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INTEGRATING TRADITIONAL DISPUTE RESOLUTION MECHANISMS WITH THE FORMAL JUSTICE SYSTEM IN KENYA

A CASE STUDY OF THE KIPSIGIS COMMUNITY

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DECLARATION

I hereby declare that this thesis is my original work and that it has not previously been submitted elsewhere. All materials used have duly been acknowledged.

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This thesis is dedicated to my deceased parents, Chepsergon Chelagat, Kobilo Chepsergon and Tungo Chepsergon, who nurtured me to become who I am in society.

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ABBREVIATIONS & ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ASAP	African Solutions to African Problems
BAA	Black Administration Act
CCTMJ	Council of Customs Traditions and Mechanisms of Justice
CDRMs	Customary Dispute Resolution Mechanisms
CEs	Councils of Elders
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
CSOs	Civil Society Organisations
ELC	Environment and Land Court
FGDs	Focus Group Discussions

ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ILO	International Labour Organisation
LDTs	Land Disputes Tribunals
LSK	Law Society of Kenya
NLC	National Land Commission
ODPP	Office of the Director of Public Prosecutions
TDRMs	Traditional Dispute Resolution Mechanisms
US	United States

CHAPTER 1 INTRODUCTION

1.1 Introduction

This chapter explores the context of traditional dispute resolution mechanisms (TDRMs) in Kenya with a view to setting a foundation for the study. This includes the statement of the problem, the research objectives and questions, justification for the study, scope of the study and attendant limitations, relevant theories, conceptual framework of the study, as well as a review of existing literature on TDRMs. The chapter also highlights the structure of the thesis as part of the conclusion.

1.2 Contextual Analysis

Social norms and customary structures are inseparable. According to Leila *et al*, the vast majority of human behaviour is shaped and influenced by living normative frameworks inherent in customary law.[1] Part of these frameworks are TDRMs, which are widely used by many communities to exercise self-governance despite the dominance of formal (Western) legal system. TDRMs are ingrained in the customs and traditions of communities and, hence, part and parcel of their lives. They play an important role in managing conflicts relating to, *inter alia*, land, family, succession, water, and cattle rustling. Many communities resort to TDRMs and other alternative dispute resolution (ADR) forms because of the difficulties associated with the formal justice systems, namely high court fees, physical inaccessibility, and the huge backlog of cases.[2] In contrast, TDRMs are cost-effective, easily accessible, flexible, restorative, and are not informed by legalese and strict rules of evidence. They, therefore, bring about harmony and ensure that justice is served expeditiously without undue regard to technicalities that characterise the formal justice system.

Considering these advantages, the complementarity between TDRMs and the formal justice system is imperative given the huge demand for efficient and timely justice in Kenya. Cognisant of this, the Constitution 2010 requires courts and tribunals to promote the use of TDRMs as one of the ADR mechanisms.[3] TDRMs are also recognised in diverse sectoral laws,

[1] Chirayath Leila, Caroline Sage and Michael Woolcock, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (2005) 2.

[2] ICJ-Kenya, *Interface between Formal and Informal Justice Systems in Kenya* (ICJ Report, April 2011) 31. [3] Constitution of Kenya 2010, article 159(2).

such as the Environment and Land Court Act 2011, Community Land Act 2016 and Land Act 2012, among others. Some courts have recognised the importance of TDRMs in line with Article 159(2) of the Constitution. For instance, in *Lubaru M'imanyara v Daniel Murungi*,[1] the parties filed a consent seeking to have the case resolved by the *Njuri Ncheke* Council of Laare Division within Meru County. The Court referred the case to the *Njuri Ncheke* on the basis that it was in line with Articles 60(1) (g) and 159(2) (c) of the Constitution, 2010.[2]

However, while TDRMs reflect the culture and interests of the Kenyan communities, they are not without shortfalls. Some of the TDRMs have been infiltrated and used to propagate political ideologies.[3] Additionally, lack of regulation of TDRMs beyond textual recognition in the Constitution, including clarity on their jurisdiction, has led to their abuse. For instance, the *Kambi* of the Agiriama has increasingly been accused of being influenced by corrupt individuals.[4] TDRMs are also perceived as patriarchal tools which subvert the rights of women and children.[5]

Besides, TDRMs are still subject to the repugnancy test introduced by the British legal system. Unfortunately, there is no agreed test for 'justice' and 'morality' elements of the repugnancy clause. Different communities in Kenya have their own unique systems of TDRMs, which may differ from one another, hence the difficulty in setting a standard of application of justice and morality. Moreover, there is no regulatory or policy framework that states when and how TDRMs are to be applied.

[1] Meru High Court Miscellaneous Application No. 77 of 2012 [2013] eKLR.

[2] The question of repugnance to justice and morality was not in issue in this case. Article 159(2) (c) of the Constitution, 2010, provides for the promotion of alternative dispute resolution mechanisms, including TDRMs. The court considered this provision together with Article 60(1) (g) to refer the matter to the Njuri Ncheke.

[3] Martha Mutisi and Kwesi Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from Selected Cases in Eastern and the Horn of Africa* (ACCORD, Africa Dialogue Monograph Series No 2, 2012) 8.

[4] Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' <http://www.ciarb.org/docs/default-source/> accessed 13 February 2017.

[5] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya 2010' (2015) 1(1) Strathmore Law Journal 32.

It is within this context that this study sought to establish how best to strengthen TDRMs and integrate them with the formal justice systems. The study relies on the Kipsigis TDRMs as the main Kenyan case study, drawing perspectives from Rwanda and South Africa.

1.3 Problem Statement

TDRMs in Kenya have become inevitable given the huge case backlog and other challenges affecting the formal justice system.[6] Yet, the link between TDRMs and the formal justice system is yet to be established given the dominance of the latter. Article 159(2) (c) of the Constitution of Kenya, 2010, recognises TDRMs as an important alternative avenue for dispute resolution. However, there is no corresponding legal framework for their recognition and integration with the formal justice systems. Importantly, there is no clear legal framework defining the subject-matter and personal jurisdiction of TDRMs, applicable procedure, enforcement of awards, and what (or how) cases should be referred to formal courts. For instance, while the post-2010 jurisprudence indicates varied application of the concept of 'compensation' under section 176 of the Criminal Procedure Code (CPC),[7] there is no clear demarcation of the criminal jurisdiction of TDRMs and the method determining the amount of compensation. Although it is acknowledged that the constitutional recognition of TDRMs does not exclude criminal cases, there is no formalised structure on how and to what extent TDRMs should exercise their criminal jurisdiction.

Under Article 159(3) (b) of the Constitution, TDRMs should not be applied in a manner that is repugnant to justice and morality, or inconsistent with the Constitution and the Bill of Rights. While the standards of Human Rights and the Constitution or other written laws are clear, the Constitution and statutes do not define what justice and morality entail. The question therefore is: against whose justice and morality should the applicability of TDRMs be curtailed?

[6] The Judiciary, Republic of Kenya, *Judiciary Case Audit and Institutional Capacity Survey 2014* (Nairobi: Performance Management Directorate, 2014) iii. For instance, in 2013, the case backlog in the formal courts stood at 426,508.
[7] Cap 75 Laws of Kenya.

In view of the foregoing, and using a case study of the Kipsigis TDRMs, this study explores how TDRMs can be integrated with the formal justice system.

1.4 Research Hypothesis

The lack of a clear-cut legal or policy framework defining the jurisdiction (both personal and subject-matter), applicable standards and procedures, enforcement of awards, and referral of cases between courts and TDRMs, hinders their promotion and integration with the formal justice system.

1.5 Research Objectives

The main objective of this study is to establish how TDRMs can be integrated with the formal justice system and, in particular, whether a legal framework is necessary to demarcate the jurisdiction and functioning of TDRMs, and provide for their inter-section with the formal justice system. The specific objectives of the study include:

1. To examine and document the structure, functioning and jurisdiction of the Kipsigis TDRMs.
2. To establish whether the procedures applied by the Kipsigis community to resolve disputes through TDRMs are consistent with the human rights and natural justice norms.
3. To identify and evaluate constraints to the integration of TDRMs with the formal justice system, including the repugnance clause under Article 159(3) (c) of the Constitution, 2010; and
4. To recommend practical measures to be undertaken to strengthen and integrate TDRMs with the formal justice system, taking into account their perceived weaknesses and the fact that there is no legal framework that demarcates their jurisdiction and what cases should be referred to courts, or how courts can play a role in enforcing awards.

1.6 Research Questions

1. What is the structure, functioning and jurisdiction of the Kipsigis TDRMs?
2. How does the procedure applied by the Kipsigis TDRMs conform to the human rights and natural justice norms?

3. What are the hindrances to the promotion and integration of TDRMs with the formal justice system in Kenya?
4. How can the TDRMs be promoted and integrated with the formal justice systems as complementary avenues of access to justice in Kenya?

1.7 Justification

Given the high level of recognition of, and recourse to, TDRMs globally, these mechanisms have become integral in the justice sector. The Constitution, 2010, provides for a requirement to guarantee access to justice for all persons.[8] In order to achieve this, the Constitution acknowledges the use of ADR mechanisms, including TDRMs.

However, there is no TDRM-specific framework to guide the users, many of whom have no or little knowledge on the jurisdiction of these mechanisms. The lack of such a framework in Kenya and other challenges that face TDRMs, stifle effective development and integration of TDRMs with the formal justice system. Thus, a study into how best TDRMs can be promoted and integrated with the formal justice systems provide pragmatic options for improving access to justice in Kenya. It is, therefore, hoped that the study will provide useful information for further research, and policy making particularly on the legitimacy of TDRMs. Furthermore, the findings of this research justify the use of TDRMs in reducing the backlog of cases in Kenyan courts.

Secondly, the findings generated in this study are in line with the Kenyan Vision 2030, which identifies observance of the rule of law as key to operationalising the legal, policy and institutional architecture for ensuring fair, affordable and equitable access to justice.[9] The policy also identifies national and inter-community dialogue as a tool towards ensuring harmony among the Kenyan people.[13] Thus, by identifying the possible ways in which TDRMs can be strengthened, bearing in mind their conundrums, the study has the effect of supplementing the formal justice systems in dealing with all sorts of disputes.

[8] Constitution of Kenya, 2010, Article 48.

[9] Republic of Kenya, *Vision 2030* (Government Printer's Press 2007) 176, available at <http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf> accessed on 24 October 2015. [13] ibid 161.

1.8 Theoretical Framework

This study proceeds on the basis of legal pluralism as the most preferred or primary theory, with Rawls' theory of justice, restorative justice and sociological jurisprudence operating as supplements mainly to support specific aspects, such as substantive and procedural fairness, fundamental principles of TDRMs and the need for interdependence in a plural legal set up. Their relevance to this study is explored further below.

1.8.1 Legal Pluralism

Legal pluralism refers to the normative heterogeneity associated with multifarious social fields.[10] It reflects a society in which two or more legal systems operate, some officially and others unofficially. This is the case with many post-colonial countries in Africa which exhibit co-existence of diverse governance and justice models premised on history, religion, culture and politics.[11] Legal pluralism therefore underscores the concept of diverse legalities. Some countries have recognised this diversity in their constitutions albeit with benchmarks specifically for traditional practices that tend to violate international standards. Such benchmarks seem to devalue traditional cultural values, including TDRMs which paradoxically form the fulcrum of justice in many African societies.

A key constraint to legal pluralism, as noted by Griffith, is legal centralism which describes 'law' as the law of the state, superior and exclusive of all others.[16] The other set of laws are hierarchically inferior to state law.[17] The legal centralist view is true of Kenya where state law is considered the ultimate norm to which the less normative orderings, such as customary law, must adhere. This understanding of law based on a sovereign command, may be linked to the

[10] John Griffiths, 'What Is Legal Pluralism' (1986) 24 Journal of Legal Pluralism 39.
[11] David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 14(1) *Yale Human Rights and Development Journal* 59. [16] Griffith (n 14) 3. [17] ibid. [18] Ralph Michaels, 'Global Legal Pluralism' <https://core.ac.uk/download/pdf/62563409.pdf> accessed 3 June 2021.

colonialist's subjugation of African customary law based on their presumed universal (and 'civilised') standards of justice and morality.

In addition, Griffith points out two typologies of legal pluralism critical to this study: strong pluralism; and weak pluralism. Strong pluralism is, according to Griffith, true pluralism. It depicts a legal system where both state and non-state laws and institutions are partly in harmony and partly in contest with each other.[18] In contrast, weak pluralism is evident in a legal system where the sovereign implicitly recognises and embraces parallel legal regimes, such as customary law, but subject to the overarching and controlling 'official' legal system.[12] This is a typical reflection of legal centralism. It implies that law (particularly what Griffith refers to as 'parallel legal regimes') must always be pegged on a single validating source, the state.

Relevance of Legal Pluralism to the Study

With more than forty ethnic communities and diverse cultures, Kenya truly has a pluralist legal system. This plurality is premised on the official recognition, under the Judicature Act,[13] of the co-existence of and diversity in different legal sources, including customary law. Customary law encompasses unwritten customs and practices through which a community identifies itself and defines the relationship between its members. It is 'living' law that is deeply entrenched in the traditional, social and psychological fabrics of the human society.[14] This law is fluid and constantly evolving.[15] Its formal recognition as one of the sources of law, legitimises the cultural values that underlie them including customary institutions such as TDRMs.[16]

Further, through the official recognition of culture in the Constitution 2010,[17] every community in Kenya has space to promote its culture and customs. TDRMs, being an appendage of customary law, form an important forum for people to exercise their right to culture as envisaged in Article 11 of the Constitution. However, Article 2(4) limits this right if the culture or the conduct relating to that culture contradicts the Constitution. This implies that Kenya is a weak pluralist state, a fact that is buttressed further by the dominance of state law and the

[12] Griffith (n 14) 5.
[13] Judicature Act Cap 8 Laws of Kenya, s 3.
[14] Peter Onyango, *African Customary Law System: An Introduction* (Nairobi, LawAfrica Publishing (K) Ltd, 2013) 18.
[15] Cuskelly Katrina, *Customary and Constitutions: State recognition of customary law around the world* (IUCN, Bangkok, Thailand 2011) 1.
[16] Constitution of Kenya 2010, Article 159(2) (b).
[17] ibid, Article 11.

constitutional limitation in the application of TDRMs.[18] Despite this, customary law has remained resilient as the primary 'living' law that defines the different tribal communities in Kenya. This points to a need to establish how the functioning of TDRMs can be harmonised with the formal justice systems with a view to strengthening the country's plurality.

1.8.2 Rawls' Theory of Justice

The study employs Rawls' justice theory in identifying procedural and substantive gaps inherent in TDRMs. One of the reasons why many people resort to TDRMs is procedural technicalities characterising the formal justice system's adversarial approach. However, TDRMs may not be an adequate panacea for all the ills of the formal justice systems. This is because of perceived impartiality in the rules and approaches preferred by some elders and traditional chiefs, some of which are premised on personal greed. Other issues include

adherence to the principles of equality and natural justice. Rawls' theory of justice is vital in this context.

Rawls perceives justice as the core value undergirding social institutions.[19] According to him, justice is the basic structure of society, or more accurately a charter upon which institutions or mechanisms, such as TDRMs and courts, distribute fundamental rights and duties and determine the division of advantages from social cooperation.[20] Rawls further perceives justice as fairness.[21] In his view, an injustice is reasonable only if it is necessary to circumvent an even greater injustice.[22] This may, for example, occur where local administration takes advantage of some elders' lack of knowledge to influence decisions and therefore impede justice. In the present study, the aspect of justice is construed to mean fidelity to the rule of law, procedural fairness, equal treatment of all the parties to a dispute, and equal distribution of opportunities. This definition is undoubtedly consistent with the arguments advanced by Rawls in relation to procedural justice, and social justice.

[18] ibid, Article 159(3).
[19] John A Rawls, *A Theory of Justice* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1971) 3.
[20] ibid 6.
[21] ibid 52.
[22] ibid 4.

The concept of social justice is characterised by Rawls' principle of 'original position' in which every person decides the values of justice from behind a veil of ignorance.[23] The 'veil' in this case is a tool that blinds a person to all facts about himself or herself, which might affect how the person perceives justice. What this means is that people will come up with institutions and principles which will govern their rights and duties in the society and how to distribute the gains of both. Rawls argues that ignorance of one's social status or position in the society will lead to principles that are fair to all.[31] This concept speaks against the most notorious and discriminatory features of the substantive law applied by TDRMs, which run counter to the Constitution of Kenya, 2010. Rawls' conception of social justice, however, seems to ignore the most likely situation of people in the contemporary society finding it difficult to place themselves under the veil of ignorance by reason of which (as Rawls notes) everyone would choose what is fair and favourable to all.

Of great importance to this study is the concept of procedural justice, which denotes the fairness of a dispute resolution procedure. In addition, as noted by Omondi, 'fairness' connotes

procedural fairness, equity and satisfaction by the disputants.[24] Rawls argues in this regard that procedural justice is guaranteed if a correct or fair procedure exists and is properly followed.[25]

Further, Rawls's concept of justice as fairness is based on the principle of equal opportunities and liberties.[26] Every citizen is treated equally in a just society, and the rights secured by justice are not subject to negotiation.[27] Rawls explains this argument further using two principles: the difference principle and the equal liberty principle.[28] The principle of equal liberty refers to a society that is fair and just by assigning equal or fair opportunities (rights and liberties) to everyone. The rationale, according to Rawls, is to ensure that the system of cooperation is one of pure procedural justice.[29] In the context of TDRMS, this can be achieved only if the substantive (and procedural) law applied is fair to all the parties regardless of their gender and

[23] ibid 111.
[31] ibid.
[24] Scholastica Omondi, 'Procedural Justice and Child Sexual Abuse Trial in Kenya' (2014) 2 (5) *Journal of Research in Humanities and Social Science (Quest Journals)* 30 <http://www.questjournals.org> accessed 4 November 2015.
[25] Rawls (n 26) 75.
[26] ibid 52.
[27] ibid.
[28] ibid.
[29] ibid 76.

status in society. This principle has been pointed out as the most vulnerable part of Rawls' theory. For instance, the principle misses the concept of "autonomy", an essential species of freedom espoused in the philosophy of Rousseau.[30] Conspicuous in the theory is lack of a definition or conceptual analysis of 'liberty';[31] but a mention of 'basic liberties' seems to refer to the rights and freedoms protected under the Constitution of Kenya, 2010.

