporation was mainly in an advisory capacity, where they were involved periodically and for specific matters as opposed to a formal inclusion that makes them permanent members of the council.

6.2 ON HEARING AND DETERMINING DISPUTES

The Maasai dispute resolution process is integrated into the everyday life. This means that dispute resolution is based not on a set of abstract, objective principles, but derives from the lived values, beliefs, customs and practices of the Maasai. This increases the acceptability of the process and its decisions, as they are familiar to the users. However, it means that specific rights recognised today as fundamental human rights and universal to all regardless of individual cultures and contexts are not consistently upheld through the decisions of the council of elders, and certainly not when they are at odds with community values.

The council of elders not only resolves disputes but it is also integral to enforcing morality as defined by Maasai customs. Based on the age-set system, it is expected and accepted that the elders in the community know most about the culture and moral standards of the community and they are often approached to provide an interpretation of customs in various circumstances. Junior elders play a role in the education and direction of younger initiates as they go through the various rites of passage. Individual rights are promoted to the extent that they contribute to the cohesion and strength of the community. Community rights, cohesion and integrity are prioritised over individual rights.

The right to be heard is important and is upheld in the Maasai local justice process. When a matter comes before the council of elders, the process ensures each of the parties to the dispute is heard. It does not require the parties to have special oratory skills in order to present their views. At the same time, it is not left to the parties to determine what evidence to adduce. Through an inquisitorial process, the council enables the parties to present all relevant information including witnesses or experts where needed, in order to arrive at an understanding of the cause, nature and consequence of the dispute and find a solution.

The use of an inquisitorial approach focuses on a win-win outcome as opposed to the win-lose outcome that defines the current adversarial system of the formal justice mechanism. Kenya's current legal system evolved from the British colonial system and common law. It remains alien to the majority of civilians. The Kenyan judicial process has also proved costly, lengthy and often highly convoluted in its dispensation of justice. The local justice system is seen as accessible in terms of physical access as well as procedural access.

Remarks made by a political leader to the Maasai in Kajiado indicated that even among the political leadership, dispute resolution through the councils of elders is preferred. Writing about the incident, Christine Musa comments:

Ewaso Kidong' county representative Justus Ngossor... urged the warring clans to shun violence and engage in dialogue to resolve their differences. "The Purko and Keekonyokie are brothers as they both belong to the Maasai community. Therefore, they should not fight or go to court to resolve the boundary conflict. As leaders, we will hold peace negotiations and ensure we come up with a solution."... Some members of the two clans said they prefer peace talks instead of court case because all clan members will understand the proceedings of the resolution as well as contribute to the final decision.⁵³

The focus on reconciliation while fostering cordial relations between individuals ultimately promotes the peaceful coexistence of members of the community. The council of elders handles disputes between individuals as well as addressing infractions of social mores. The principle of 'equality before the law' is not linear in the context of Maasai dispute resolution and requires a nuanced understanding. Individual rights and responsibilities arise on the basis of age and gender. Respect for one's elders is a central tenet. These principles would come to bear in determination of claims between members of different age-sets and different genders. For example, a dispute over property between a brother and a sister would have a different resolution than a similar dispute between two men.

However, the focus on resolution and reconciliation in the local justice system may obscure the desire for punishment that an individual may want in their definition of a just outcome. At the same time, where an individual is not ready for reconciliation or may not want reconciliation at all, the local justice mechanism may inadvertently coerce such persons into a show of reconciliation and extinguish any further claims where the person is dissatisfied. The local justice mechanism introduces a measure of homogeneity in resolving disputes, which is not practical, even in a seemingly homogenous community. The formal justice system, on the other hand, is often objective to the point of being impersonal and aloof. It defines just outcomes in fairly rigid categories based on rights and remedies defined by the law and with little reference to the subjective definitions of just outcomes that disputants may have in any given situation.

