<u>Use Of Technology To Institutionalize Customary Mediation In Sub-Saharan Africa</u>

By Fordam O. Wara

This article analyses the legal frameworks for mediation under traditional dispute resolution mechanisms or "customary mediation systems" in sub-Saharan Africa and explores the prospect of using technology to integrate such mechanisms into the formal state judicial systems. Some examples of customary mediation systems that have been integrated into formal judicial systems in sub-Saharan Africa include *Kadhi's Courts* (applying Islamic law to Muslims) and the *Njuri Ncheke* (Council of Elders among the Meru Community) in Kenya and *Gacaca Courts* (dispute resolution by respected community leaders) and the *Abunzi Committees* (local mediators) in Rwanda. The difference between these customary mediation systems and mediation under formal state judicial systems is a matter of form over substance.

Most of the justice systems in sub-Saharan Africa are dual natured in form but similar in substance. Whereas formal dispute resolution mechanisms are based on constitutional and legislative provisions, customary mediation practices exist by default within the sub-Saharan African communities and are now beginning to gain recognition and integration within the formal statutory and legislative systems. Customary mediation practices persist among sub-Saharan African communities regardless of their non-recognition by the formal justice systems. This is because the customary mediation practices are accepted by the communities as legitimate dispute resolution processes consistent with the communities' value systems, policies, ideologies, ideas of justice, morality and other conditions of validity of laws. Formal dispute resolution mechanisms, on the other hand, usually employ legal technicalities and complex procedures and take place in urban centers that are inaccessible to a majority of the rural populations in sub-Saharan Africa.

Besides the written formalities, the substance of mediation under formal dispute resolution processes and customary mediation practices remains generally similar. The word "mediation" has a Latin origin, based on the word "mediare," which means "to be in the middle". Mediation, irrespective of the basis upon which it is carried out, is a consensus-based dispute

resolution process, whereby disputing parties attempt to reach an amicable settlement of their dispute with the assistance of a neural third person or persons who have no authority to impose a solution to the dispute. Mediation is flexible, meaning that the mediation procedure to be used can be tailored to the specifics of the dispute and adapted to the needs of the parties, including their cultural and legal backgrounds.

Identifying the core characteristics or substance of mediation in sub-Saharan African countries is therefore helpful in understanding the interaction between the formal dispute resolution systems and customary mediation mechanisms. It will also help in creating an interface model between the two systems that will encourage their use while discouraging unhealthy competition between them. Indeed, such an exercise will be useful in speeding up the integration of customary mediation systems into the formal justice systems of sub-Saharan African countries. Countries with diverse mediation systems such as the United States and Canada have enacted or considered enacting uniform mediation legislation to enhance access to justice for their communities. Such uniform mediation legislations generally address key mediation issues, including the definition of terms, qualifications and impartiality of the mediator, confidentiality of the mediation process and procedural requirements.

Sub-Saharan African countries do not have to enact uniform mediation legislation in the short term because customary mediation has proceeded informally in a majority of these countries and their formal jurisprudence relating to customary mediation remains embryonic. This means that the formal judicial system's interpretation of customary mediation has not yet matured thus providing fertile ground for the development of practice rules or standards that will allow for recognition and integration of customary mediation at an acceptable pace for both systems and the communities impacted. These practice rules or standards can be based on each country's constitution, relevant legislation, and customary mediation practices of the various communities within the country, to provide the communities with standards aimed at reducing inconsistencies and inefficiencies while strengthening confidence in customary mediation as a dispute resolution process. The practice rules or standards will lead to progressive harmonization and unification of the customary mediation practices and, eventually, uniform mediation legislation within each country or block of countries.

Customary mediation practice rules or standards can also be included in a legal framework that also recognizes and integrates customary mediation into the formal judicial system. The current interface between formal state judicial systems and traditional dispute resolution mechanisms in sub-Saharan Africa, generally, varies from legal frameworks that do not recognize these customary mediation systems to those that formally integrate them. Kenya's Constitution of 2010 is an example of a legal framework that recognizes customary mediation practices. It states in article 159(2)(c) that "in exercising judicial authority, the courts and tribunals shall be guided by [the principle that] alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted".

An example of Kenya's constitutional recognition of traditional dispute resolution mechanisms is the *Kadhi's Courts*, which pre-date the Kenyan state system. *Kadhi's Courts* are a traditional dispute resolution system among Muslims based on Islamic laws and presided over by Kadhis (Judges) who handle cases brought to them by Muslims who also submit to their jurisdiction. *Kadhis' Courts* applying Islamic law of personal status (for example marriage, divorce and inheritance) to Muslims have been in East Africa for over 200 years and were also entrenched in Kenya's Independence constitution in 1963. The Kenya Constitution of 2010 also integrates the *Kadhi's Courts* system under article 169 and specifies their jurisdiction and the qualifications of a Chief Kadhi and other Kadhis under article 170. Kenya also enacted a legislative framework, the Kadhis' Courts Act, Chapter 11 of the Laws of Kenya, to operationalize the *Kadhi's Courts*. Today, the *Kadhis' Courts* are established in all forty-seven counties in Kenya, with their judicial officers recruited and remunerated by the State at par with their conventional courts counterparts. Appeals from *Kadhis' Court*s go to the High Court for determination and, further, to the Supreme Court of Kenya.