On the other hand, the difference principle is a pure egalitarian concept, which is to the effect that, unless there is another distribution that will satisfy both parties, an equal distribution is the best option.[32] Thus, equality cannot be achieved by worsening the position of the 'least advantaged' – a contested concept emanating from Rawls theory of justice.

The theory engenders legitimacy by according the parties a neutral and dependable arbiter, giving them voice, and treating them equally and with respect.[41] This demonstrates deference for their rights and imbues confidence and trust. The parties are, thus, able to own and accept the applicable rules of procedure. Galligan argues that fair procedures explained to and

accepted by the parties, lead to a fair and acceptable outcome even though one of them is disgruntled.[33]

Relevance of Rawls' Theory of Justice to this Study

This study uses Rawls' concepts of fairness, equal opportunities and liberties, and fidelity to the law in examining the procedural and substantive aspects of TDRMs. The theory provides a yardstick for examining the extent to which TDRMs meet the principles enshrined under Articles 27, 47, 50 (1), and 159 (3) of the Constitution of Kenya 2010. It provides guidance for TDRMs, by ensuring that the parties have equal treatment, that their dispute is determined by persons who have no ulterior interest, who are obliged to render a decision only on the basis of facts and objective rules rather than on personal whims, and that any assertions or accusations must be buttressed by cogent evidence.

[30] Kai Nielsen, 'Rawls and the Left: Some Left Critiques of Rawls' Principles of Justice' (1980) 2 (1) Analyse & Kritik 74-97.
[31] ibid 77.
[32] Rawls (n 26) 65-66.
[41] ibid.
[33] J D Galligan, *Due Process and Fair Procedures* (Oxford University Press 1996) 12.

Furthermore, TDRMs are embodied in customary laws that are often considered patriarchal and discriminatory to women and children. The theory, therefore, underscores the need to ensure equal gender representation in dispute resolution avenues, such as TDRMs. TDRM procedures should strike a gender balance in terms of opportunities and liberties. This is in keeping with Article 27(3) of the Constitution of Kenya 2010, which emphasises the equality between men and women in political, economic, cultural and social spheres.

Rawls' concept of fairness is a natural justice principle. Other fundamental principles include the absence of procedural technicalities, due process, impartiality, the right of being heard, and giving reasons for a decision. Rawls' theory is therefore used to assess TDRMs' alignment with these principles and any gaps that should be addressed to strengthen the mechanisms and integrate them with the formal justice system.

1.8.3 Restorative Justice Theory

With their emphasis on social harmony, one of the fundamental principles of TDRMs is their restorative justice approach.[34] In disputes between family members or communities, the preferred traditional approaches are mediation, arbitration or conciliation. Restorative justice theory emphasises on the rebuilding of the relationship between the warring parties rather than mere punishment.[35] The principles that undergird restorative justice include accountability of the offender, participation of the victims and their family or community members, flexibility, responsiveness, and emotional and physical safety of the parties.[36] TDRMs are premised on these principles. The penalties meted out by TDRMs often focus on compensation or restitution as a means of restoring the *status quo* and not punishing the offender.[37] Although some penalties like fines are imposed by TDRMs among the Kipsigis, the central themes remain reparation and taking the offender to account. Corporal punishment is still one of the penalties

[34] Ramy Bulan, 'Dispute Resolution: Restorative Justice under Native Customary Justice in Malaysia' in Elsa Stamatopoulou, *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (New York: Institute for the Study of Human Rights, Columbia University Academic Commons, 2014) 331 <http://academiccommons.columbia.edu/catalog/ac:184687> accessed 22 June 2016.

[35] 44 ibid.

[36] Francis Kariuki, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' (2014) 2(1) Alternative Dispute Resolution Journal 214.

[37] ibid.

in some TDRMs, but it seldom extends to women or girls. This, however, remains a mere assumption until practical evidence is found.

Central to the restorative justice approach is the aspect of repairing the harm caused. The ultimate aim is to engage the community in rebuilding relationships. It creates a forum for both the victims and the offenders to play a role in resolving the dispute. Accordingly, restorative justice perceives crime as a violation of relationships between people, giving rise to an 'obligation to make things right.'[38] James argues that crime takes away from the personhood, the personal wholeness and worth of the victim.[39] The offender is the foremost person to repair and restore the injured person by giving him his integrity and value.[40]

According to Bulan, restorative justice displays crime primarily as a conflict between individuals that causes injuries to victims and communities, and secondarily as a violation against the state.[41] It is also premised on the position that governance of security, crime and disorder should be shared among all the members of the community. Accordingly, the purpose of criminal justice system should be to create peace in societies by reconciling the parties involved and repairing the harms done.[42] This process should entail active participation of the victims, offenders, and their families or communities so as to reach mutual resolutions to the conflict.[43] The process is informed by forgiveness, healing, reparation and reintegration.

In contrast, the formal criminal justice system focuses on punishment, which is a basic tenet of retributive justice. As such, it clearly lacks the restorative justice attribute, which defines TDRMs. Admittedly, crimes are committed against the state, but there is need to strike a balance between restorative and retributive justice since the interests of victims are completely ignored in the formal justice process.

Relevance of Restorative Justice Theory to this Study

Restorative justice is relevant to this study because of its emphasis on reconstruction of relationships, which is one of the main features of the Kipsigis community's TDRMs. As noted

[38] Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PA: Herald Press 1990) 1-49, cited in Bulan (n 43) 332.
[39] Thomas James, *Be Reconciled! Meaningful Steps for Mending Relationships* (Mississauga: McDougal & Associates 2007) 175, cited in Bulan (n 43) 332.
[40] ibid.
[41] Bulan (n 43) 332.
[42] ibid.
[43] ibid.

by Allot, TDRMs are characterised by the attribute of reconciliation or restoration of harmony between warring parties.[44] This cannot, however, be realised unless the parties are satisfied that justice has been served.[45] Further, according to Elechi, TDRMs bring the offender and the victims of crime into communication, enabling all the affected parties to participate in the resolution process.[55] In this regard, the attribute of restorative justice accords the victims the opportunity to tell the offender the actual impact of the crime committed, and to get a mutually acceptable solution. The downside of this theory is that, while it bypasses many bottlenecks in the adversarial system, it does not address the question of "guilty" but merely focuses on "what shall we do" after the accused person confesses – although this could also be viewed as a strength.

1.8.4 Sociological Jurisprudence

This theory was advanced by Eugen Ehrlich and Roscoe Pound.[56] Their approach includes an assumption of pluralism, a reification of the law, the interdependence of the law and societal attitudes and values, and a cautious approach to instituting legal reform.[46] This study applies Ehrlich's living law approach as a supplement to legal pluralism based on its focus on how different normative patterns derive from social life.

According to Ehrlich, studies of the law should be situated within a societal context. This view was based on what Ehrlich considered as 'living law.' Ehrlich defines 'living law' as that

which, though not posited, dominated life and characterised ordinary social interactions prior to the advent of state law.[47] In his view, state law is founded on 'living law'. Ehrlich further notes that law should be properly applied not just to the pronouncements of legislators and

[44] A N Allot, 'African Law' in Dirrett J D, *An Introduction to Legal Systems* (Sweet & Maxwell 1968) 131-156.
[45] ibid. [55] Oko O Elechi, 'Human Rights and the African Indigenous Justice System' (18th International Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec, Canada, 8-12 August 2004) 4. [56] J W Harris, *Legal Philosophies* (2nd edn, Oxford, New York: Oxford University Press 2004) 251.
[46] Arlene Sheskin, 'Critical Review and Assessment of the Sociology of Law' Mid-American Review of Sociology 109.
[47] David Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities' (2008) 9(2) Theoretical Inquiries in Law 446.

judges, but also to the social norms that control day-to-day interactions.[48] He adds that law emanates immediately from society itself in the form of a natural ordering of social relations.[49] Ehrlich's view that social order is unfixed is consistent with the nature of customary law, which is the hallmark of TDRMs.

According to Ehrlich, formal law is often detached from the realities of everyday social interactions, though it is inherently a derivative of the social norms embodied in living law.[50] In other words, formal law cannot possibly cover the entire law. He justifies this by arguing that judicial decisions, which are the origin of "legal provisions," arise simply from the cases which come before courts. He acknowledges the fact that only a few cases are brought to court and most issues are often dealt with out of court in a friendly manner, or they work themselves out without any conflict. Only the decisions of competent courts operate to create legal provisions and many disputes never reach court.

Quite relevant to this study is Ehrlich's call for the intersection between living law and state or formal law. Ehrlich interlinks the creation or application of law by lawyers and others, rules and usages of organisations that are recognised by or will develop into state law, as well as the shared practices that are disapproved of by the state.[51] He asserts that the sociology of law should track the link between living law and positive law. According to him, the only method by which this can be done is by observing life keenly, asking people how they address matters (including the local institutions used to resolve disputes and their connection to court), and noting down their responses.

[48] Chin-Hyon Kim and Yong-Kyun Chung, 'Legal Culture and Commercial Arbitration in the United States and Japan' (2013) 23(3) Journal of Arbitration Studies 189 <ttp://society.kisti.re.kr/sv/SV_svpsbs03V.do?method=download&cn1=JAKO201330951777514> accessed 4 May 2017.
[49] ibid.
[50] ibid.
[51] Nelken (n 58) 446.

However, while Ehrlich seems to back the place of customary law in the jurisprudence of normative pluralism,[52] he fails to delineate the legal character of the so-called "living law".[64]

Relevance of Living Law Approach to this Study

The living law approach propounded by Ehrlich is used in this study as a supplement to legal pluralism, to explain the nature of TDRMs and their linkage with the formal justice system. There is no doubt that TDRMs are resilient. Thus, Ehrlich's view that social order is flexible is consistent with the nature of TDRMs, which are in a constant flux.

Additionally, Ehrlich's argument that the term law should be applied beyond the dictates of legislators and judges implies that any interpretation of law should not ignore the living law that controls day-to-day interactions. This living law, according to Claassens, includes customary law and institutions, such as TDRMs.[65] Indeed, TDRMs constitute the most accessible forms of conflict management at the grassroots.[53] These mechanisms operate in a wider socioeconomic context and form part of the realities of everyday life. For example, in addition to managing disputes, TDRMs address issues relating to security at the grassroots, environmental conservation, health and civic education.

The link between TDRMs and the formal justice system in Kenya is fraught with complexities. For instance, while TDRMs are entrenched in the culture and history of the Kenyan communities, the formal legal system subjugates them for instance through the repugnance test, which remains undefined. The lack of a regulatory framework that defines the jurisdiction of TDRMs, the functioning and how or what cases should be referred to courts is a serious

[52] Tim Murphy, 'Living Law, Normative Pluralism, and Analytic Jurisprudence' (2012) 3(1) Jurisprudence 177–210. [64] Gerhart Husserl, 'Review of Fundamental Principles of the Sociology of Law by Eugene Ehrlich' (1938) The University of Chicago Law Review 330-340 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1560&context=uclrev> accessed 18 May 2021. [65] A Claassens, 'Customary Law and Zones of Chiefly Sovereignty: The Impact of Government Policy on Whose Voices Prevail in the Making and Changing of Customary Law' in A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 360.
[53] Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Nairobi: Glenwood Publishers Limited 2015) 52, 53.

challenge that hinders the integration of these mechanisms with the formal justice systems. This is in line with Ehrlich's argument that formal law is often detached from the realities of

everyday social interactions, though it is inherently a derivative of the social norms embodied in living law.[54]

According to Ehrlich, the state should stop monopolising the law by recognising and promoting other laws or institutions that control social interactions.[55] This argument mirrors Llewellyn's proposition that 'law jobs' do not have to be performed by state institutions.[56] This in essence, means that other mechanisms, such as TDRMs, should be promoted to complement state institutions. Ehrlich actually recognises the fact most disputes are addressed locally through TDRMs and other ADR mechanisms, and only few of them end up in court. TDRMs are, therefore, significant avenues to access to justice and should be strengthened and integrated with the formal justice systems as complementary mechanisms. In this regard, Ehrlich calls for the intersection between living law and state or formal law.[57] He argues that the sociology of law should track the relationship between the positive law and the customary law by observing life keenly, asking people how they address matters and noting down their responses.

This study is in line with Ehrlich's suggestion, because it seeks to assess how the Kipsigis community resolve disputes through TDRMs, the challenges faced, the strengths and weaknesses of these mechanisms, the impact of the repugnance clause in the integration of TDRMs with the formal justice systems, and how the mechanisms can be strengthened and integrated with the formal justice systems.

1.9 Conceptualization of the Study

This section evaluates how TDRMs relate with other concepts, such as access to justice, formal justice systems, and the repugnance test. The aim of this analysis is to demonstrate the strengths of TDRMs, their weaknesses (based on the natural justice, rule of law, and human rights

[54] ibid.
[55] Nelken (n 58) 451.
[56] ibid.
[57] ibid 446.

variables) and their integration into formal justice systems. Quite relevant in this analysis is the aspect of regulation, which is considered as the main variable that can cure the weaknesses of TDRMs and integrate them with the formal justice mechanisms.

1.9.1 The Concept of 'TDRMs'

In Kenya, informal 'grassroots' methods of dispute resolution are referred to as '*community*,' '*customary*' and '*traditional*' mechanisms.[58] For instance, Articles 60(1) (g) and 67(2) (f) of the Constitution 2010 synonymously refers to 'traditional' and 'community' dispute resolution mechanisms or initiatives as ideal methods of resolving land disputes. Section 68(1) of the Marriage Act, 2014, also recognises the use of conciliation or 'customary' dispute resolution mechanisms in determining a marriage dispute before parties can resort to court. The terms "customary," "traditional" and "community-based" are not synonymous. They have different meanings and normative content as explained further below.

Community-based initiatives: The term 'community' is defined under the Community Land Act 2016, as a distinct and organised group of users of land identified based on common ancestry, culture or unique modes of livelihoods, geographical space, ecological space, and socio-economic or other similar common interest.[59] A community is, thus, a group of people who recognise their common purposes, rights and privileges for which they assume shared responsibility and commit to the well-being of each other.[73] Dispute resolution mechanisms used by this group are called community-based initiatives. The recognition of "communitybased initiatives" in the Constitution acknowledges the need for decentralisation of dispute resolution power to local communities based on restoration of party relationships as opposed to retribution.

Customary dispute resolution mechanisms (CDRMs)**:** The meaning of CDRMs depends on how the term "custom" or "customary practice" is construed. Black's Law Dictionary defines a

[58] Francis Kariuki, 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' (2015) 3 (1) Alternative Dispute Resolution 163.
[59] Community Land Act, 2016, s 2; See also D Ramsey and K B Beesley, '"Perimeteritis" and Rural Health in Manitoba, Canada: Perspectives from Rural Healthcare Managers' (2007) 7 Rural and Remote Health 850. [73] Kariuki (n 71) 170.

custom as a usage of the people, which, by common adoption and acceptance, and by long and unchanging habit, has become binding and enforceable in the place or subject-matter to which it relates.[60] The word "customary" emphasises that a certain practice is according to or founded on custom.[61] The custom must be practised extensively (either by a business, ethnic group or otherwise) for it to gain the 'customary' status.[62] Thus, customary dispute resolution

mechanism refers to mechanisms that are premised on the customs or customary practices of a particular group of people.[63]

TDRMs: Although the definition of 'customary' is close to 'traditional,' the two terms are not synonymous. The term "traditional" is derived from 'tradition', which denotes a practice or usage that is old, ancient or pre-modern.[64] Thus, while the word 'customary' may mean that a practice or usage is old or modern, the term 'traditional' emphasises that the practice or usage in question is old, ancient or pre-modern. Thus, TDRMs are age-old mechanisms that have been practised for a long time by communities and passed from generation to generation.[79]

However, both customary and TDRMs are embedded in customary law. Equally, given the broad definition of "community" under section 2 of the Community Land Act, 2016, the substantive law governing community-based initiatives may include customary law, especially if such initiatives are based on tribal customs or traditions that have gained notoriety. Thus, there are similarities between TDRMs, community-based initiatives and CDRMs.

This study uses the term "traditional" instead of "customary" or "community" dispute resolution mechanisms. This is because Article 159 of the Constitution of Kenya, 2010, which is core in this study, subjects only "traditional" dispute resolution mechanisms to the repugnance test, acknowledging the broad nature of customary and community-based justice systems. In addition, this limitation arguably creates a hierarchy in which customary and

[60] Henry Campbell Black, *Black's Law Dictionary* (4th edn., West Publishing Company 1968) 461.
[61] ibid 462.
[62] Kariuki (n 71) 174.
[63] E Henrysson and S F Joireman, 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya' (2009) 43 (1) Law and Society Review 39-41.
[64] Kariuki (n 71) 176.
[79] ibid.

community-based justice systems rank higher than TDRMs. In this study, the term TDRMs refers to mechanisms used by communities since time immemorial to resolve disputes based on culture, practices, beliefs and rituals, and passed from one generation to the other.

1.9.2 Concept of Integration

The concept of 'integration' has not been clearly defined or contested in literature. It implies combining separate elements to form a whole unit. This not only includes eliminating norms and practices that tend to segregate those elements, but also active incorporation of their strengths into the system to ensure efficiency and build relationships. In the context of TDRMs, 'integration' as understood by Macfarlane, includes establishing a system of cooperation or partnership between informal and formal systems, for instance through referral of certain types of cases to community-led justice processes, training and oversight.[65] This system of cooperation, in the researcher's view, could be achieved through a clear-cut legal or policy framework that links TDRMs and formal justice system as complementary avenues for access to justice.

TDRMs constitute the most cost-effective and expeditious avenues for access to justice.[81] "Access to justice" refers to a situation where people with a complaint are able to get effective remedies from a justice system that is cost-effective, accessible, fair, expeditious, and aligns with fundamental human rights and the rule of law.[66] It may also include the awareness of and understanding of the law, and access to information, and speedy enforcement of decisions.[67] In this study, access to justice is understood as including the principles of expeditious disposal of disputes, proportionality, equal opportunities in the justice system, procedural fairness, party autonomy, affordability, party satisfaction, and effectiveness of remedies. Some of these principles define natural justice and the rule of law.