The judicial outcomes in formal justice proceedings often seek to reinforce precedents of previous similar cases or to overrule previous decisions and establish new precedents. The Maasai process, on the other hand, approaches justice as an indivisible part of social life. The focus is not to establish precedents and assert principles, but to resolve disputes by taking into account all the relevant factors that led to and arose from the dispute. As such, it is interested in

⁵³ Christine Musa, "Leaders Vow to Resolve Clan Rows in Kajiado" in *The People* 12 August 2013 <http://www.thepeople.co.ke/14941/leaders-vow-to-resolve-clans-row-in-kajiado/>

the context and circumstances of an offence in order to prescribe the outcomes. Hence, where one woman kills her husband for neglecting her and their children and subjecting them to wanton hardship, and the other kills her husband in the course of a heated argument that resulted in a stabbing, the resolutions of the informal justice mechanisms will take interest in the circumstances, the history of the two marriages and previous conduct, among other factors, in order to arrive at a decision.

The fact that some members of the community approach the police and the police, in their assessment, then refer the disputants to the council of elders indicates that not all members of the community view the council of elders as placed to deal with all issues arising in the community. Some seek legal intervention as a first step. Research also points to the fact that many community members will report an incident of crime to the police simply to ensure there is a legal record of the incident, even if they intend to use local community dispute resolution measures to resolve the issues. Why community members report to the police is worth exploring in a deeper study on community members' perspectives on justice through the local and formal justice mechanisms.

The study did not delve into the handling of disputes between Maasai community members and non-Maasai individuals. However, the understanding of the dispute resolution process by the council of elders raises the question of how disagreements involving a non-Maasai living among the Maasai would be handled by the council of elders. This is a pertinent question as the industrial growth of Kajiado town and its proximity to Nairobi make it attractive to immigrants of other ethnic extraction. .

6.3 EFFECT OF CURRENT DEVELOPMENTS

The Maasai have not remained unaffected by the influence of modern social, political, economic and legal organisation in Kenya. As the formal (national) systems of governance permeate into the Maasai community, they steadily erode the integrity of the Maasai systems and culture as the predominant way of organising community life. Roles and responsibilities have changed. Some aspects of the rites of passage have been retained, while many important aspects have become impractical. For example, the sequestration and years of intense training that Maasai warriors would go through are no longer possible as the demands of formal education and formal employment water down the integrity of the rituals. Increased reliance on cash to define economic status, which has also given women access to greater opportunities to acquire their own property, all have an effect on the authority granted to the decisions of the council of elders over individual actions.

Laws that outlaw female genital mutilation and early, child, marriages, as well as mandatory primary education laws have changed the age at which women get married. The authority of the local justice mechanism relies on respect and social cohesion and this is gradually eroding. In addition, the significant pressure from women in the community as well as women's rights activists outside the community has challenged the position of women in the Maasai community and the local justice mechanisms which are seen to reiterate gender hierarchies that elevate men above women. Its portrayal in the media has also become a source of embarrassment among younger Maasai men who do not want to be seen as gender-biased.

The fact that the elders do not permit discussion where an incident of rape has occurred but instead hand over the case to the police points to the success of the intensity of the nationwide campaigns to end violence against women which culminated in the Sexual Offences Act of 2006. The Police Service has been under unrelenting criticism for their casual approach to violence against women and poor evidence collection and investigation of rape cases. It is conceivable that the decision of the Maasai community in Kajiado not to handle any matters related to rape through their local justice process is a response to the pressure on the judicial system (including the police) to demonstrate greater seriousness in dealing with sexual and gender violence.

On criminal matters, the police are the entry point to the formal justice process. The council of elders pointed out that as a show of respect for the local justice mechanism and appreciation for their dispute resolution approaches, the police sometimes urge people reporting an issue to them to resolve it through the local justice mechanisms. This may skew the facts on how much sway the council of elders retains as the first point of call for resolving disputes. It may be that there are unwilling participants in the local justice mechanism, who may have wanted to take a particular matter to the formal court but the police may have thwarted their efforts.