Another example of a traditional dispute resolution mechanism in Kenya is the *Njuri Ncheke*, a Council of Elders among the Meru Community who are mandated to resolve disputes involving community members. It also pre-dates the Kenyan state and is a traditional dispute resolution mechanism recognized under article 159(2)(c) of the Kenyan Constitution of 2010. The Kenyan High Court recognized the *Njuri Ncheke* dispute resolution mechanism in <u>Lubaru</u>

M'imanyara v Daniel Murungi, Miscellaneous Application No. 77 of 2012. [2013] eKLR, in which a petitioner had challenged the referral of a dispute to the *Njuri Ncheke*. The name "*Njuri Ncheke*" is derived from the ritual oath that was taken by all the members of the traditional council. It means "the thinned out" or "selected council of adjudicators with a definite social role", referring to the traditional council of elders who have passed through a series of special initiation rites and paid the established fees. Elders are selected to join the *Njuri Ncheke* because of their maturity, respect within the community, personal discipline, wisdom, knowledge of the Meru Community's customs and traditions and wealth. Like the *Kadhis' Courts*, the *Njuri Njeke* also handles disputes between parties who consent to its jurisdiction. The *Njuri Ncheke* bases its decisions on the customs and traditions of the Meru Community that are unwritten and therefore remain inconsistent and incoherent to other communities in Kenya. Disputes resolved by the *Njuri Ncheke* can be challenged before the High Court.

Like Kenya's Constitution, Rwanda's Constitution also recognizes traditional dispute resolution mechanisms. It provides for the enactment of laws to establish different mechanisms for home-grown solutions based on Rwanda's culture and for organic laws that may establish specialised Courts. Rwanda's legislature adopted Organic Law 40/2000 establishing the *Gacaca Courts* on October 12, 2000 to, *inter alia*, accelerate the 1994 genocide trials, to reconcile the Rwandans and reinforce their unity, and to prove that Rwandan society has the capacity to settle its own problems through a system of justice based on Rwandan custom. The state also created a department within the Rwandan Supreme Court to administer the *Gacaca Courts*. G*acaca courts*, as a traditional dispute resolution mechanism, pre-date the Rwandan state and have been in place in Rwanda since the 15th Century. The word "*gacaca*" is Kinyarwandan (Rwanda's official language) and refers to the lawn where community members traditionally gathered to resolve disputes among members of the community. G*acaca* judges are also known in Kinyarwanda as *inyangamugayo*, meaning "those who detest disgrace" and are usually elected by the local community to serve as Judges. Following a Presidential Order in October 2001, over two hundred and fifty thousand *Gacaca* judges were elected by local communities.

Abunzi Committees are also provided for in the Rwandan Constitution. The word "*Abunzi*" in Kinyarwanda means "those who reconcile" and "*Abunzi Committees*" refer to local

mediators chosen to mediate disputes within the local community. Rwanda's Constitution lists the qualification of members of an *Abunzi Committee* as "persons of integrity who are recognised for their conciliation skills". The Organic Law No. 31/2006 has been adopted by Rwanda's legislature to specify the jurisdiction, functioning and competence of *Abunzi Committees*. The *Abunzi Committees* were formed to reduce case backlogs, to decentralize the justice system and to provide access to justice for individuals who have challenges accessing the formal justice system. Three mediators typically hear and resolve a dispute, two chosen by each party and the third chosen by the mediators. Proceedings are conducted in public and community participation is encouraged. The *Abunzi Committees* afford disputing parties the opportunity to attempt mediation before submitting their disputes to courts of law in Rwanda.

These legal frameworks for customary mediation in Kenya and Rwanda demonstrate a policy preference for increasing use of such traditional dispute resolution mechanisms to alleviate the problems of cost, delay and complexity that are prevalent in the formal justice systems. Both *Kadhis' Courts* in Kenya and *Gacaca Courts* in Rwanda each function like formal judicial systems as they are constitutionally recognized, are based on legislation and are integrated into the Court systems as subordinate or specialized courts. These are examples of policy trajectories in favor of increasing use of these traditional dispute resolution mechanisms. However, constitutional and legislative provisions alone will not lead to integration of customary mediation in the formal justice systems without public participation. The implementation process for the legal frameworks should include mechanisms that create conditions for public participation and that build the capacity and confidence of communities to access and afford customary mediation mechanisms.

Technology can be a tool for recognition and integration of traditional dispute resolution systems into formal state judicial systems in sub-Saharan Africa by increasing public participation. Technology can be used by the formal state judicial systems and community systems to roll out education and awareness campaigns on customary mediation, especially practice rules or standards that will allow for recognition and integration of customary mediation. In Kenya, for example, almost 90 percent of the population is connected to the internet. Since social media is web-based and also accessible through mobile technology, it can provide a platform for widely

disseminating information on customary mediation. Social media offers access to a vast audience and resources such as real-time legal updates and the ability to discuss customary mediation practice rules or standards with parties, mediators and community members generally.

The formal judicial system and community systems can also use technology to train mediators, legal practitioners and the community on customary mediation mechanisms. Videoconferencing platforms such as Zoom, Skype, WhatsApp Microsoft Teams, Webex, Lifesize and Bluejeans are increasingly being used to conduct training seminars on customary mediation practices. Such training will enable the judicial system and the relevant communities to recruit and train qualified mediators, to develop best practices and standards for customary mediation and, generally, participate in the evolution of customary mediation practices. Use of technology to train the general public on customary mediation may also aid the progressive harmonization and unification of customary mediation practices within each state.

Besides sensitizing the general public on customary mediation, technology can also be used to hold virtual customary mediation sessions. Virtual hearings or proceedings and/or audio-only conferences can be conducted through third party platforms such as Zoom, Skype, WhatsApp, Microsoft Teams, Webex, Lifesize and Bluejeans and can involve participants in remote/inaccessible areas. Naturally, resort to virtual customary mediation would be subject to the disputants' consent or to practice rules or standards that allow the matter to proceed virtually. Through increased public participation and the opportunity to conduct virtual customary mediation processes, technology can be used as a tool to integrate customary mediation mechanisms into the formal state judicial systems in sub-Saharan Africa.