TDRMs play a vital role in managing conflicts relating to, among others, land, family, water, cattle rustling and petty offences. The continued use of TDRMs is based on their costeffectiveness, flexibility, and the fact that they are not informed by legalese and strict rules

[65] Julie Macfarlane, 'Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System' (2007) 8 Cardozo J. of Conflict Resolution 487-509. [81] Muigua (n 66) 52-53.
[66] *Dry Associates Limited v Capital Markets Authority & anor* Nairobi Petition No 358 of 2011 (Unreported).
[67] ibid.

of evidence. Their use, therefore, brings about harmony and ensures that justice is served expeditiously without technicalities. The recognition of TDRMs under Article 159(2) of the Constitution, 2010, creates a platform for the use of these mechanisms in reducing the huge case backlogs in formal courts.

Further, with their emphasis on the rebuilding of relationships between the disputants, TDRMs are guided by the principles undergirding restorative justice, namely accountability of the offender, participation of the victims and their family or community members, flexibility, responsiveness, and emotional and physical safety of the parties. However, the application of TDRMs may be characterised by procedural hurdles, such as non-compliance with the rule of law and the principles of natural justice, such as bias, giving reasons for decisions and the right of being heard. This is contrary to Rawls' argument that justice can only be realised through

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fair procedures and equal distribution of opportunities and resources between the parties to a dispute.

Additionally, Article 159(3) (b) of the Constitution, 2010, stipulates that TDRMs should not be applied in a manner that is contrary to the Bill of Rights, the Constitution and other written laws, or repugnant to justice and morality. A notable weakness of TDRMs in Kenya emanates from the patriarchal nature of the applicable customary law. TDRMs often provide limited space for women to participate and effectively benefit from the use of these mechanisms. Other weaknesses include corruption and political influence, and harsh sentencing customs (like banishment). These weaknesses necessitate the need to have basic guidelines reflecting on the Bill of Rights, and how courts can play a role to enhance access to justice at the grassroots.

The repugnance clause in the Constitution, 2010, also hinders the development of TDRMs and their integration with the formal justice system. While the other limitations in Article 159(3) (b) are clear, the Constitution does not define the standards of justice and morality in the context used. Formal courts therefore have the discretion to interpret these standards as they deem best. Admittedly, the repugnance clause is a statutory filter, seeking to sift bad elements of customary law. The question, however, is: on whose morals?

The relationship between TDRMs and the formal justice system is a delicate one due to the hurdles identified above. Thus, taking into account these practical hurdles and the obscurity of

the repugnance test envisaged in the Constitution, 2010, the researcher argues that there is need to develop legal mechanisms that can promote TDRMs and integrate them into the formal justice system. This argument is consistent with Ehrlich's proposition that the sociology of law should promote the interlinkage between formal justice systems and the living law.

The term "integration" is construed in this study to mean having a basic legal or policy framework regarding the complementarity between TDRMs and the formal justice system. Thus, the main model of integration is regulation with particular focus on referral of serious cases from TDRMs to courts, and use of TDRMs as first instance avenues in certain cases to avoid case backlogs in courts. While each community will need to document their procedures, the study considers it appropriate to have a general legal framework containing basic guidelines that each community should follow in the application of TDRMs. The legal framework should provide for a basic guideline defining the repugnance clause for elders to identify and eliminate practices that are "immoral" and "unjust" pursuant to Article 159(3) (b) of the Constitution, basic standards that TDRMs should adhere to (for instance procedural fairness), their jurisdiction, and how cases should be referred between TDRMs and courts (for instance, the need to submit the records of a case to the court). Awareness can also be done to promote compliance with human rights, the rule of law, and natural justice principles.

Figure 1: Diagrammatic Illustration of Strengths, Constraints and Integration of TDRMs

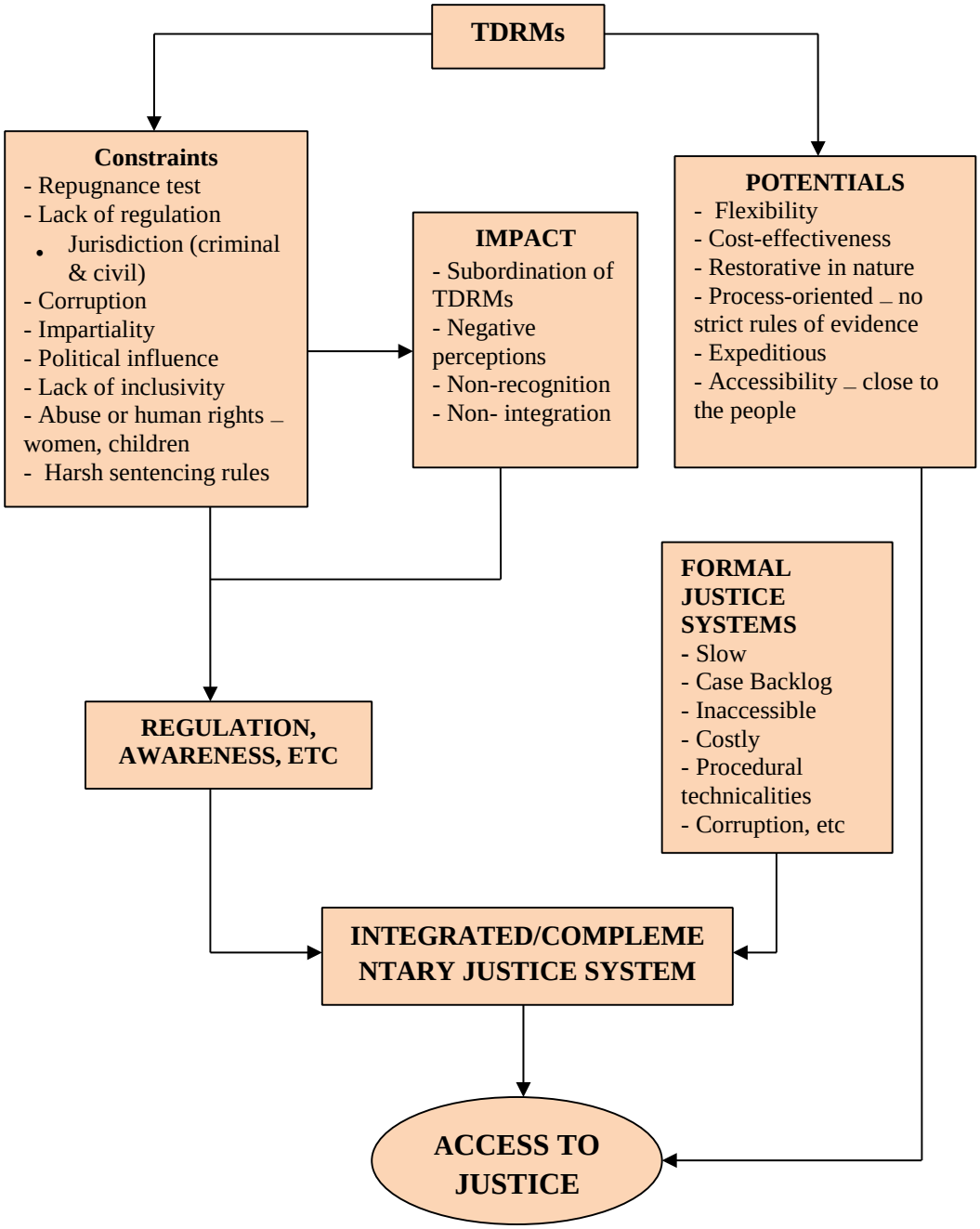

Figure 1: Conceptual framework (Source: Data Analysis)

1.10 Literature Review

This section thematically reviews existing literature on TDRMs based on the objectives of the study.

1.10.1 Capitalising on the 'African' Potential

Traditional and customary systems have remained ubiquitous, yet their reformation has been completely neglected by the international development community, which has rapidly focused

on the formal justice sector reform.[68] As noted by Chirayath, Sage and Woolcock, development organisations perceive TDRMs and customary law in fairly negative terms, regarding them as 'backward', 'rigid and not amenable to modernisation', 'archaic', 'undemocratic', and lacking in legal legitimacy, authority and enforceability.[85] In addition, the most significant criticism of TDRMs is their perceived incompatibility with human rights, and the western understanding of justice.[69] This negative perception has nexus to the colonial view that African customary law and institutions are oppressive and discriminatory.[87] Chirayath, Sage and Woolcock consider these concerns as serious but not sufficient grounds to ignore the existence and value of TDRMs.[70] In their view, there are cogent reasons why many people resort to TDRMs instead of formal courts, which are often characterised by procedural technicalities and backlog of cases.[89]

African Customary law has a stand-alone basis for its existence besides merely addressing the failures of the formal legal systems.[90] Sing'oei acknowledges in this regard that many states in Africa still have the element of collectivism, which, in his view, justifies the need to deploy TDRMs in addressing disputes.[71] It is claimed that formal justice systems have failed to provide redress for communal matters and the robustness of customary law must be appreciated rather

than just being subordinated to the edicts of an amorphous matrix of public order, justice and morality.[72] Kinama argues in connection to this, that the reliance of one form of justice system to resolve disputes can hamper access to justice.[73] This is because many countries in Africa and Kenya in particular are characterised by diversity in ethnicity, culture and religion and it is

[68] Caroline Sage and Michael Woolcock, 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems' (July 2005) 3 <http://namati.org/resources/customary-law-and-policy-reform-engaging-withthe-plurality-of-justice-systems/> accessed on 5 March 2016. [85] ibid 4.
[69] ibid.
[87] ibid.
[70] ibid 5. The authors for instance argue that, the imposition of formal legal systems on communities in total disregard of local level governance processes is not only ineffectual, but can actually create serious negative implications. The failure to recognise TDRMs may in itself be exclusionary and, hence, inequitable. [89] ibid. [90] Abraham Korir Sing'oei, 'Customary Law and Conflict Resolution among Kenya's Pastoralist Communities' (2010) 1-2 Indigenous Affairs 17 <http://www.iwgia.org/publications/search-pubs?publication_id=470> accessed on 5 March 2016.
[71] ibid.
[72] ibid 18.
[73] Kinama (n 8) 21-23.

therefore imperative that this diversity is manifest in the management of disputes.[74] Many communities prefer TDRMs to the formal justice systems mainly because they are costeffective, familiar, easy to use and understand, and that matters are dealt with expeditiously.[95]

The concepts of collectivism and diversity as key features in many African countries, resonate well with the ideology of 'African Solutions to African Problems' (ASAP). This pan-Africanist ideology is premised on the fact that Africa's problems are so distinct and unique from those of the rest of the world.[75] The ideology speaks of the need to come together and collectively repair the damage that African countries have grappled with for years.[76] It awakens African leaders to realise that the international community had detached itself from Africa long ago especially after the Cold War. As the African Union notes in its report, the Rwandan genocide saw little intervention from the international community, something that compelled Rwanda to revitalise the *Gacaca* system and build local capacity to complement existing justice efforts.[77] In light of this, African nations including Kenya should seek to capitalise on the existing potential to forge a path to prosperity. This includes strengthening customary justice systems, such as TDRMs, to effectively address existential challenges to peace and security across the continent.

It suffices to recognise key milestones across the region, such as the African Union's (AU) Panel of the Wise, ECOWAS' Council of the Wise, COMESA's Committee of Elders, and SADC Panel of Elders. Created within the rubric of ASAP, these bodies agree on the need to collaborate and strengthen relations to foster sustainable peace in the region.[78] The AU seems

[74] ibid 23.
[95] ibid 28.
[75] Chichi Anyoku and Marc Anani-Isaac, 'African Solutions to African Problems? A Review' (2019) Kennedy School Review <https://ksr.hkspublications.org/2019/11/19/african-solutions-to-african-problems-areview/#_ednref6> accessed 26 May 2021.
[76] Remofiloe Lobakeng, 'African solutions to African problems: a viable solution towards a united, prosperous and peaceful Africa?' (2017) Occasional Paper No 71, 3.
[77] African Union and ACCORD, *The African Union Panel of the Wise: Strengthening Relations with Similar Regional Mechanisms* (The High-Level Retreat of the African Union Panel of the Wise, held in Ouagadougou, Burkina Faso, on 4 and 5 June 2012) 31.
[78] ibid.

to link the emergence of these African ideologies to weaknesses in many states and institutions.[79] It attributes this to the colonial system's failure to establish robust institutions for governance and socio-economic development, a challenge which has seen many states struggling to contain ethnic and tribal wars instead of addressing development challenges.[80] For instance, the AU Panel of the Wise was created under the Protocol Relating to the Establishment of the Peace and Security Council (PSC Protocol), to provide opinions to the Peace and Security Council (PSC) and to promote efforts to prevent and resolve conflicts in the region.[81] A key aspect in the Panel of the Wise is the fact that its modalities allow it to receive recommendations for intervention, for instance from the African Commission on Human and Peoples' Rights. This provides precedent on how TDRMs and other justice mechanisms can be mutually reinforcing.

Thus, the AU Panel of the Wise and other similar panels across the region are in sync with the need to increasingly revitalise and integrate TDRMs to complement the formal justice systems. In his argument for the creation of a similar panel in Nigeria, Jegede cautions the danger of relying on courts as the primary forums for managing violent conflicts related to identities such as ethnicity, religion and natural resources.[82] He argues that the question of identity is one of 'right against right' as opposed to 'right against wrong'.[104] This can only be addressed effectively on a negotiating table and not the adversarial system.[83] Equally, customary justice systems such as TDRMs cannot be applied to identity conflicts due to the risk of holding people liable by a custom that is foreign to them.[84] On the contrary, such mechanisms can actually be used to resolve conflicts associated with identity especially pastoralist conflicts. Jegede acknowledges this fact to the effect that the concept of the wise is inextricably linked to the African values exemplified in the wisdom of elders who form the corpus of TDRMs.[85]

[79] ibid 17.
[80] ibid 18.
[81] African Union and ACCORD (n 98) 33.
[82] Ademola Oluborode Jegede, 'Bridging the Peace Gap in Nigeria: The Panel of the Wise as a Constitutional Essential' (2016) Journal of African Law 6. [104] ibid.
[83] ibid 6.
[84] ibid 11.
[85] Ademola Jegede, 'The African Union peace and security architecture: Can the Panel of the Wise make a difference?' (2009) 9 African Human Rights Law Journal 432.

That said, Jegede's position basically seems to present a case for a non-adversarial conflict management that can inform the establishment of a panel of the wise at the domestic level,

borrowing from the AU's Panel of the Wise. He cites in support of this, other experiences from the House of the Federation in Ethiopia, the ECOWAS Council of Elders, among others.

Overall, the importance of TDRMs as a repository of African values and wisdom is well settled in literature as explored above. Jegede's work for instance affirms the fact that the AU Panel of the Wise and similar avenues in the region are at the very least a renaissance of the concept of the wise,[86] which is so ingrained in TDRMs. This provides an imperative to capitalise on such mechanisms to enhance access to justice and peace building in Africa and Kenya in particular. It makes a case for a shift in focus from the formal justice sector to the TDRMs which have been neglected for many years yet they are the most preferred justice mechanisms at the community level. What has not been explored in literature is how best to strengthen TDRMs and integrate them with the formal justice systems, taking into account their practical weaknesses. This is the central question that this study sought to investigate.

1.10.2 Typology and Procedures of the Kipsigis TDRMs

The Kipsigis are a sub-tribe of the Kalenjin community in Kenya. Their cultural practices and customs are slightly similar across the different sub-tribes despite the differing pronunciation of words. The culture of the Kipsigis has changed over the time, and so has their customary law and practices. Scholarly work done in the 1970s provide context about the Kipsigis. Saltman, for instance, asserts that the Kipsigis' contact with the colonialists fundamentally changed their economic system, from pastoral farming to mixed farming and peripheral association with a network of national markets.[87] Within 30 years, Kipsigis economic interests shifted from a focus on cattle to intense interest in land and cash.[88] It was during this period that the Kipsigis developed a corpus of land law.[89] This development was not achieved through

[86] ibid 433.

[87] Michael Saltman, 'A Restatement of Kipsigis Customary Law' (Dissertation, Graduate School of Arts and Sciences, Brandeis University, 1971).

[88] ibid.

[89] ibid.

legislation by the colonial authorities, but was generated out of the restatement of certain principles under customary law.[90]

Exuding from these developments were three Kipsigis communities, displaying markedly different economic structures.[91] The first community was representative of the traditional

pastoral economy. The second, a reserve community, represented a mixed farming economy peripherally associated with the national economy, while the third community, a government settlement scheme, was also a mixed farming community but was more closely linked to the national economy and the bureaucracy. The nature of legal reasoning in each community, given the different economic bases of disputes, was significantly different. However, as Saltman notes in another piece of work, the basic judicial body of the Kipsigis, the *kokwet*, persisted with only minor changes in its structure.[92] Saltman's work is critical in this research as it shades light on how the Kipsigis TDRMs evolved from the pre-colonial, colonial and postcolonial period, although many changes have happened since his writings.

Equally critical to this study is the work of Fish and Fish, who provide insight on the centuriesold traditional religious and social practices of the Kalenjin.[93] The authors provide an in-depth analysis of the criminal justice system of the Kalenjin, particularly in relation to murder and killing, and incidental concepts such as cleansing, intentional killing, and isolation.[94] They also delve into the cursing and oath taking as the main mechanisms of eliciting admissions.[95] For instance, if either party to a dispute refused to take the oath, judgment was forthwith given against him/her; if both parties accepted, it operated as a curse upon the obligated or guilty party.[118] Their work also provides a historical account of TDRMs as practised by the larger Kalenjin community. This study singles the Kipsigis who form the largest sub-tribe of the Kalenjin.

[90] ibid.
[91] ibid.
[92] Michael Saltman, *The Kipsigis: A Case Study in Changing Customary Law* (Cambridge, Schenkman Publishing Co., Inc. 1977) 98.
[93] Burnette C Fish and Gerald W Fish, *The Kalenjin Heritage: Traditional Religious and Social Practices* (Nairobi: African Gospel Church, World Gospel Mission and William Carey Library, 1995).
[94] ibid 317.
[95] ibid 359. [118]
ibid.

In his examination of the effectiveness of the arbitral law and ADR in Kenya, Gakeri provides a brief caption of the Kipsigis TDRMs.[96] He acknowledges the various levels of the Kipsigis TDRMs, notably *kotigonet* (lower level) which means giving advice; and *kokwet* or *kiruogik*, which literally means judges or adjudicators. These levels, according to Gakeri, operated in tandem depending on the gravity of the disputes.[120] It should be noted, however, that *Kiruogik* operates as the highest level that deals with appeals from the *kokwet*, which is the main dispute resolution mechanism of the Kipsigis comprised of elders. These levels were eminently aimed

at ensuring that settlement was as non-disruptive as possible. Dispute resolution was contingent on negotiation rather than adjudication. These mechanisms have remained resilient despite the dominance of the transplanted English legal system in Kenya. This study provides, in the context of the question of integration, clarity on these three concepts of the Kipsigis TDRMs and how they deal with disputes.