6.4 FORMAL JUSTICE VERSUS LOCAL JUSTICE MECHANISMS IN KENYA

The council of elders' primary role in the community is to ensure harmony, cultural integrity and good social relations in the society. Justice is viewed as an objective quest with greater community significance beyond individual satisfaction in its outcomes. The local justice mechanism focuses on resolution and reconciliation. The formal justice system is more concerned with protecting and asserting individual rights and, in many instances, on punishing the offender. Reconciliation is not at the core of the formal system.

Unlike the formal governance systems where the dispensation of justice, executive governance and legislative functions are separated, among the Maasai and communities that are similarly guided by ethnic customs, the responsibility for dispensing justice is not separate from the responsibility of providing leadership and developing customary laws. Justice is seen means of promoting social cohesion and good relations. The council of elders also provides political leadership engaging with external entities on behalf of the community. The checks and balances for behaviour are embedded deep in community structures. The age-set system provides important checks on behaviour of individuals. The family structure is also a means of moderating individual and collective behaviour. Every level of initiation and the rites of passage incorporate systems of checks on individual behaviour and foster internal dispute resolution methods. Not every disagreement is brought before the elders.

The rules of evidence intended to give formal justice mechanisms sufficient impartiality may in fact end up convoluting the everyday justice that people seek and therefore making people steer clear of the processes when avoidable. Investigations and prosecutions do not always complement adjudication, judgment and enforcement in the formal system and so the guarantee of justice and fairness is weak in the formal justice mechanism. The system is open to compromise or sabotage at several levels of the process.

The fact that the formal justice process is backed by the coercive power of the police and the possibility of incarceration for failure to comply with court directives is likely to make individual community members seek the intervention of the formal justice process, rather than leaving the matter to the local justice process. The respondents mentioned that individuals seek police intervention and in some cases they are asked to resolve the issue through the council of elders.

CHAPTER 7

7 CONCLUSION

There remains a schism between the formal conception of justice and the actual pursuit of justice in the lives of many Kenyans. The provisions in the 2010 Constitution and the ongoing judicial reform process open the door for dialogue on formal justice and local justice processes, and the incorporation of the best elements of both into processes that deliver justice to community members at all levels. The previous Constitution and the judicial system instituted under it had anticipated the attrition and eventual obsolescence of local justice systems. However, formal justice was failing to deliver a viable option for dispute resolution and administration of justice that inspired the confidence, trust and satisfaction of its users. Forty-seven years on,⁵⁴ the formal justice system was distrusted and resented while the local justice systems occupied a central place in the administration of justice in local communities.

Internationally as well, there has been recognition that local justice mechanisms remain the most prominent and influential systems in the dispensation of justice at community level in many developing countries, and wishing them away or legislating them out of existence has not been successful. A nuanced understanding of the operation of local justice mechanisms, how they define and deliver justice and the responses of community members to the operation of local justice mechanisms is important in developing and strengthening justice systems. While the universality of fundamental rights and freedoms is a well-established principle, how rights are prioritised, realised and pursued is, necessarily, context specific. Reflecting on East Asia's experiences, Inoguchi and Newman explain that East Asian democracies have developed on a different trajectory than the Western conceptualisation of democracy. Consensus and harmony backed by strong government with significant responsibility for collective growth are considered priorities, rather than freedom of expression and separation of powers for example. Ibhawoh has observed that the tension lies in striking a balance between individual human rights legal standards and the

⁵⁴ The most credible judiciary reforms are considered to have commenced with the promulgation of the 2010 Constitution, 47 years after Kenya gained independence.

primacy of communalism and community rights that remains a reality for many groups.⁵⁵