In her work regarding community justice systems in Kenya, Kirui makes reference to the *kokwet* as a case study.[97] The study identifies the procedures followed by the *kokwet* as well as perceptions of different actors such as the legal fraternity and marginalised groups, about the functioning and/or relevance of community justice systems.[98] Part of her study includes how these systems collaborate with what she refers to as 'modern' system, to enhance access to justice.[123] The Kipsigis customary law is in constant evolution with changing circumstances, and so are the TDRMs. This study relies on Kirui's work to augment the field findings, with particular focus on how the different typologies and procedures of the Kipsigis TDRMs align with the rules of natural justice and how to integrate them with the formal justice system.

1.10.3 Compatibility of TDRMs with Natural Justice and Human Rights Standards

TDRMs play an important role in the Kenyan justice system. According to Muigua, Kenyan communities have used traditional negotiation and mediation since time immemorial.[124] These

[96] Jacob K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2006) 1(6) International Journal of Humanities and Social Science 219. [120] ibid 222.

[97] Agnes Cheptooi Kirui, 'Access to Justice for All: An Investigation into the Functioning of the *Kokwet* of the Kipsigis Community of Londiani Division, Kericho District' (Master of Arts Thesis, University of Nairobi 2006) 7.

[98] ibid. [123] ibid. [124] Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (Paper Presented at the 1st
NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi, 25-26 September 2014) 33 <http://www.uonbi.ac.ke/kariuki_muigua/> accessed on 25 October 2015.

methods were flexible, expeditious and aimed at restoring relationships.[99] Thus, effective application of TDRMs can undeniably bolster access to justice for all including those who are unable to access courts.[126] Despite the numerous advantages of TDRMs, empirical research regarding the interplay between TDRMs and human rights and natural justice rules is lacking. Nevertheless, existing literature provide an indication on how these concepts interact with each other.

Kaczeda, for instance, argues, based on existing literature, that TDRMs do not embed the right to a fair hearing as encapsulated in Article 50(1) and (2) of the Constitution.[100] Considering the importance of TDRMs in the Kenyan justice system, Kaczeda recognises the need to incorporate this right in TDRMs given their constitutional recognition that legitimises their use. This can be done, for instance, through a separate legislation regulating TDRMs.[128] Kaczeda's work, though done about a year following the commencement of this study, is useful as it demonstrates the fact that TDRMs do not fully observe the right to a fair hearing. At the centre of this thesis is how to strengthen TDRMs and integrate them with the formal justice system without affecting their fluid nature.

Equally important is Muigua's study on institutionalising TDRMs and community justice systems. His study is worth acknowledging, particularly because it provides insight on the need for mechanisms to ensure compliance with due process and natural justice rules, as well as a policy and legal framework to regulate TDRMs.[101] A justification for such a proposal is, however, necessary considering the dangers of codification on the evolutionary nature of customary law and related structures. This study provides this justification with a historical background, including why the colonial administration avoided calls for codification of customary law in Kenya. The study also draws on perspectives from the Land Disputes Tribunals Act, 1990 and examples from Rwanda and South Africa. Additionally, while

[99] ibid; Kariuki Muigua, Didi Wamukoya, and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* (Nairobi: Glenwood Publishers Limited 2015) 415-417. [126] Muigua (n 124) 34.

[100] David Kaczeda, 'The Right to A Fair Hearing in Traditional Dispute Resolution Mechanisms in Kenya' (Dissertation, Strathmore University 2016) 17. [128] ibid 49.

[101] Kariuki Muigua, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems' (April 2017) 50-53 <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-TraditionalDispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> accessed 9 November 2019.

acknowledging the advantages of TDRMs as posited by Muigua,[102] this study proceeds on the premise that TDRMs should operate within certain principles as set out in the Bill of Rights; and that textual recognition beyond Article 159(2) and (3) of the Constitution is necessary to avoid misalignment with human rights and natural justice rules.

From an international perspective, the United Nations (UN) notes that, many African countries that have incorporated the concept of legal pluralism, generally recognise customary law to the extent that it remains consistent with the constitution and human rights norms.[103] The UN identifies a number of human rights challenges posed by TDRMs with specific reference to

Article 14 of the ICCPR[104] on the right to equality and the concept of fair and public hearing. Reference is equally made, in this context, to the Human Rights Committee's General Comment No. 32 of 2007, para. 24 of which states inter alia, that customary and religious courts should be restricted to minor civil and criminal matters and meet the basic requirements of fair trial and other guarantees in the ICCPR.[105] Thus, TDRMs, having been legitimised under the Constitution 2010, must align with Article 14 standards—reflected in Article 50(1) and (2) of the Constitution. An illustrative case is drawn from Namibia, where the High Court, in a matter concerning a challenge to procedures employed in a customary law dispute, asserted that any determinations must meet the fairness and reasonableness standards vide Article 18 of the Namibian Constitution.[106] The UN publication is useful in this study in so far as it demonstrates how TDRMs do not fully protect various fundamental human rights. This study relies on the UN publication to provide a case for a legal framework that defines parameters that TDRMs should observe, and how to integrate them with the formal justice system.

1.10.4 Constraints to the Integration of TDRMs

The nebulous repugnancy clause, under Article 159(3) (b) of the Constitution 2010, forms one of the key constraints to the integration of TDRMs. The term 'repugnancy', as defined by

[102] ibid 13-16.
[103] United Nations, *Human Rights and Traditional Justice Systems in Africa* (New York and Geneva, United Nations Publication, 2016) 43.
[104] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171 <https://www.refworld.org/docid/3ae6b3aa0.html> accessed 9 November 2019.
[105] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 <https://www.refworld.org/docid/478b2b2f2.html> accessed 9 November 2019.
[106] United Nations (n 131) 44.

Sheleff, denotes a situation of distastefulness, disgust, and revulsion.[107] As noted later in this study, the test is modelled within the British system and understanding of 'justice' and 'morality'. Its inclusion under the Constitution 2010 in the context of TDRMs has drawn a lot of attention from some scholars. According to Muigua, the repugnancy clause was premised on the contention that there were certain customary law practices that did not augur well with human rights standards.[136] This has continually been used by courts to subjugate customary laws thus undermining the efficacy of TDRMs.[108]

Muigua further argues that the clause is a product of grievous misconceptions of 'justice and morality' as it imposes Western as opposed to the African sense of justice and morality.[109] The effect of this misconception is implicit in Okoth-Ogendo's assertion that, the rate at which parliaments in Africa are enacting laws based on Anglo-European jurisprudence will place customary law in a juridical morgue.[110]

Muigua posits that, redefining the clause requires a change of attitude by courts and reforms to elevate the position of customary law.[111] Muigua's position is useful in this study in that it underscores the need for clarity on the nebulous repugnancy clause. While cognisant of the historical intent of this clause, this study posits that the Bill of Rights and the Constitution provide sufficient tests for TDRMs and customary law, hence the need to delete the clause or provide clarity on what 'justice and morality' means in the Kenyan context bearing in mind the country's cultural diversity.

Kinama argues that, although TDRMs are useful in resolving disputes in Kenya, they are not widely accepted as they sometimes clash with the formal justice systems.[141] The repugnancy test is also problematic because morality is relative as a concept in the contemporary world.

[107] Leon Shaskolsky Sheleff, *The Future of Tradition: Customary Law, Common Law & Legal Pluralism* (London: Routledge 2013) 125. [136] Muigua (129) 11.

[108] Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' 5 <http://www.chuitech.com/kmco/attachments/article/111/paper%FINAL.pdf> accessed on 29 May 2019.

[109] Muigua (n 129) 11.

[110] Okoth-Ogendo HWO, 'Customary Law in the Kenyan Legal Systems: An Old Debate Revived' in Ojwang and Mugambi, *The SM Otieno Case* 136.

[111] Muigua (n 129) 11.

[141] ibid 30. [142]

Sing'oei (n 90).

This justifies the need to promote TDRMs to augment formal justice systems. Kinama's work is very important in this study as it delves into strengths and weaknesses of TDRMs. The scope of this study is, however, limited to the integration of TDRMs with the formal justice system.

As noted by Sing'oei, post-colonial states in Africa have blatantly excluded certain citizen behaviours from the design of formal law on the basis of historical circumstances of limited capacity.[142] In most areas where the presence of the state is minimal, TDRMs are permitted by default to complement the costly state-run justice system.[112] While some matters, notably marriage and succession, have historically been addressed under customary law, criminal matters have often remained the preserve of formal courts.[113] According to Sing'oei, this

argument may be explained by the variance that exists between the imported Western laws and the African normative structures.[114]

1.10.5 Integrating TDRMs with the Formal Justice System

According to Mutisi and Sansculotte-Greenidge, TDRMs remain useful in the contemporary Africa.[115] However, their relationship with the formal justice systems is a contested terrain ridden with complexities.[116] In certain cases, TDRMs are politicised and usurped by the state.[148] The authors discuss the concept of integration but in other jurisdictions, such as Uganda and Rwanda. This study focuses on the integration of TDRMs with the formal justice systems in Kenya, drawing examples from the Kipsigis community.

According to Ubink, durable means of reviving and bringing certainty to customary law is restatement.[117] They argue that restatement of customary law is likely to diminish the discretion

[112] ibid.
[113] ibid.
[114] ibid.
[115] Mutisi and Sansculotte-Greenidge (n 6) 9.
[116] ibid.
[148] ibid.
[117] Janine Ubink, 'Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia' (2011) 8 Traditional Justice: Practitioners' Perspectives Working Paper Series 6. Ubink defines "restatement" as the process of combining and reordering previous customary law expressions in a more logical and comprehensive manner.

of judges who normally disregard customary law on the basis of the repugnance clause and other validity tests.[118] This study argues that the substance of customary law varies from community to community, meaning that restatement may not be the best reform strategy for TDRMs. However, a regulatory framework is necessary to provide for the principles that will guide TDRMs, the types of cases that should be resolved by TDRMs and those to be referred to courts, as well as how courts can play a role in the enforcement of awards.

While discussing the development of law in South Africa, Claassens argues that the rejection by the Constitutional Court of the 'official' written version of customary law in favour of 'living law' understanding is premised on changing contexts.[119] Claassens buttresses this argument by the colonialists' codification of essential customs and silencing of contrary customs. Further, the author avows that the potential advantages of customary law construction remain susceptible to deeply embedded formalist assumptions about the operation of law.[152] Her study concentrates on customary law and omits the aspect of intersection between TDRMs and formal justice systems. This study fills this gap by exploring the nature of TDRMs, their application, strengths and challenges, and integration with the formal justice systems.

According to Muigua, Kenyan communities have used traditional negotiation and mediation since time immemorial.[120] These methods were flexible, expeditious and aimed at restoring relationships.[121] Muigua notes that effective application of TDRMs can undeniably bolster access to justice.[122] While Muigua's paper contributes additional knowledge for this study, it does not delve into the question of integration of TDRMs with the formal justice systems, including the impact of the repugnance clause. This study seeks to bridge this knowledge gap.

Kariuki interrogates the applicability and relevance of TDRMs in resolving criminal disputes.[123] He argues that the constitutional recognition of TDRMs must be understood within

[118] ibid 6 (citing Allott and Cotran 1971, Uni 18-19).
[119] Claassens (n 65) 360.
[152] ibid 363.
[120] Kariuki Muigua, 'Natural Resources and Conflict Management in East Africa' (Paper Presented at the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi, 25-26 September 2014) 33 <http://www.uonbi.ac.ke/kariuki_muigua/> accessed on 25 October 2015.
[121] ibid; Kariuki Muigua, Didi Wamukoya, and Francis Kariuki, *Natural Resources and Environmental Justice in Kenya* (Nairobi: Glenwood Publishers Limited 2015) 415-417.
[122] Muigua (n 153) 34.
[123] Kariuki (n 45) 202.

the context of access to justice.[124] Additionally, because of the resilience of customary law, TDRMs should not be formalised as this may subject them to the challenges that characterise the formal justice. Yet, formalization may foster adherence to the Bill of Rights.[158] Further, according to Kariuki, despite the numerous advantages of TDRMs, a number of hurdles exist in their use. First, customary law is viewed as inferior to statutory law; hence TDRMs, which are an embodiment of customary law, may be undermined. This study takes a different viewpoint, that enactment of a law outlining the basic principles that will guide TDRMs, including their jurisdiction and basic procedures, will not affect the flexibility of the substantive law that undergirds these mechanisms.

1.10.6 Literature Gaps

The central question in this research relates to how TDRMs can be strengthened and integrated with the formal justice systems. The foregoing review of existing literature exposes a number of issues regarding the application of TDRMs, including their advantages as restorative and cost-effective justice avenues, the concept of the Panel of the Wise (as largely deriving from TDRMs), perceptions around incompatibility of TDRMs with human rights, the repugnancy clause under the Constitution, and shortfalls of TDRMs. However, these issues (particularly those relating to the repugnancy clause, jurisdiction, natural justice and human rights) have not comprehensively been explored in the context of 'why' and 'how' TDRMs should be promoted and integrated with formal courts. Muigua's study on institutionalising TDRMs and community justice systems partly grapples with this question and provides insight on the importance of putting measures in place, including policy and legislative framework, to ensure compliance of TDRMs with due process and principles of natural justice. However, a justification for such a proposal is necessary considering the dangers of codification and Kenya's failed experiment with the Land Disputes Tribunals.

Empirical research is therefore critical to examine these issues in a more in-depth way in order to establish how TDRMs can be revitalised and integrated with the formal justice system in Kenya without affecting the fluid nature as embodiments of customary law. This study fills this gap with positive lessons from Rwanda and South Africa to inform its findings. The study

[124] ibid 211.
[158] ibid.

proceeds on the premise that, even if TDRMs are self-regulated, it is imperative to have basic guidelines on how they should be applied without causing injustice, their jurisdiction, referral of cases between courts and TDRMs, and how courts can play a role in the enforcement process.

1.11 Scope and Limitations of the Study

The study mainly focused on all aspects of TDRMs in Kenya, including traditional arbitration, mediation, reconciliation and negotiation; applicable procedures; the repugnance clause and other challenges that hinder the integration of TDRMs with the formal justice systems; the legal framework; and the principles that TDRMs should comply with.

Kenya is a multi-ethnic state with over forty-two communities, each having a unique governance structure and history. This study used a case study of the Kipsigis community of Kericho County to explore how TDRMs align with the Constitution and areas that need to be addressed to integrate them with the formal justice systems. Apart from the Kipsigis, Kericho County is inhabited by people from other communities who work in the tea plantations, such as the Kisii, Kikuyu, and Luo. This diversity presented a good case to assess how the Kispisgis TDRMs have exercised their personal jurisdiction over non-members (being immigrants or persons who domicile in the county as a result of intermarriage or other relationships).

The key respondents were the Kipsigis elders and TDRM users. The study also considered the fact that the councils of elders (CEs) in Kericho County comprise elders from different constituencies, which is rare in other counties. For instance, Kamasian council of elders comprises elders from Kipkelion West and Kipkelion East constituencies, while Myoot council of elders is composed of elders from Ainamoi and Belgut constituencies. Most of these elders constitute the larger Kipsigis council of elders. It was also important to assess whether the ancient hierarchical structure of the Kipsigis TDRMs, which comprised of the *kotigonet* (lower level), *kokwet* (traditional judges or adjudicators), and *kiruogindet/kiruogik* (well respected external judges),[125] still remain, and if so, how disputes are resolved at each stage.

The study examined the Kipsigis TDRM procedures both in civil and criminal cases; their jurisdiction (personal and subject-matter); whether and how the Kipsigis TDRMs work with formal courts as complementary avenues, for instance through referral of felonies and complex civil cases; whether there are any challenges in the enforcement of awards and how courts can

[125] Ian Q Orchardson, *The Kipsigsis* (East African Literature Bureau, 1961) 17.

play a role; and whether the entire dispute resolution processes are consistent with the natural justice principles, the Bill of Rights and other provisions of the Constitution, 2010.

Some of the issues elicited included how TDRMs have been used over time, why the community prefers TDRMs, jurisdiction of TDRMs, the challenges faced in the application of TDRMs, strengths, procedural aspects (hearing and sentencing), and other customary law issues among the Kipsigis community. It was noted that the elders were not aware of certain terms especially the repugnance clause in the Constitution 2010. The researcher addressed this challenge through a local translator. Further, while it is acknowledged the data generated from the Kipsigis elders align with the objectives of this study, the researcher observed that it might be important to draw examples from other communities in Kenya, particularly on topical issues such as jurisdiction. In addition, the researcher considered the views and observations of local chiefs (who work closely with the elders), and selected key informants from the Judiciary, the Law Society of Kenya, civil society and the Chartered Institute of Arbitrators.

The study also explored the experience of integration of TDRMs in South Africa and Rwanda. The rationale is that, compared with other countries in Africa, these two countries have extensively provided for the recognition, jurisdiction, and functioning of TDRMs in their

national laws. Rwanda also has the *Abunzi* systems,[126] which are reflected in Article 159 of the Constitution of Rwanda, 2003, and the Organic Law of 2010.[161] The latter Law deals with the jurisdiction, functioning and competence of the *Abunzi* Mediation Committees. The *abunzi* system is used as a first instance avenue for cases valued below 3 million Rwandese francs. Appeals from the *abunzi* mediators go to the formal courts.[162] Important insights may be drawn from South Africa's Traditional Courts Bill and other statutory provisions on traditional leadership and structures.

1.12 Research Methodology

The study applied mixed methods approach comprising the desk-based research, qualitative research, and case studies. The desk-based research entailed a review of existing literature,

[126] The term *abunzi* literally refers to "those who reconcile." These are local mediators in Rwanda who have the mandate to resolve disputes through mediation. *See also* Mutisi and Sansculotte (n 6) 41. [161] Mutisi and Sansculotte (n 6) 47. [162] ibid 47.

including books, journals, reports, publications, and internet sources. The researcher also analysed pre-2010 and post-2010 primary sources, such as statutes and court decisions. The study used qualitative approach of data collection and analysis. According to Aspers and Corte, qualitative research is an iterative process in which empirical materials – case studies, life stories and experiences, as well as interview, observational, historical, interactional and visual texts, among others – are generated and analysed to uncover trends in or understand the phenomenon being studied.[127] The case study approach involved a study of the Kipsigis TDRMs in Kenya, as well as comparative TDRM practices from South Africa and Rwanda, to inform the recommendations of the study. The rationale for selecting these case studies is stated in part 1.11 above.

The methodology of the study is presented further under the following themes: the research site, population, sampling and data collection techniques, data analysis, and ethical requirements.

1.12.1 Research Site

The study was conducted in Kericho County, which has a total of six constituencies - Belgut, Ainamoi, Bureti, Kipkelion East, Kipkelion West and Sigowet-Soin. Kericho County is

inhabited by people from other communities who work in the tea plantations, such as the Kisii, Kikuyu, and Luo. This presented a good case to assess how the Kispisgis TDRM has exercised its personal jurisdiction in relation to non-members. The study also considered the fact that the councils of elders in Kericho County comprise elders from different constituencies, which is rare in other counties. For instance, Kamasian council of elders comprises elders from Kipkelion West and Kipkelion East constituencies, while Myoot council of elders is largely composed of elders from Ainamoi and Belgut constituencies. Most of these elders constitute the larger Kipsigis council of elders. Kabianga Council of Elders was considered because one of the elders is a former assistant chief, who shared information on how the Kipsigis TDRMs relate with the local administration.

[127] Patrik Aspers and Ugo Corte, 'What is Qualitative in Qualitative Research' (2019) 42 Qualitative Sociology 139–160.

1.12.2 Population, Sample Size and Sampling Procedure

The main population for this study comprised purposively sampled CEs and TDRM users within Kericho County. The researcher interviewed the Kamasian CEs from Kipkelion West and East constituencies, Myoot CEs from Ainamoi and Belgut constituencies, and a group of village elders from Kabianga ward. The study commenced with a scoping study on 12 January 2018 involving a focus group discussion with 12 participants within Kericho County to test the research tools. The participants included 7 elders, 3 chiefs and 2 TDRM users.

The actual study employed purposive sampling to ensure that the groups selected were composed of elders who have the experience and presumed ability to help the researcher in achieving the research objectives. The initial plan was to sample elders who have presided over disputes for over 10 years. However, some of the oldest elders presumed to be well experienced, especially Myoot CEs, were unwell and it was difficult to interview them. The researcher therefore chose to sample elders of all ages to ensure wide geographical scope within Kericho County. It was presumed that, since most of the elders have been chosen by the community to serve as such based on their integrity and understanding of the community customs, tradition and culture, they already have the required experience as community leaders. The age of those who participated ranged from 43 years to 82 years. The researcher conducted a separate Focus Group Discussion (FGD) with the Myoot elders on 15 December 2018, which greatly addressed some of the issues that were not adequately responded to by the Kamasian and Kabianga elders. Myoot comprises senior elders (traditionally called *kiruogik*). A total of twenty-one (21) elders were interviewed, which included eight (8) elders from Kabianga; eight (8) elders from Kamasian; and five (5) from Myoot.

The researcher also interviewed 4 chiefs from Kabianga who have an active role in TDRM process. It was noted that the presence of chiefs instils confidence and a sense of security in the process. All records of TDRM proceedings are also kept by the chiefs and produced as and when required. In addition, 4 TDRM users from Kabianga and Kamasian were interviewed to assess the circumstances under which they appeared before the elders (whether it was at first instance or by way of referral by court), and whether the TDRM process was consistent with the Constitution, including the principles of natural justice, equality and legality.

Sixteen (16) key informant interviews were conducted with purposively sampled representatives from the judiciary (magistrates and judges), the Law Society of Kenya (LSK),

Chartered Institute of Arbitrators, local administrators, academia and civil society. The sampling of these key informants was based on their understanding of the research topic and expertise in ADR and customary law.

Overall, fourth-one (41) participants were engaged as respondents in this study compared to the target sample of sixty (60) participants. Eleven (11) of these were women, who shared important perspectives and insights on the question of gender equality and the place of women in community justice processes – specifically on whether the rights of women (and children, by extension) are effectively protected and fulfilled by TDRMs, whether they are treated equally as men or accorded special rights.

Table 1: Sample and Sample Size by Category of Respondents

Category	**Sub-category of respondents**	**Target sample**	**Interviewed**	**Gender**	
				Men	**Women**
COEs	Elders	30	21	19	2
TDR Users	Community members	15	4	1	3
Judiciary	Judges	2	1	-	1
	Magistrates	3	3	1	2
Law Society of Kenya	Legal practitioners	4	3	2	1
Local administration	Chiefs	4	4	3	1
Academia	Lecturers/Advocates	-	3	2	1
Civil Society	NGO	-	1	1	-
Chartered Institute of Arbitrators (Kenya)	Accredited mediator/arbitrator/advocate	2	1	1	-
Total		**60**	**41**	**30**	**11**

1.12.3 Data Collection Techniques and Tools

The study collected qualitative data using two techniques, namely FGDs and interviews.

(a) Interviews

Individual interviews were conducted with the elders and chiefs, reflecting on the tentative findings of the study after the completion of FGDs. The researcher used open-ended questionnaires to elicit views on the nature of TDRMs, their jurisdiction and extent of alignment with the Constitution.

With regard to the key informants, interviews were conducted based on a guideline containing open-ended questions for further probing. The questions were designed to include aspects such the elders' intellectual rigour in investigating claims and apportioning fault, the vulnerability of TDRMs to partiality and corruption, how to enhance the legitimacy of TDRMs, full and partial integration of TDRMs with the formal justice system, and whether there is need to have a hybrid oversight body that draws upon the authority of both TDRMs and formal justice.

(b) FDGs

The researcher conducted FGDs after individual interviews with the elders and TDRM users. The importance of FGDs was to allow the respondents to freely express their views. FGDs, therefore, provided the diversity of views and opinions on the Kipsigis TDRMs and customary law.

(c) Data Recording Tools

Recording of the data was done through note taking and audio recording. To ensure reliability, the data was recorded as near as possible in the words of the respondents and with minimal or no inferences. The researcher enlisted the services of two research assistants and one field assistant to expedite the field study.

1.12.4 Data Analysis

The findings of this research were analysed using a qualitative approach that involved four processes: reduction of data based on its relevance; thematic grouping according to the objectives of the study; drawing provisional conclusions about the data based on the research questions and hypothesis; and data verifying. Data reduction was done by simplifying and transforming raw data to useful data as per the study objectives. This ensured that the data collected was relevant to the objectives of this study. The provisional conclusions drawn were tested or verified for their validity.

Qualitative data was presented in a narrative form by the researcher. The data collected through interviews and FGDs was augmented with that from secondary sources to allow for comparison and validation of the research findings.

1.12.5 Ethical Considerations

The study observed utmost objectivity and integrity by avoiding any issues of bias in the collection of data. The researcher explained the nature and purpose of the study to the respondents to allow them to make informed decisions as to whether or not to participate in the study. The respondents were caused to sign consent forms authorising the use of their names in the study. However, the researcher respected their right to privacy by anonymising their names during data presentation. The respondents were also informed that they can withdraw their consent any time they wished not to continue with the interviews or FGDs.

1.13 Chapter Breakdown

This study is structured along seven chapters as outlined below.

Chapter One: Introduction

This chapter provides an overview of the study comprising, among others, a contextual analysis of TDRMs in Kenya, the statement of the problem, research questions and objectives, methodology and theoretical framework.

Chapter Two: Legal Framework Governing TDRMs in Kenya

This chapter analyses the national, regional and international law provisions applicable to TDRMs to establish whether there is an effective legal framework for inter-section between the formal justice systems and TDRMs. The chapter also analyses the question of jurisdiction based on best practices from select jurisdictions.

Chapter Three: Case Study of the Kipsigis TDRMs

This chapter discusses the history of TDRMs in Kenya, the types of TDRMs and the disputes involved based on examples from the Kipsigis community. The chapter also outlines the Kipsigis' traditional dispute resolution procedures in both criminal and civil cases. These include the various hearing stages, whether there are any appellate bodies at the local level, the sentencing processes, compensation, the enforcement of decisions or awards, and whether there are any cases which have been referred to courts and vice versa.

Chapter Four: Interplay of the Kipsigis TDRMs with the Rules of Natural Justice

This chapter discusses whether and how the Kipsigis community's TDRMs comply with the standards of natural justice or procedural fairness and human rights. The researcher interrogates how TDRMs align with these principles based on Rawls' theory of justice.

Chapter Five: Constraints to the Integration of TDRMs with the Formal Justice System

This chapter discusses the concept of repugnance using pre-2010 and post-2010 case law, and the impact of the repugnance clause on the development and integration of the Kipsigis TDRMs with the formal justice systems. It also identifies the challenges that hinder the development and use of the Kipsigis TDRMs and their interrelation with the formal justice system.

Chapter Six: The Question of Codification of TDRMs

This chapter discusses the question of codification of TDRMs in Kenya, including how the Land Dispute Tribunals (LDTs) interacted with formal courts in the adjudication of land disputes. The chapter identifies best practices of TDRMs in Rwanda and South Africa to show how the mechanisms have been integrated with the formal justice systems in these jurisdictions. The rationale for this analysis is to draw lessons for Kenya.

Chapter Seven: Conclusion and Recommendations

Chapter seven is the final chapter of this study. It comprises a summary of findings based on the research questions and hypotheses, recommendations, and conclusion. Part of the recommendations are proposed provisions of an ideal regulatory framework for TDRMs, particularly on the procedural aspects, the guiding principles, the jurisdiction of TDRMs, what and how cases should be referred to courts, and how courts can intervene in the enforcement of awards.

CHAPTER 2

LEGAL FRAMEWORK GOVERNING TDRMS IN KENYA

2.1 Introduction

The integration of TDRMs with the formal justice system depends on the prevailing legal and policy framework. TDRMs are embedded in customary law. The Constitution and other written

laws also contain relevant provisions. Countries which have successfully integrated TDRMs with the formal court system started with a constitutional recognition, which Kenya has met. However, mere textual recognition is not enough. There are many questions regarding the application of TDRMs that remain unclear, and it is arguable whether a legislative or policy framework suffices. In light of this, this chapter examines the prevailing legal and policy framework to establish whether it adequately regulates the application of TDRMs in Kenya. Key aspects in the chapter include: jurisdiction of TDRMs (both personal and subject matter), the legitimacy of TDRMs, linkage with the judicial system, and connected issues. The chapter draws a few best practices on the question of delineating the jurisdiction of TDRMs, from Bolivia, Ghana and South Sudan. Further analysis of country case studies will be explored in the subsequent chapters.

2.2 Evolution of TDRMs in Kenya

Before colonialism, communities in Kenya were governed by traditional normative order emanating from a distinctively African ontological metaphysics.[164] Resulting from this was an epistemologically distinct concept of law and politics informed by collectivism, culture and religion.[165] As noted by Mazrui, social cohesion in the communities was realised through consensus, with minimal use of coercion.[166] Regulation in the African sense was therefore distinct from the coercive laws issuing from official state systems.[167] Arbitration and mediation were preferred because of their capacity to promote cohesion even after disruptive conflicts.[128] Inter and intra-ethnic conflicts were also settled by elders from the conflicting communities coming together to enter into peace pacts.[129]

[164] Dial Dayana Ndima, 'Reimagining and Reintegrating African Jurisprudence under the South African Constitution' (Doctor of Laws Thesis, University of South Africa 2013) 1; John Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' (2015) 1(1) Strathmore Law Journal 41, 43. [165] Ndima (n 164) 2.

[166] Ali A Mazrui, *The Africans: A Triple Heritage* (Boston and Toronto: Little, Brown and Co. 1986) 69, cited in Ambani and Ahaya (n 164) 44.

[167] Linda James Myers and David H Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World (2010) <scholarworks.iu.edu/journals/index.php/bdr/article/download/1220> accessed 30 November 2016.

[128] Andrew Chukwuemerie, 'The Internationalisation of African Customary Law of Arbitration' (2006) 14 African Journal, International Commercial Law 143-175.

[129] For instance, the Pokot and the Marakwet had a traditional peace pact known as *miss*.

The advent of colonialism and capitalism in Kenya introduced the Western legal systems that imposed strict limitations on the application of TDRMs.[130] For instance, Article 2(b) of the Native Courts Regulations Ordinance, 1897, recognized the application of TDRMs (then comprised of local chiefs and elders)[131] subject to the repugnance test under Article 52 of the 1897 Order-in-Council.[132] Native tribunals were allowed, under section 13(a) of the 1930 Native Tribunals Ordinance, to apply customary law as long as it was not repugnant to justice or morality or inconsistent with any law then in force in the colony. Yet, the ideals of justice and morality were applied strictly in accordance with the British understanding as opposed to the African customs.[133]

Formal courts held African customary practices in contempt. For instance, in *Re Southern Rhodesia*, the Privy Council described African tribes as socially disorganised 'that their usages and conception of rights and duties are not to be reconciled with the institution or legal ideas of civilised society.'[134] This perception by the Privy Council implies that the reason why the jurisdiction of traditional courts was limited to certain cases within the tribal reserves was because some of the customs and usages applied were archaic and therefore repugnant to justice and morality.

Nevertheless, the colonial administration allowed traditional institutions to operate in order to use customary law as a tool for gradually moulding the African society.[135] This may be buttressed by the reforms undertaken between 1930 when the Native Tribunals Ordinance was

[130] Ndima (n 164) 2.
[131] Muslims were allowed to apply their law under Article 57 of the 1897 Native Courts Regulations Ordinance, 1897.
[132] Article 52 of the 1897 Order-in-Council provided that African customary law applied to Africans provided it was not repugnant to justice and morality.
[133] *Regina v Luke Marangula*, Reports of Northern Rhodesia (1949-1954) 140.
[134] *Re Southern Rhodesia* (1919) AC 211.
[135] Brett L Shadle, 'Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60' (1999) 40 The Journal of African History 412.

promulgated to establish native tribunals, and 1967 when the Magistrate's Courts Act, was promulgated to replace all African Courts with District Magistrate's Courts.[136]

The post-independence government of Kenya inherited the English formal systems of law, including the repugnance test,[137] but this has not stopped Kenyan tribal communities from using TDRMs alongside the formal justice system.[138] This has resulted to plurality in the Kenyan justice system under which TDRMs remain integral.

2.3 International Law Perspectives on the Use of TDRMs

International law does not expressly provide for TDRMs. However, the rationale for promoting such mechanisms may be inferred from the general recognition of the right to culture and selfdetermination under the UN Charter,[139] Universal Declaration of Human Rights, 1948,[140] the International Covenant on Civil and Political Rights, 1966 (ICCPR),[141] the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR),[142] among others. Article 33 of the UN Charter specifically requires Sates parties to an international dispute to first resolve the dispute through mediation, negotiation, enquiry, conciliation, arbitration or judicial settlement.[143] The Parties may also approach regional or other peaceful avenues of their own choice to address the dispute.[144] Such avenues could include the AU Panel of the Wise or TDRMs and other domestic non-judicial peace building initiatives. These instruments apply to Kenya vide Article 2(5) of the Constitution, 2010.

TDRMs are a key enabler of self-determination, which upholds the right of communities to determine their own governance systems. In the *East Timor* case, the International Court of Justice described self-determination as an *erga omnes* right of peoples and an indispensable

[136] Richard L Abel, 'Customary Laws of Wrongs in Kenya: An Essay in Research Method' (1969) 4013 Faculty Scholarship Series 582-586.
[137] See the Judicature Act Cap 8 Laws of Kenya, section 3(2); Constitution of Kenya 2010, Article 159(3).
[138] Kariuki (n 45) 206.
[139] United Nations, *Charter of the United Nations* (1 UNTS XVI, 24 October 1945), Article 1(2).
[140] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR]. Article 27(1) of the UDHR accords everyone the right to freely participate in the cultural life of his or her community.
[141] ICCPR, Article 1.
[142] ICESCR, Article 1(1).
[143] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[144] ibid.

principle in international law.[145] In the Kenyan context, this principle derives from the inaugural line, '*We, the people of Kenya*' under the preamble of the Constitution 2010, which

aptly captures the vision of the people. The Constitution underscores the sovereignty of the Kenyan people;[146] and it is within this premise that the people of Kenya have a right to determine their political and cultural identity and freely pursue their development goals.[147] Customary governance institutions, such as TDRMs, are a core tenet of the peoples' cultural identity.

Ojwang' defines the term 'peoples' as an organised group seeking to sustain and liberate their distinct cultural identity.[148] Self-determination is, thus, the legitimate basis for remedial rights under which people seek to revitalise their identity.[149] It drives on five principles: nondiscrimination; cultural integrity; control over land and resources; social welfare and development; and self-governance.[150] It constitutes independence and autonomy of control and choice of a peoples' destinies.[191] This includes full control and enjoyment of distinctive lifestyles, customs, linguistics, and other cultural practices which are a central heritage of a people that should be protected and preserved.[151]

Laws are only effective if, in their formulation, account is taken of society as a whole in terms of governance structures, history, culture, religion, ethnicity, economy, and politics. Under Article 27 of the ICCPR, persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture. In one of its General Comments, the Committee on Economic, Social and Cultural Rights (CESCR) asserts that the right to participate in cultural life is a freedom that requires the State party not to interfere with it, and to take positive action for participation, facilitation and promotion of cultural life, and access

[145] International Court of Justice (ICJ), Case Concerning East Timor, *Portugal v Australia* (1995), para. 23-35.
[146] Constitution of Kenya 2010, Article 1.
[147] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 993 U.N.T.S. 3, article 1(1) (entered into force January 3, 1976); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 999 U.N.T.S. 171, article 1(1) (entered into force March 23, 1976).
[148] Duncan Ojwang, *Converging Child Identity & Culture with the Tribe's Right to Self Determination: The Native American and Africa Child Identity* (Lambert Academic Publishing, 2015) 21.
[149] ibid 25.
[150] ibid 21.
[191] ibid.
[151] ibid 29.

to cultural goods.[152] The Committee further states that the decision by a person to exercise such a right is a cultural choice that should be recognised, respected and protected on the basis of equality. The Committee, however, recognises the importance of applying limitations, in accordance with Article 4 of the ICESCR, to one's right to participate in cultural life especially

where it involves practices that violate other human rights; provided that the limitations applied are proportionate and consistent with the international human rights on limitations.

Further, in General Comment no. 24 of 2017, the CESCR states that effective access to justice for indigenous peoples may require a State party to recognise their customary laws, traditions and practices, and customary ownership of their lands and natural resources in judicial proceedings. The State party should also provide training to judicial officers on indigenous history, legal traditions and customs.