This study set out to understand the procedures of the Kajiado Maasai dispute resolution and how they incorporate key principles of fair hearings. The Constitution of Kenya 2010 has acknowledged that local justice mechanisms are important dispute resolution mechanisms that Kenyans continue to use. Importantly, the wording of the Constitution does not presume that local justice mechanisms are inherently repugnant to justice and morality. For the first time, courts in the formal justice system are urged to promote the use of the local justice mechanisms as alternative dispute resolution measures as long as they are not repugnant to justice and morality in their processes as well as outcomes. Customary laws may not consistently promote human rights as defined in international treaties and conventions. However, an in-depth examination of the operation of the local justice mechanisms begins to reveal important human rights standards inherent to the processes as well as important deficits of the processes in securing human rights. However, attempts to radically change culture are bound to generate significant resistance. This is even more pertinent for the question of justice, as it is an integral part of the organisation of social life in the community and the means by which peace, harmony and equilibrium are maintained.

7.1 FAIR TRIAL RIGHTS IN LOCAL JUSTICE MECHANISMS

The study reveals that equality of access to the council of elders is important and also that it is made simple. There are no technical procedures to bring a claim before the council of elders. The inquisitorial approach that is incorporated into the dispute resolution process mitigates the need for the legal representation that is paramount in formal justice processes. Kenya has adopted the adversarial approach in its justice system with the intention of providing an opportunity for the greatest possible protection for individual rights. However, over time the process has simply become adversarial in the sense of acrimony and hostility. The result is that access to justice through the formal court system is impeded not only by the difficulty of getting physical access to courts, but also by the acrimony of the system.

The Maasai councils of elders adopt an inquisitorial approach to dispute resolution, with a focus on arriving at the truth, resolving a dispute and promoting reconciliation between the parties. The goals of the council of elders mechanism are to protect individuals' rights and to promote reconciliation. The process is interested in restoring equilibrium in the society. This is an important value for societies where communalism is prioritised.

⁵⁵ Ibhawoh 2001.

The use of an inquisitorial approach is focused on allowing every opportunity for a just outcome, even without representation. In the view of the elders responding to the study, the justice in the formal system is dependent on the brilliance of one's representation as opposed to fairness between the two parties. However, the approach used in the Maasai dispute resolution mechanism does not provide safeguards against self-incrimination, and it depends significantly on the honesty of persons before the councils. While there are powerful social sanctions that made such an expectation feasible, the continuous watering down of cultural life is weakening the unwritten social sanctions that generate 'right' or moral conduct.

The strong social hierarchy based on age and gender is inevitably replicated in the dispute resolution mechanism. The gender and age relationship structures in every community in Kenya are under increasing pressure from changing political, social and economic circumstances. The prominence of state legal measures is also leading to a change in gender relations. The Maasai, like many communities, were governed by gender structures that on the surface may have appeared unequal but which were supported by strict social and cultural principles aimed at producing fairness in their outcomes. However, with significant social changes, the practices simply result in inequalities that are considered unacceptable.

The concept of separation of powers and separate organs carrying out different functions in the community is not the norm in how the Maasai community is organised. However, the age-set system provides a strong system of regulation for individual behaviour as well as of vetting prospective members of the council of elders. Impartiality, consistency, knowledge of cultural values – all these are expected from those who eventually become council elders. The vetting is a lifelong process. The fact that the elders are well known, trusted and respected in the community by the time they assume the role of elder on the council inspires confidence and trust in the elders and in the system. The in-depth knowledge of community customs and culture aids rather than impedes perceptions of impartiality of the processes. They are approached by community members not for their familial or clan affiliations, but because they occupy a recognised and respected space as arbitrators in the community.

The formal justice system has, for a long time, compromised on impartiality, which diminished trust in the system. Impartiality concerns not only the procedures of rendering justice but also the values of the judges and adjudicators in the process. For a long time, the formal justice system underestimated the value that Kenyan communities attach to impartiality of judges in securing an impartial system. Prior to the 2010 Constitution, the public

were not involved in vetting of judges. As judicial reforms are ongoing, the integrity and impartiality of the judges is gaining prominence and has been opened up to public commentary.