Kenya has not ratified the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[153] and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO Convention No 169"), but the constitutional recognition of indigenous communities, culture, customary law and TDRMs, is a key milestone.[154] Notably, culture is considered as a key foundation of the nation and the civilisation of the people of Kenya.[155] The Constitution of Kenya, 2010 underscores the right to enjoy one's language and culture and not to be forced to observe another's culture.[156] Under the ILO Convention No 169, tribal peoples are entitled to maintain and develop their own customs and institutions, and any mechanisms customarily practised for dealing with community disputes must be respected.[157]

TDRMs form an important indicator of culture and cultural expressions of tribal peoples. They have, as their major point of selling, the attributes of cost-effectiveness, accessibility, simple

[152] Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life* (2009).
[153] United Nations Declaration on the Rights of Indigenous Peoples, Resolution No. 61/295 adopted in 107th Plenary Meeting on 13th September 2007 in New York City USA.
[154] Constitution of Kenya, 2010, Article 159(2).
[155] ibid, Article 11(1).
[156] ibid, Article 44.
[157] See also ICESCR, article 8(2) and 9.

procedures, flexibility, and restoration of relationships. Their use is therefore critical in advancing the right to access to justice as encapsulated in the Constitution of Kenya, 2010.[158]

Further, the use of TDRMs is informed by, and reinforces, the concept of legal pluralism. The Judicature Act envisages this concept by providing for different sources of law, including customary law. These sources of law co-exist in the same social context.

2.4 The Legal Test for TDRMs in Kenya

The Constitution 2010 is the primary instrument setting the standard for the use of TDRMs in Kenya.[159] It is the highest judicial norm that binds everyone including the State.[160] The supremacy of the Constitution in relation to other laws is anchored in Article 2(4), which positions the Constitution as the primary validity test for 'any law, including customary law.' The effect of the provision is to establish a constitutional test for other laws in Kenya, including customary law which is the hallmark of TDRMs. It represents a clear appreciation of customary law as an important source of law and the fact that constitutional standards and principles hold supreme and should be promoted. The Constitution thus offers the primary benchmark against which TDRMs are measured.

TDRMs, as an embodiment of customary law, should be applied in accordance with the Constitution. In particular, TDRMs must be guided by the national values and principles of governance, most notably the rule of law, human dignity, inclusiveness, equality, human rights, non-discrimination, transparency and accountability.[161] In addition, the Constitution guarantees the right to equal protection of the law for all persons.[162] This right is augmented by the principles of fairness, cost-effectiveness, efficiency, legality, equality, timeliness,

[158] Constitution of Kenya, 2010, Article 48.
[159] Ambani and Ahaya (n 164) 49.
[160] Constitution of Kenya 2010, Article 2(1).
[161] ibid, Article 10(2).
[162] ibid, Article 27(1).

proportionality, and effective remedy. Some of these principles serve as the core elements of the right to fair administrative action under the Constitution.[163]

Moreover, the Judicature Act[164] requires formal courts to be '*guided by African customary law in civil cases*' provided '*it is not repugnant to justice and morality or inconsistent with any written law*'.[165] This requirement restricts the application of customary law in two ways. First, it requires courts to apply customary law as a *guide* and not as a binding source of law. While the provision is silent on whether or not customary law is hierarchically inferior to the other sources of law, the fact that it should be a guide puts customary law at the bottom of the hierarchy. This uncertainty has been cured by Article 2(4) of the 2010 Constitution, which identifies customary law as one of the laws that should be voided if proven to be inconsistent

with the Constitution. This provision replicates the supremacy clause previously provided for under section 3 of the 1969 Constitution.

Secondly, customary law cannot be applied if it is, in the court's opinion, repugnant to justice and morality. Any customary law practices which offend justice and morality, are caught under section 3(2) of the Judicature Act. This provision is also amplified in Article 159(3), which states that TDRMs should not be applied in a manner that is repugnant to justice and morality or inconsistent with the Bill of rights and the Constitution or any other written law. TDRMs are deeply anchored in and informed by a community's customs and culture. Their effectiveness in enhancing access to justice is, therefore, pegged on the recognition of culture as a key element of the contemporary human rights regimes. Any limitation test against TDRMs includes cultural practices and the substantive law that governs them. Thus, the Constitution seeks to retain the repugnancy clause reflected in section 3(2) of the Judicature Act but with a shift to TDRMs.

It is imperative to note that the application of the repugnancy test depends on the court's discretion regarding the meaning of 'justice and morality'. This is typically based on the judicial officer's own understanding and the perceived deficiencies of TDRMs, such as bias,

[163] ibid, Article 47(1).
[164] Cap 8, Laws of Kenya.
[165] Judicature Act Cap 8 Laws of Kenya, s 3(2).

discrimination, abuse and non-compliance with natural justice principles. In *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others*,[166] the High Court issued a temporary injunction against the use of Njuri Ncheke in the matter based on the Applicant's affidavit which stated, among others, that the "Njuri Ncheke practices are dehumanising, emotionally stressing, traumatising, stigmatizing and demeaning," and that "their decisions are not based on proper application of law and are not fair."

2.5 Jurisdiction of TDRMs

Jurisdiction is a fundamental question that courts are constrained to determine whenever this arises in a matter before them. According to Castleman, TDRMs must resolve the disputes that are legitimately brought before them if they are to be effective.[208] This requires them to define their powers to exercise jurisdiction over both the dispute (subject matter jurisdiction) and the parties before them (personal jurisdiction).[167]

2.5.1 Subject Matter Jurisdiction

TDRMs in Kenya often apply to disputes that are known to customary law. These may be both civil and criminal. For instance, the Kipsigis TDRMs have a wide jurisdiction to hear disputes related to, inter alia, boundaries, marriage, succession, assault, theft, rape and homicide (*rumiisyeet*). Despite the absence of a specific framework governing TDRMs, the subject matter jurisdiction of TDRMs in Kenya may be derived from a number of laws as discussed further under the following sub-headings.

2.5.1.1 Civil and Personal Law Jurisdiction of TDRMs

TDRMs are naturally embedded in customary law. This law is dynamic and constantly evolving, and so are its attendant institutions such as TDRMs. Thus, a claim under customary law may be subjected to TDRMs at the request of the parties. Such a claim is limited under the Magistrates' Courts Act, 2015, to civil matters, such as land held under customary tenure; marriage, maintenance or dowry; seduction or pregnancy of unmarried women or girls;

[166] [2012] eKLR [22]. [208] David A Castleman, 'Personal Jurisdiction in Tribal Courts' (2006) 154 University of Pennsylvania Law Review 1253, 1254.
[167] ibid.

adultery; matters affecting the status of women, widows and children; and intestate succession and administration of intestate estates not governed by statutory law.[168]

(a) Land Disputes

Land disputes involve complex issues, including, inter alia, ownership, control, management and administration. Their resolution in the most effective and efficient way is a critical requirement for sustainable economic growth. The National Land Policy, 2009 urges the State to integrate and utilise all possible conflict resolution options including those traditionally used by communities. The Constitution 2010 encourages the use of recognised community-based mechanisms to address land disputes.[169] One of the principles of land policy under the Land Act, 2012, includes the use of ADR mechanisms, such as TDRMs, in the management of land disputes.

The National Land Commission (NLC), which is the main institution involved in the administration and management of land in Kenya, is required to observe the above principle by encouraging the use of TDRMs in land disputes.[170] The NLC may establish committees and county offices for the carrying out of its functions.[213] The membership of these committees

may include other persons whose knowledge and skills are necessary in the discharge of the NLC's mandate.[171] Community leaders play significant role in the management of land. This provision therefore provides room for their inclusion in the NLC's activities. Section 17 of the NLC Act requires the NLC to consult and cooperate with other government agencies at the national and county levels in line with Articles 10 and 232 of the Constitution. This provision can be amended to allow for consultation with the elders on matters relating to community land.

The main legislation governing community land is the Community Land Act, 2016. Any disputes relating to such lands should be settled in the first instance using ADR mechanisms including TDRMs.[172] The Act requires courts or other dispute resolution fora to apply relevant

[168] Magistrates' Courts Act 2015, s 7(3).
[169] Constitution of Kenya, 2010, Article 60(1) (g).
[170] Constitution of Kenya, 2010, Article 67 (2) (f); National Land Commission Act 2012, s 5(f). [213] National Land Commission Act 2012, s 16.
[171] National Land Commission Act 2012, s. 16(2(.
[172] Community Land Act 2016, s 39(1) (giving effect to Article 60(1)(g) of the 2010 Constitution 2010).
[216] Community Land Regulations 2017, r. 25(1).

customary law in the settlement of community land disputes only if that law is not repugnant to justice and morality or inconsistent with the Constitution. Where the community is unable to resolve the dispute, the complainant shall refer it to the land adjudication officer.[216] The Cabinet Secretary in charge of land shall appoint an ad hoc committee to hear and determine this dispute.[173] In the hearing and determination of the dispute, the committee may consider ADR mechanisms including TDRMs.[174] The membership of the committee must include not more than four representatives from the communities where the community land is situate. The selection of these representatives must take into account the two-thirds gender rule. This requirement is critical in promoting the involvement of women in the resolution of community land disputes.

The Environment and Land Court (ELC) is required to adopt and implement appropriate resolution mechanisms such as TDRMs as stipulated in Article 159(2) (c) of the Constitution.[175] If the use of such mechanisms is a condition precedent, the ELC ought to stay the proceedings until such condition is met. The ELC must be guided by the principle of sustainable development, which includes initiatives traditionally used by communities for the management of land and natural resources provided the same are not in conflict with any written law.[220]

(b) Matrimonial Disputes

The Marriage Act, 2014, contains provisions on the resolution of matrimonial disputes.[176] The Act specifically provides that a dispute relating to the resolution of a customary marriage may be resolved in the first instance through conciliation, CDRMs or TDRMs before the petition is determined by court.[177] This process should align with the Constitution.[178] Moreover, the mediator or conciliator is required to prepare a process report for the court. In this regard, the court plays a supervisory role over the conciliation process.

[173] ibid, r. 25(4).
[174] ibid, r. 25(10).
[175] Environment and Land Court Act 2011, s 20.
[220] ibid, s 18.
[176] Marriage Act 2014, Part X.
[177] ibid, s 68(1).
[178] ibid, s 68(2).

2.5.1.2 Criminal Jurisdiction of TDRMs

The Judicature Act emphasises that African customary law should only apply to civil matters that affect either party to the dispute.[179] It is implicit that customary law should not be applicable to criminal matters. This position is affirmed by Article 50(2) of the Kenyan Constitution to the effect that no person should be tried for a criminal offence that is not enshrined under statutory law or international law. However, the Criminal Procedure Code (CPC) allows courts to promote reconciliation in cases involving common assault, or any other offence of a personal or private nature *not amounting to felony,* and *not aggravated in degree,* on terms of payment of compensation or other terms as may be permitted by the court.[225] This provision clearly restricts the application of customary law (including TDRMs) to petty offences, such as common assault, and reserves the jurisdiction regarding felonies and other serious offences for the formal courts.

Pre-2010 jurisprudence affirms this limitation. For instance, in *Kosele African Court Criminal Case no 33 of 1966*, the court found the accused guilty of indecent assault and imposed a customary fine of a heifer instead of imprisonment. Likewise, in *Bungoma District African Court Criminal Case No 493 of 1967*, the accused was found guilty of common assault and fined a customary compensation of a sheep. The imposition of a customary compensation may be due to the lack of clarity under section 176 of the CPC on how courts should determine the specific amount of compensation in monetary terms.

While the post-2010 jurisprudence of customary law indicates widespread application of the concept of 'compensation' under section 176 of the CPC, questions have emerged as to the legality of extending this application to felonies. The most relevant case is *R v Mohamed Abdow Mohamed*,[180] which was marked as settled based on Islamic customs and laws, as well as Articles 157 and 159(1) of the Constitution. It was claimed that the accused's family had given goats and camels to the deceased's family as compensation and performed blood money rituals. However, in *Stephen Kipruto Cheboi & 2 others v R*,[181] the court declined to quash the

[179] Judicature Act, Cap 8 Laws of Kenya, s 3(2). [225] Criminal Procedure Code (Cap 75), s 176.
[180] [2013] eKLR.
[181] [2014] eKLR.

conviction of the appellants who had appealed on grounds that an amicable resolution had been reached through reconciliation aimed at enhancing family cohesion. Equally, in *Republic v Abdulahi Noor Mohamed* (alias Arab),[182] the High Court raised questions on the above case, emphasising the importance of having guiding principles on such aspects as the jurisdiction of TDRMs, interrelation of such mechanisms with the court process, how and when TDRMs should be invoked, among others.

In addition, the National Cohesion and Integration Act 2008 mandates the National Cohesion and Integration Commission to promote conciliation, mediation and similar ADR mechanisms to enhance ethnic and racial peace and harmony.[183] The Act provides for offences such as hate speech, which is a felony.[230] This implies that TDRMs may be used as a restorative mechanism to secure peace and harmony in conflicting communities even where felonies have been committed.

The above analysis exudes conflicting positions regarding the criminal jurisdiction of TDRMs under section 176(3) of the CPC. The researcher's position in this regard is that TDRMs should exercise their jurisdiction within the remit of section 176 of the CPC and only extend to capital offences where the parties, the victims or other stakeholders involved in the matter have *consensually* and *voluntarily submitted* to the TDRM process and the court is satisfied that the ends of justice have been met. These twin elements essentially limit the jurisdiction of TDRMs in sensitive cases involving children and other vulnerable or marginalised groups given the potential difficulty in ascertaining free, mutual, informed and irrevocable consent. The role of the Director of Public Prosecution (DPP) in such cases is paramount as a representative of state interests in criminal cases under Article 157 of the Constitution. All these parameters should

be clearly defined in legislation. Otherwise, Kenya will continue developing bad jurisprudence that will be relied upon to subvert the ends of justice. The most recent scenario took place in Garissa in which an accused person, who had been charged with murder, was released by the Court following an out-of-court settlement involving payment of forty camels worth Ksh4 million to the family of the deceased.[184]

[182] [2016] eKLR.
[183] National Cohesion and Integration Act 2008, s 25(2)(g).
[230] ibid, s 13.
[184] Kamau Muthoni and Graham Kajilwa, 'Man Pays 40 Camels Worth Sh4.4 Million to Settle Murder Case' *Standard Digital* (Online, 26 March 2018).

Global best practices justify the need for a legal or policy guideline on the criminal jurisdiction of TDRMs. For instance, Ghana has enacted the Alternative Dispute Resolution Act 2010, which provides for among others, customary arbitration.[185] Part 3 of this Act prohibits the application of customary arbitration in criminal matters, unless it is so ordered by a court. Similarly, in Bolivia, TDRMs are restricted from adjudicating on certain legal matters, such as crimes against humanity, crimes relating to terrorism, trade, corruption, human and drug trafficking, tariff law, and civic cases to which the state is a party.[186] Additionally, the jurisdiction of TDRMs does not extend to matters relating to children and adolescents, homicide or assassination, labour, social security, tax, information, hydrocarbon, and forest.[187][188] The Bolivian Law on Jurisdictional Delimitation prohibits indigenous authorities from dealing with agrarian law issues, except those relating to community land. The approach of delimiting the jurisdiction of TDRMs constitutes an important best practice for Kenya.

2.5.2 Personal Jurisdiction

In most cases, TDRMs consider themselves as having general jurisdiction. A question that arises is: under what circumstances does such a mechanism exercises jurisdiction over a party? As was held by the US Supreme Court in *Nevada v Hicks*, such forums cannot be 'courts of general jurisdiction' because their 'inherent adjudicative jurisdiction over non-members' is at most only as broad as their legislative jurisdiction.[235] The definition of a non-member in India provides important perspectives in the instant discussion. As noted by Castleman, an Indian is someone: with some Indian blood who is considered an Indian by his or her community; or who is a member of a particular tribe.[236] This gives rise to three classes of persons: non-Indian,

Indian non-member, and member. In *Montana v United States*,[237] the US Supreme Court limited legislative or regulatory jurisdiction over non-members to cases where the non-member is involved in a consensual relationship with the tribe or where the political integrity, economic

[185] The Alternative Disputes Resolution Act, 2010 (Act 798) Preamble.
[186] Anna Barrera, 'Turning Legal Pluralism into State-Sanctioned Law: Assessing the Implications of the New Constitutions and Laws in Bolivia and Ecuador' (2011) German Institute of Global and Area Studies Working Paper 176/2011, 12.
[187] Bolivian Law on Jurisdictional Delimitation, Article 8-11.
[188] US 367 (persuasive to Kenya). [236]
Castleman (n 208) 1259.

security, or health and welfare of the tribe is at stake. This limitation was re-affirmed in *Strate v A-1 Contractors*.[238]

It should be noted that these limitations have been delineated by the court, and not Parliament, which has the plenary power to legislate. Whichever is the case, Kenyan courts and Parliament have not delimited this jurisdiction. Thus, there is no clarity as to whether TDRMs have personal jurisdiction on non-members. In the Kenyan context, and borrowing from the above Indian perspective, non-members may be persons who are part of a particular community by virtue of intermarriage, displacement, immigration, or other reasons. A 'community' is defined under the Community Land Act 2016 as a distinct and organised group of users of land identified based on common ancestry, culture or unique modes of livelihoods, geographical space, ecological space, and socio-economic or other similar common interest. This definition takes cognizance of the possibility of having a group of people, who may not necessarily be of the same culture, common ancestry or ethnicity, but qualify as a community by virtue of other reasons including similar geographical or ecological space.

In a rural set-up especially in places experiencing commercial farming like Kericho, such a community often has a dominant tribal group (e.g. the Kipsigis) with defined customary law structures, including TDRMs. The question is whether, in such circumstances, the elders of the dominant tribal group will disqualify themselves and refer a dispute to court if it involves community members and non-members? This jurisdictional dilemma needs to be addressed in law or policy. It is however critical to recognise the deliberate inclusion of a provision in the Constitution 2010, to the effect that no one should be compelled to observe, perform or undergo another person's cultural practice.[239] This provision, if clearly captured in a TDRM-specific legislative framework, will be key in restricting the personal jurisdiction of TDRMs only to members of a tribal community.

[237] 450 US 544, 565-67 (1981).
[238] 520 US 438, 453 (1997).
[239] Constitution of Kenya 2010, Article 44(3).

2.6 Judiciary's Role in Promoting the Use of TDRMs

The Judiciary provides the main avenue for promoting the use and integration of TDRMs with the formal court system. In keeping with this principle that justice should be served to all people without delay and undue regard to technicalities,[189] courts and tribunals should be in the forefront in promoting ADR, and TDRMs in particular. This is within the spirit of advancing the overriding objective principle. The overriding objective entails facilitating the just, expeditious, proportionate and affordable settlement of the civil disputes as provided for in Civil Procedure Act.[190] This objective is also amplified by the Appellate Jurisdictions Act.[191] The ultimate goal is to ensure fairness and justice in the circumstances of every case. The overriding objective, therefore, provides a basis for courts to explore other forms of dispute resolution, including TDRMs, as complementary avenues towards enhancing access to justice.

Moreover, courts have the mandate to make orders in furtherance of the ends of justice.[192] This encompasses the mandate to promote the use of TDRMs in furtherance of the overriding objective principle.[193] Thus, based on this provision, and in the interest of justice, a court can issue an order extending the time limitations under the Limitation of Actions Act[194] where a matter has been transferred to TDRMs. In the same vein, the court can issue an order enforcing any decisions, orders or fines imposed by TDRMs.

The Civil Procedure Rules provide for pre-trial rules,[246] for instance regarding the use of ADR, which should be observed by courts before setting a case for hearing. Courts are required to employ any other appropriate avenues for resolving disputes such as TDRMs to achieve the overriding objective.[195] Additionally, a court may refer a dispute to an ADR mechanism, including TDRMs, and give necessary orders to facilitate the use of that mechanism.[196] In light

[189] ibid, Article 159(2).
[190] Cap 21, Laws of Kenya, s 1A (1).
[191] Cap 9 Laws of Kenya, ss 3A and 3B.
[192] Civil Procedure Act (Cap 21), s 3A.
[193] ibid, ss 1A and 1B.
[194] Cap 22, Laws of Kenya – sections 4(1) and 22 of this Act should be amended to allow matters which have unsuccessfully been resolved through TDRMs to be taken to court notwithstanding the lapse of time. [246] Civil Procedure Rules 2010, Order 11.
[195] ibid, Order 46 rule 20.
[196] ibid, Order 46 rule 20(2).

of this provision, the judiciary should consider introducing court-annexed TDRMs to enhance access to justice consistent with the overriding objective.

The law expressly identifies specific courts that should promote the use of TDRMs and the law that governs them. In particular, the ELC is required to adopt appropriate dispute resolution mechanisms, including TDRMs,[197] in the spirit of ensuring just, accessible, expeditious and proportionate settlement of disputes.[198] This was the case in *Joseph Kalenyan Cheboi & Others v William Suter & another*,[199] in which the ELC referred a dispute involving encroachment into ancestral land held communally under the *Marakwet* customs, to a group of clan elders (known as *Osis*) from the clan to which the parties belonged, citing Article 159(2)(c) of the Constitution. The ELC ordered that the meetings of the *Osis* be organised by the Chief, who would subsequently file findings and the report of the *Osis* within 30 days.

The High Court (Organization and Administration) Act, 2015 encourages the High Court to promote reconciliation amongst the parties to civil proceedings.[200] This Act also allows the High Court to adopt any other appropriate ADR forms, including reconciliation, mediation and TDRMs pursuant to Article 159(2)(c) of the Constitution.[201] Where ADR is a condition precedent, the Court has the option of staying the proceedings until this requirement is fulfilled.[202] In the case of *Lubaru M''imanyara v Daniel Murungi*,[203] the parties had filed consent in the High Court seeking to have the matter resolved by the *Njuri Ncheke* Council of Elders of the Meru community in Lare Division. The Court granted the application based on Articles and 60(1) (g) and 159(2) (c) of the Constitution 2010, on the use of recognised community initiatives to resolve land disputes.

In discharging their mandate, the Small Claims Courts may adopt or promote the use of TDRMs as one of the appropriate mechanisms of resolving disputes.[204] The Small Claims Courts Act,

[197] Environment and Land Court Act 2011, s 20.
[198] ibid, s 3(1).
[199] [2014] eKLR.
[200] High Court (Organization and Administration) Act 2015, s 26(1).
[201] ibid, s 26(3).
[202] ibid, s. 26(4).
[203] [2013] eKLR.
[204] Small Claims Court Act 2016, s 18(1).

2012,[205] allows the Courts to adopt alternatives means of dispute resolution and make orders necessary to facilitate such a process.[206] Any agreement reached by means of the mechanism is considered as binding upon the parties. The Courts have powers to adopt such procedures as may be appropriate to ensure fairness of process, cost-effectiveness, simplicity

of procedure, equal opportunity, and expeditious disposal of proceedings.[207] These courts shall be set up at the sub-county level or other geographical unit of decentralization pursuant to Article 6(3) of the Constitution. As 'grassroots' courts, they provide a good forum for integrating TDRMs with the judicial system. The subject matter jurisdiction is below two hundred thousand Kenya Shillings, which means that TDRMs can hear most disputes in the first instance before they are brought before the Small Claims Courts.

2.6.1 Alternative Justice Systems Framework Policy, 2020

The Alternative Justice Systems (AJS) Framework Policy represents efforts by the Judiciary to align AJS mechanisms with the Constitution of Kenya, 2010 and the Judiciary's Framework for Sustaining Judicial Transformation. The Judiciary had commissioned the AJS Taskforce to examine the legal, policy and institutional framework for AJS (including TDRMs) in order to give effect to the Judiciary's constitutional mandate to promote ADR. The Taskforce acknowledges, under the Policy, that in spite of the constitutional mandate under Article 159, AJS are yet to be institutionalised and there are *no adequate legal and policy guidelines to govern* AJS.[208]

Thus, the purpose of the AJS Framework Policy is to promote robust cooperation and harmony between AJS and the Court system, and enhance access to and expeditious delivery of justice.[209] It explores, inter alia, the historical perspectives and relevance of AJS, as well as the prevailing environment and legal imperatives for engaging with AJS in Kenya.

[205] This Act establishes Small Claims Courts with jurisdiction to hear matters relating to contracts, liability in tort, and compensation for personal injuries. The pecuniary jurisdiction of these Courts is limited to two hundred thousand shillings.
[206] Small Claims Court Act 2016, s 18(2).
[207] ibid, s 3.
[208] The Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (2020) 3 <https://www.unodc.org/documents/easternafrica//Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf> accessed 23 May 2021 [hereinafter "AJS Framework Policy"].
[209] ibid 1.

The Policy recognises the existence of four models of AJS, which are very key in the recommendations put forward for the Judiciary to consider.[210]

1. *Autonomous AJS Institutions*: These are non-judicial mechanisms that are run entirely by the community, such as TDRMs. The Policy urges the Judiciary to establish minimum standards for these institutions to ensure conformity with constitutional values.
2. *Autonomous Third-Party AJS Institutions*: These include, among others, the chiefs, police, probation officers, child welfare officers, village elders under the County government, and the chair of *Nyumba Kumi* groupings. The Policy recognises the need to remedy the gaps that exist in these institutions and the AJS process itself.
3. *Court-Annexed AJS Institutions*: These refer to AJS processes that work closely with, and under the guidance of, the Court to resolve disputes outside the Court. This model fuses the community-based justice processes and the formal justice system. The Policy calls upon the Judiciary to develop and implement, in good faith, a Plan of Action for this AJS model.
4. *Regulated AJS Institutions*: These are AJS mechanisms established, regulated, and practiced either entirely or partially by State law. These include traditional courts and/or local government structures which are incorporated in the court systems as part of the judicial mechanism. Examples of these practices of AJS can be found in South Sudan, South Africa and, to some extent, Botswana and Uganda. Kenya also briefly experimented with this model in the form of the Land Disputes Tribunals.

The Policy further acknowledges that AJS are part and parcel of the everyday lives of Kenyans and are effective in increasing access to justice for the people. However, AJS practices face a number of challenges, in particular: lack of formal recognition (as a complementary arm in the administration of justice); gender injustice; exclusion of marginalised and vulnerable persons such as women and persons living with disabilities; and lack of proper mechanisms for accountability – including lack of procedural fairness in some AJS mechanisms, and misalignment with constitutional and human rights values and standards.[211] The Policy thus

[210] ibid 7.
[211] ibid 5.

charts an avenue for recognising and animating AJS wile mitigating the identified challenges through a robust human rights framework which involves didactic engagement with those mechanisms as well as adoption of appropriate doctrines for determining their jurisdictional reach and interaction with the courts.

Importantly, the Framework Policy recommends that Kenya should only apply the first three models of AJS outlined above. These models should be maintained, respected, protected, and transformed in practice.[212] The Policy warns against introducing the fourth model (that is, the *Regulated AJS Institutions)* in Kenya on grounds that it will likely unduly distort AJS practices, is too readily amenable to appropriation, and may undermine rather than promote AJS practices overall.[213] The Policy notes further that Kenya's failed experiment with the Land Disputes' Tribunals in the 1990s provides a necessary cautionary tale in this regard.

The AJS Policy nonetheless proposes, in addition to the development of AJS User Guidelines, that a Framework be designed and operationalised to promote appropriate interaction between the Judiciary and the various models of AJS to give effect to the constitutional mandate that promotes the use of alternative justice mechanisms.[214] The Policy is, however, silent on how this Framework should look like, having warned against the introduction of Regulated AJS in Kenya. It leaves it to the Judiciary to consolidate emerging consensus on various aspects of AJS outlined in the Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country and if so, develop such a statute. The Policy adds to this muddle the recommendation that AJS be operationalised through the development of Standard Operating Procedures and Guidelines that will enhance compliance with the Constitution and human rights principles.[215] This is a confusion that the drafters of the Policy should have endeavoured to address, and it might take another time for the Judiciary to determine the appropriate model of integration besides the Framework Policy.

It suffices to note that, AJS systems are as diverse as the communities in Kenya, and any standard procedural guidelines developed as well as determination of AJS jurisdiction, should

[212] ibid 8.
[213] ibid.
[214] ibid 11.
[215] ibid 12.

be cognisant of this diversity. This could be done through studying and grouping of diverse customs, and the cases which have frequently been resolved by TDRM forums – something that the AJS Framework Policy is silent about.

Nevertheless, the Policy forms an important point of reference on the role of AJS in the justice chain in Kenya, and how to ensure such mechanisms are administered consistent with the Constitution. Thus, it provides an important basis for this study to recommend a "beyond textual recognition" model for strengthening TDRMs and integrating them with the formal justice system in Kenya. This includes a best practice justification for a statutory framework that provides for the specific jurisdiction and basic guidelines for TDRMs, and aligns their functioning with the workings of formal courts – for instance, through execution of TDRM awards, transfer or referral of disputes, appeals and opposition against TDRM decisions, as well as oversight.

Furthermore, whereas the AJS Policy recognises the importance of the Constitution and the Bill of Rights as sufficient standards for the legality of AJS (including TDRMs), it does not conclusively provide guidance on the nebulous repugnancy test in Article 159 of the Constitution – again leaving it open for the Judiciary to address this. This study grapples with this question based on the absence of a clear definition of 'justice' and 'morality' as the key defining elements of the repugnancy test.

2.7 Conclusion

Kenya has made progress in legitimising TDRMs. As indicated above, the Constitution 2010 has recognised TDRMs as one of the ADR mechanisms that should guide courts. The AJS Framework Policy explores the utility of TDRMs as part of AJS and provides important suggestions on how such mechanisms can be aligned with the Constitution. However, there are still unanswered questions. These mainly relate to the jurisdiction of TDRMs, the extent of limitation under the law, clarity on what the repugnancy clause constitutes, and the principle of natural justice. These questions are discussed further in Chapter 3 in the context of the Kipsigis TDRMs. It, however, suffices to state, based on the foregoing, that a framework limiting the criminal jurisdiction of TDRMs to relatively minor offences is critical. More serious offences should be heard and determined by subordinate or higher courts. A schedule of crimes which are outside the jurisdiction of TDRMs can be defined clearly to ensure that

these mechanisms only deal with minor offences. The same should apply in relation to civil cases, borrowing from the Small Claims Courts Act 2016.

CHAPTER 3 NATURE AND CHARACTERISTICS OF THE KIPSIGIS TDRMs

3.1 Introduction

The constitutional recognition of TDRMs, as demonstrated in Chapter 2, legitimises them as complementary avenues for accessing justice in Kenya. However, the lack of clarity regarding the scope of these mechanisms makes it difficult to integrate them with the formal justice systems. An understanding of how the mechanisms work is critical in addressing this lacuna. This chapter discusses the typology of TDRMs in Kenya, and the disputes involved based on a case study of the Kipsigis community. The chapter also outlines the Kipsigis TDRM procedures in both criminal and civil cases. Part of this includes the question of jurisdiction. The chapter also discusses various reporting and hearing stages, whether there are any appellate bodies, enforcement of awards, compensation, and whether there are any cases which have been referred to courts and vice versa. The chapter lays a basis for the analysis of TDRMs from a natural justice perspective in Chapter 4. It relies on data from interviews and FGDs augmented by secondary data. As noted in chapter one, the field study was carried out in Kericho through FGDs with Myoot, Kamasian and Kabianga elders within Kericho County. The researcher also interviewed TDRM users to provide a user experience regarding the resolution of disputes by TDRMs. Their views provided insight on why TDRMs are preferred, and issues of natural justice.

3.2 Background of the Kipsigis Community

Kipsigis form the largest sub-group of the Kalenjin-speaking people, accounting to 43% (1.972 million) of the entire Kalenjin population as per the 2009 national census.[268] Historically, the Kalenjin migrated from the northern part of Africa along the Nile Valley.[269] They are said to have descended from a people who variously called themselves Myoot, Teremot, Lutyay or Mwitan.[270] The first branch of the Kalenjin arrived at Mt. Elgon region and the Kitale plateau between 800 and 900 AD and spread southwards and south-eastwards.[271] However, prior to

[268] Kalenjin Information Centre (KIC) <http://kalenjininfocentre.blogspot.com/2011/01/kipsigis-are-largest--subtribe-of.html> accessed on 21 June 2018.
[269] Bill Rutto and Kipng'etich Maritim, *Kipsigis Heritage and Origin of Clans* (Nairobi: Spotlight Publishers (E.A) Limited, 2016) 3.
[270] Orchardson (n 159) 4.
[271] Rutto and Maritim (n 269) 3.

their movement, different sub-groups emerged amongst them; that is, the ancestors of the present-day Kipsigis, Nandi, Tugen, Keiyo, Marakwet, Sabaot and Pokot.[216] The first groups to migrate from Mt. Elgon and Kitale were the Kipsigis and the Nandi in the first quarter of the 17th century.[273] They are said to have settled around Lake Baringo before moving through the heavily forested areas Mau escarpment to settle at Eldama Ravine.[217] The Tugen, Keiyo, and Marakwet followed the footsteps of the Nandi and Kipsigis, but were disrupted by a fierce section of the Maasai around Solai and Menengai in the present day Nakuru County.[218] The subsequent history of the Kipsigis occurred during the British rule from 1902 when the first colonial administration station was established in the present-day Kericho County.

3.3 Typology of the Kipsigis TDRMs

TDRMs differ across the diverse ethnic lines in Kenya. Yet, their typology is the same. Among the Kipsigis, the systems mainly comprise traditional mediation, negotiation, reconciliation and arbitration. Traditional arbitration, also known as 'traditional administration of justice,' is somewhat comparable to statutory arbitration. However, the Kipsigis' enforcement of TDRM decisions is premised on their customs, and involves the entire clan or community.[219] It eschews the complex rules of evidence and rarely do the disputes go to court.[220] The parties to a dispute appear before a panel of village elders (also known as *kokwet*) or traditional judges (*kiruogik*). The panel operates under the precision of at most two judges or arbiters.

Another important typology of the Kipsigis TDRMs is mediation. This process operates at the *kotigonet*, which is the lowest level of the Kipsigis TDRMs obtaining within the family or clan. The parties involved have equal power and decisions are made by the family or clan, a 'bottom up' as opposed to 'top-down' basis, and decision making is bottom-up with active involvement of the concerned family or clan. Mediation among the Kipsigis applies to domestic disputes at

[216] ibid.
[273] ibid.
[217] C Chesaina, *Oral Literature of the Kalenjin* (Nairobi: East Africa Educational Publishers Ltd, Formerly Heinmann Keny Ltd, 1991) 1.
[218] Rutto and Maritim (n 269) 4.
[219] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[220] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.

the level of occurrence (mostly at the family level). At the family level, the husband mediates disputes between children and the wife.[221] Where the husband is party to the dispute, it is referred to the elders within the extended family or clan for mediation.[222] Members of the husband's age set may also be called to mediate. This process is not only for individual healing but also a course for socialisation and ensuring the wider social balance.

Mediation is closely related to negotiation, wherein the *kokwet* or *kiruogik* and the parties to the dispute gradually come to a consensus. This mechanism is very vital in resolving interethnic conflicts involving the Kipsigis. Respected and mentally sharp elders from the warring communities meet under a designated tree or place where they engage in a negotiation or dialogue aimed at resolving the conflict by consensus. Any passers-by are required to sit in the panel to give a neutral view.

Central to the Kipsigis justice system is the concept of reconciliation.[223] This is often an integral and final phase in every dispute resolution process. The parties are reconciled through various customary rites and symbols, but this always depends on the type of dispute. The rites range from, inter alia, ceremonies to consolidate peace, drinking and eating together, and slaughtering of animals. A key element in many disputes is compensation, which is considered a precondition in the Kipsigis reconciliation and reintegration ceremonies. In this regard, Pain notes that payment of damages precedes forgiveness and reconciliation.

An underlying theme in the Kipsigis TDRMs is the fact that they are concerned with social reconstruction and peace-building. To a large extent, they seek to ensure restorative justice. This is because the parties, clan and/or community members are actively involved in the assessment of damage and in the search for a solution acceptable to both parties.[224] One of the key strengths of TDRMs is restoration of harmony. This can only be realised if the parties are contented with the decision.

As a restorative mechanism, the Kipsigis TDRMs consider the disputes as a problem of the whole clan or community and emphasise on reconciliation and restoration of social harmony.

[221] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[222] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[223] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[224] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018; FGD, Kabianga Village Elders, Kericho County, 30 June 2018; FGD. Myoot Council of Elders, Kericho County, 15 December 2018.