The Kajiado local justice mechanism combines restitution and punishment in the outcomes of dispute resolution. Punishment is not the focus of the hearings, even in criminal matters. Restitution plays a bigger role in the decisions of the council. Underpinning the entire process is an interest in reconciliation and restoring broken relationships for the greater good. This is a significant value for societies in which community life and rights are important. As such, in Kajiado and many other local justice mechanisms, dispute resolution is incomplete without measures for reconciliation. The arguments presented by the accused person's community in the High Court case of *R vs. Abdow* illustrate the prominence given to reconciliation in many Kenyan societies. The decision of the judge suggests a new appreciation for reconciliation in the administration of justice in the formal process. This is a discussion that should be picked up in the judicial reform process and the improved access to justice objectives.

7.2 DISPENSATION OF JUSTICE IN KENYA IN THE FUTURE

Kenya is neither a fully 'modern' society where individual human rights take precedence over communal values,⁵⁶ nor is it fully governed by cultural and communal values. It is a society morphing with a combination of community and individual human rights priorities. As such, the system of determining disputes and dispensing justice should incorporate the mixed nature of the country's social priorities.

The most important is that it is no longer enough to approach the *de facto* legal pluralism with a focus on how to change local justice mechanisms into miniature versions of the formal justice system. The Constitution has opened the door to inclusion of local justice mechanisms as a form of alternative dispute resolution within the formal justice system. Reform measures within the formal justice system should commence from an understanding of local justice mechanisms and local understandings of what amounts to a fair hearing and justice. One important reform area must be the length of time it takes to hear and resolve disputes. Numerous commentaries on justice and fair trials have already established that justice delayed is justice denied. A frequent complaint of many Kenyans about the judiciary is that cases take too long to conclude.⁵⁷

⁵⁶ Sammy Adelman, "Constitutionalism, Pluralism and Democracy in Africa", *Journal of Legal Pluralism* 42: 73–88 (1998), p. 75.

⁵⁷ *Judiciary Transformation Framework 2012–2016*

In securing the values of an adversarial process intended to protect rights and guarantee fairness, Kenya's formal justice system should focus on the complexity of the system which also generates acrimony as another hindrance to access to justice. The inquisitorial approach employed by local justice mechanisms has the effect of making the system familiar and uncomplicated to the users. While in a formal justice system an inquisitorial process raises several challenges for securing fair trial rights, certain elements of the inquisitorial approach are relevant and may be desirable. An example may be drawn from the operation of small claims courts in South Africa in which individuals may present civil claims without legal representation. The Commissioner adjudicating the claims will ask questions of the parties in order to come to a decision.⁵⁸ By setting a monetary limit and a fairly large range of issues that small claims courts can resolve, the system provides a quick, inexpensive and unintimidating means of obtaining legal justice. Many of the disputes between community members in Kenya that require resolution are simple and small claims that ought not be sucked up into the vortex of a large, complex judicial system.

It is important that users of a justice system can relate to the system. Local justice mechanisms highlight important procedural aspects of administering justice that the formal system has not incorporated. The unparalleled public support for the 2010 Constitution demonstrates that formal systems can operate with significant public support if they respond to the lived realities of people. The High Court decision in *R vs. Mohamed Abdow Mohamed* highlighted the possibility of incorporating reconciliation into the outcomes of formal judicial processes. From the examination of the Maasai, it is clear that reconciliation is a cardinal part of justice for many communities. The judicial reform process is the opportunity to bring together the formal justice systems and local justice systems in redefining the rendering of justice through the court, tribunal and local justice processes. This study flags the need for deeper studies on other local justice mechanisms, both from procedural and from substantive perspectives, in order to develop a robust discussion on the administration of justice that incorporates the values expressed in local justice mechanisms and the prominence of human rights and justice in the formal justice system.

⁵⁸ See the Republic of South Africa Department of Justice and Constitutional Development brief on small claims courts. Available at: <http://www.justice.gov.za/about/sa-courts.html> and <http://www.justice.gov.za/scc/scc.htm> (accessed 4 December 2013).



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