It is characterised by a high level of public participation, flexible rules and procedures, selection of elders based on status and lineage, voluntary and collaborative decision-making based on consensus, and restorative penalties.

3.4 Institutional Structure of the Kipsigis TDRMs

The Kipsigis TDRM comprises three hierarchical forums conditioned mainly by the gravity of the dispute: *kotigonet*; *kokwet*; and *kiruogindet or kiruogik*. The lowest forum is *kotigonet*, which literally means giving advice. It resolves minor domestic disputes, mostly in a household, and less serious disputes between neighbours. The rationale is to try first to determine the dispute at the family level before escalating it to the *kokwet*. In such cases, the disputants' close neighbours try to arbitrate the dispute by proffering advice and exhorting the disputants to live peacefully. The number of advisers ranges from 3 to 11 adult males, but, as indicated by the respondents, 4 or 5 are ordinarily present.[225] Although the *kotigonet* has no structured procedure, the oldest man acts as the chairman to maintain order.[226] There are also no defined sanctions at this level. As noted, the *kotigonet* tends to be an 'advisory' forum, which restrains the disputants from violent actions and calms them down, in the event of violence, and advises them on a 'take it or leave it' basis.[227]

More serious disputes, including those which have not successfully been resolved through the *kotigonet*, are handled by the *kokwet*. This forum typically comprises the village elders (*boisiek ab kokwet*).[228] Unlike the *kotigonet*, the procedure of the *kokwet* tends to be more structured. Historically, the *kokwet* meetings were chaired by a senior male elder, who was considered as skilled and thus proficient in maintaining order.[229] Of late, meetings of the *kokwet* are chaired by the elder from the village where the dispute took place. This elder is known as *kiptaiyat.* There is however an overall chairperson or president of the *kokwet* who maintains order and

[225] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[226] ibid.
[227] Michael Saltman, *The Kipsigis: A Case Study in Changing Customary Law* (Massachusetts, Schenkman Publishing Co., Inc. 1977) 37.
[228] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[229] Saltman (n 284) 38.
[287] ibid.

facilitates resolution of the dispute. The *kokwet* mostly meet in the place where the dispute occurred. The quorum of the *kokwet* depends on the gravity of the dispute and its possible implications for the community as a whole.[287]

Further, as noted during the FGDs, the local administration participates in the process through chiefs and sub-chiefs. Where a matter is complex, in which it is assumed that a compromise may not be easily reached, or if the disputants themselves are unruly, the chief or sub-chief may be called in to conduct the proceedings. It must, however, be noted that, while the chiefs' intervention ensures peaceful proceedings, their personal influence affects the outcome of the case. The chiefs also play a role as the custodians of the records of proceedings.

Disputes which are not resolved by the *kokwet* to the satisfaction of the parties are resolved by the *kiruogindet* (or *kiruogik*, in plural). The *kiruogik* are well-respected elders (traditionally referred to as "judges") whose fame has been established in the society. They have no defined jurisdiction but may be summoned from long distances when the dispute is one in which they are considered as experts.[230] The *kiruogik* also serve as the voice of the Kipsigis community in matters affecting them, including inter-ethnic conflicts, boundaries, politics, among others. They provide advice to the *kokwet*, the chiefs and politicians especially at the county level, but are not considered as permanent advisers.[289] However, nobody would lightly contradict the expressed opinion of a respected *kiruogindet*. The respect accorded to them by public opinion ensures that their judgments are upheld.

If a *kiruogindet* proves unsatisfactory and is unable to decide in a particular case, another may be called in. In the end the decision is absolutely binding.[231]

3.5 Composition of the Kipsigis TDRMs

The Kipsigis TDRM has historically been male dominated.[232] Women only appeared before the elders as either the complainants, accused or witnesses; and were required to address the elders while kneeling down.[292] The elders have since adapted to the reality of an inclusive

[230] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[289] Orchardson (n 159) (n 3) 17.
[231] ibid 18.
[232] FGD, Kabianga Village Elders, Kericho County, 30 June 2018. [292]
Kirui (n 121) 65.

society that recognises the interests of historically disadvantaged groups, particularly women.[233] As noted during the FGDs, women are now appointed as elders, and are allowed to equally participate in meetings.[234] While this is a positive change, statistics and existing perceptions indicate that the society has not come to terms with this.[235] Out of the 21 elders interviewed during the study, only 2 elders were female (approximately 9.5%).[296]

Traditionally, the *kiruogik* were recruited from the ranks of the war leaders (*kiptainik*).[236] Today, any man may become a *kokwet* or *kiruogindet* on his reputation in society.[298] The community does the vetting.[237] A person is also qualified if he: is married and owns a house (denoting responsibility); is of good character and integrity; is law abiding, is respected (based on his previous position in society); has self-control; is of sound mind; and hardworking.[238] There is no formal selection procedure, but a person automatically becomes qualified upon officially taking a wife[239]—though the other factors must also be considered. Boys are rarely selected as elders because of the believe that they are undependable.[240] Only young people who are of proven integrity are allowed to participate in the *kokwet* meetings for mentorship purposes.[241]

3.6 Jurisdiction of the Kipsigis TDRMs

The jurisdiction of the Kipsigis TDRMs is twofold: subject matter and personal. This is further explained below.

[233] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[234] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[235] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[296] Field data.
[236] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[298] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[237] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[238] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[239] Kirui (n 121) 65.
[240] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[241] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[304] See the discussions in section 2.5.1.2 of this thesis.

3.6.1 Subject Matter Jurisdiction of the Kipsigis TDRMs

As pointed out in chapter two, the subject matter jurisdiction of TDRMs in Kenya has been a contentious one, particularly because of the lack of clarity in existing laws as well as contradicting jurisprudence regarding criminal jurisdiction.[304] The Magistrate Courts' Act, 2015 restricts customary law claims to certain civil matters as outlined in section 2.5.1.1 of this thesis. Since the normative framework for TDRMs is customary law, the subject matter jurisdiction of TDRMs is equally limited to civil matters. The Judicature Act (Cap 8) affirms this conclusion under section 3(2).

In criminal matters, section 176 of the CPC impliedly limits the criminal jurisdiction of TDRMs to matters which are amenable to customary compensation, such as common assault. Yet, as illustrated in section 2.5.1.2 of this thesis, some communities in Kenya still use TDRMs to resolve and award compensation on serious matters such as homicide and rape. The Kipsigis

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is one of these communities. As noted during the field study, the jurisdiction of the Kipsigis TDRMs is wide because of confusion about jurisdictional limits.[242] Their system of law and justice has no distinction between criminal and civil disputes. The terms 'criminal' and 'civil' are new to the Kipsigis TDRMs. The terms are rarely used as most matters are generally referred to as 'disputes' (*tiiyet*).[243] However, for purposes of this analysis, the researcher uses these terms to delineate the subject matter jurisdiction of the Kipsigis TDRMs.

3.6.1.1 Civil Law Jurisdiction of the Kipsigis TDRMs

The Kipsigis TDRMs have jurisdiction to resolve diverse civil matters, namely property (that is, division of land, boundary, brokerage, ownership, succession, grazing, pasture, water), family (bride wealth, divorce, dissolution of marriage), defamation (unjustifiably spoiling a Kipsigis' name), and trespass, especially when animals stray into another's land and damage crops.[244]

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[242] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[243] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[244] FGD, Kabianga Village Elders, Kericho County, 30 June 2018; FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

Boundary disputes (*ng'alek ab koret)* are common among the Kipsigis or between them and neighbouring communities, such as the Kisii.[245] They are usually reported to the immediate village elder who notifies the area chief.[246] The chief then reports the matter to the *kokwet*, which organises a meeting on the land in issue.[247] A surveyor and traditional expert (known as *baorinik*) is invited by the *kokwet* to participate in the hearing sessions and help determine the true position of the boundary.[248] An investigation is done beforehand to know the history of the land in question.[249] The elders also act as witnesses in the demarcation of boundaries and can easily arbitrate on any resultant disputes.[250] A copy of the land agreement is normally given to the elders and the area chief.[251]

The Kipsigis succession process is complex and is largely facilitated by the *kokwet*. Most succession disputes in the rural Kipsigis are resolved by the *kokwet*.[252] Where a parent is

deceased intestate, the elders are called to subdivide the land.[253] The two general principles of inheritance are: when a man is polygamous, all his property is divided equally among his houses notwithstanding the number of children in each house; and the property assigned to each house is then divided equally among the sons of that house.[254] If a party is dissatisfied with the subdivision, he or she has the option to present the matter before the *kokwet*.[255] In the case of land, a surveyor may be called to measure the land afresh.[256] Besides, in the wake of the right to gender equality under the Constitution 2010, women's clamour for inheritance has engendered a new turn of succession disputes. Today, a Kipsigis daughter comes back to lay claim over her father's estate. [257] At times, even divorced women come to claim the estate of

[245] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[246] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[247] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[248] Kirui (n 121) 68, confirmed during the FGD with FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[249] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[250] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[251] Kirui (n 121) 68.
[252] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[253] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[254] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[255] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[256] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[257] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

their former husbands.[258] Further, although a woman is not traditionally said to inherit property, she is considered a joint owner with her husband of all the family property.

3.6.1.2 Criminal Law Jurisdiction of the Kipsigis TDRMs and Related Cultural Practices

The jurisdiction of the Kipsigis TDRMs extends to criminal offences, such as common assault, assault causing serious bodily harm, theft (including cattle rustling), rape and homicide, among others.[259] The process is characterised by just deserts in form of customary compensation.[260] Homicide and rape cases are considered very sensitive and they are usually referred to court. In a rape case, the offender is required under the Kipsigis customary law to pay a fine, usually goats. However, the elders currently consider rape and murder as serious offences that should be referred to the police.[261]

(a) Minor Offences

In minor offences, such as theft and assault, the complainant is required to inform the village elder who then reports the matter to the *kokwet*.[262] If the complainant is a victim of domestic violence (*ng'aleb ab kaa*), who in most cases is the woman, she is required to report to her husband's agemate who was circumcised with him.[326] The matter is then reported to the village

elder who subsequently reports to the *kokwet*.[263] The matter may, however, be resolved in the first instance by the *kotigonet* (at the family level).[264]

Theft is considered forgivable, provided the thief makes a formal apology (*nyoetap gat*), which must be done in the morning.[265] If no such apology is made, the thief's property might be taken, but enough food is left for his small children.[266] Historically, if the thief was known to be of bad character, the *kokwet* punishment would be severe; his house might be pulled down and

[258] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[259] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[260] See limitation on compensation under section 176 of the Criminal Procedure Code, Cap 75 Laws of Kenya.
[261] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[262] FGD, Kabianga Village Elders, Kericho County, 30 June 2018. [326]
Kirui (n 121) 69.
[263] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[264] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[265] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[266] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.

his belongings taken by anyone.[267] This has however changed. For theft of goods other than stock, the *kokwet* might decide that the man be beaten or his goods taken. A first theft is lightly punished but a third offence is so serious and might lead to capital punishment.[332] This however does not apply to children because they are not considered to be responsible until after initiation. Presently, the *kokwet* does not pronounce a death sentence.[268] Historically, the death sentence could only be passed by the *kokwet*, who in all serious matters would enlist the aid of a reputable judge (*kiruogindet*).[269]

There is no penalty for wounding and no compensation is payable.[270] As pointed out during the interviews, the offender has to agree to take responsibility of treating the victim.[271] If the injury is grievous and leads to death or permanent impairment, the case takes another turn.[272] The matter may even go deep to the clan. This process deters the offenders.

(b) Rape (*borien*)

Rape cases are considered serious and reported to the police.[273] Some rape cases are, however, resolved locally by the elders. A victim reports to the parent or guardian who then notifies the elders. The customary penalty for rape is not as severe as the statutory penalty. The offender's clan is required to pay the victim's clan a specified number of cows.[274] This varies depending on whether the two are strangers or acquaintances, clanmates, or if pregnancy occurred.[340] In

case the victim became pregnant, the rapist must marry her, failure to which his clan will pay six cows and one bull.[275] If pregnancy did not occur, the rapist's family will give a she-goat to the victim as a way of asking for forgiveness.[276]

[267] FGD, Kabianga Village Elders, Kericho County, 30 June 2018. [332] Orchardson (3) 115.
[268] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[269] Kirui (n 121) 71.
[270] ibid.
[271] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[272] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[273] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[274] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[340] Kirui (n 121) 71.
[275] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[276] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.

(c) **Homicide (*rumiisyeet*)**

Homicide is the most serious offence among the Kipsigis, as it results to the loss of life to the clan and the spilling of blood in the case of *kipsigisindet*.[277] Homicide is of three types: the killing of a Kipsigis (*kipsigisindet*) by accident (*lelet*) or intent with the drawing of blood; and the killing of foreigners. Whichever the case, killing of a *kipsigisindet* is a collective responsibility of the slayer's clan.[278] The family of the deceased is required to report to the village elder and the matter is subsequently reported to the *kokwet*. Once the slayer is known, the *kokwet* calls for a meeting between the clans of the deceased and slayer, to agree on compensation (*kebasta*), which is often standard.

Historically, the slayer (*rumindet*) was required to be killed on the same day by the members of the injured clan in hot blood.[279] If the slayer escaped death at the hands of the offended clan, he was required to come to his home carrying kikuyu grass (*sereetyoot*) to show his family that he was unclean because of what he had done.[346] The family would then make provision for his care and cleansing. The person was not killed after the day of the murder (*kebari*). Further, to prevent the retributive act of being killed, a cow (*iringotit*), is taken at once by the slayer's father or eldest brother to the home of the deceased's father. There, he tied it to the left of the main entrance to the house (*mabwaita*).[280] Once this has been done, no further retaliatory action may be taken, as the case is left for decision after proper trial by the *kokwet*, with the assistance of such judges (*kiruogik*) as are summoned by the clans involved. The cow is required to be a heifer of one colour, usually black.[348] The taking of the cow indicated that the slayer was ready to compensate the deceased's family.[349] Acceptance of the cow showed that they accepted the

slayer's apology. If this cow was not delivered, the offended clan could come and seize any cattle of the offender's clan and keep them until after the trial.[281]

[277] Orchardson (n 159) 114.
[278] ibid.
[279] ibid.
[346] ibid.
[280] J G Peristiany, *The Social Institutions of the Kipsigis* (London: Routledge and Kegan Paul Ltd,1939) 194. [348] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018. [349] Fish and Fish (n 115) 318.
[281] Orchardson (n 159) 114.

In most cases of accidental death, the two clans arrange payment amicably between themselves. A meeting is called consisting of the *kokwet* and the clans of the deceased and the slayer to decide on the number of cattle to be paid.[282] Compensation for a life is nine cows (*tugap muget*) if the deceased is a man, and seven cows if the deceased is a woman.[283] The slayer pays one cow while the clan pays six.[284] The deceased's family retains one cow while the rest are distributed by the elders among the members of the recipient clan, with the nearer relatives of the deceased receiving more than those more distantly related. The reasoning is that the deceased belonged to the clan as opposed to the family. Some of the cows are normally exchanged for some sheep or goats so that the more remote relatives may be paid in this smaller medium. If a serious dispute arises on the distribution, the *kokwet* is consulted and, if necessary, an arbitrator or judge (*kiruogindet*) may be called to give a final decision. Currently, compensation is Ksh9000 and one cow.[285] The money is divided amongst the families of the affected clan. The remainder is used to buy salt – each family of the clan takes a spoon.[286]

Provision was also made for a time when a slayer and a member of the victim clan might meet on the path. To avoid reprisal, each party was required to pluck a handful of grass and spit on it; then they exchange the grass. Alternatively, if the two met later at a beer party, they would exchange beer tubes. This act, also known as *ikieet* or *ipcheet* from the stem *kepche*, was to remove anger or ill-feeling between the two parties.[287] The same was meant to remove any possibility of a curse rather than for cleansing.[288] Another way of averting retaliation was for members of the two families to drink milk together from one gourd. This cleared the way for any marriage to take place between the two families. However, no compensation was payable in respect of the murder of one's own clansman. The slayer always died with his guilt.

Cleansing is done through smearing of oil, drinking milk or brewed beer, or slaughtering a ram or goat.[289] In some Kalenjin sub-tribes, blood from the deceased had to be placed on the tongue

[282] Fish and Fish (n 115) 318.
[283] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[284] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[285] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[286] ibid.
[287] Orchardson (n 159) 29.
[288] Fish and Fish (n 115) 318.
[289] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

of the slayer.[290] If this was not possible, blood was washed from the weapon used for killing and put on the tongue of the slayer.[291] The slayer also licked a handful of grass on which water and blood had fallen when washing the weapon.[292] This process was called *kaachamchameet* (tasting). A bull also had to be sacrificed for accidental killing.[362] Besides, cleansing is also done on a weapon which has been used to commit a crime.[293]

In some Kipsigis areas, where death can be traced to an internal injury (*lobutuet*) or a stab or cut (*ngotobet*) years later, the normal compensation for a life is payable. But the offender does not become unclean unless the wound is still open at the time of the death.

Repeat offenders are not acceptable in the Kipsigis tradition. The strict and complex web of cleansing deters further offending. A person is subject to condemnation if he refuses to be cleansed.

3.6.2 Personal Jurisdiction of the Kipsigis TDRMs

The question of personal jurisdiction is an interesting one, especially given the assumption of general jurisdiction by most TDRMs. Article 44 of the Constitution 2010 protects everyone's right to participate in the cultural life of his/her choice. It stipulates further that a person cannot be forced to perform, observe or undergo any cultural practice or rite.[294] This implies that, where the jurisdiction of TDRMs and the applicable customary law over one of the parties is in issue, and that party has not consented to the use of the TDRMs, the provision protects that party's interests and therefore stands as a restraint in the application of TDRMs in such cases.

Among the Kipsigis, no one is compelled to opt for the TDRMs.[295] It is a matter of choice, and most community members prefer the TDRMs because of their cost-effectiveness and restorative nature.[296] The TDRMs do not exercise jurisdiction over a non-member of the community whose customary law is presumed different.[297] This is true in all disputes that are

[290] Fish and Fish (n 115) 320.
[291] ibid.
[292] ibid.
[362] ibid.
[293] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[294] Constitution of Kenya 2010, Article 44(3).
[295] FGD with TDRM Users, Kericho County, 21 July 2018.
[296] FGD with TDRM Users, Kericho County, 21 July 2018.
[297] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.

brought before the elders, whether criminal or civil. Where an issue of personal jurisdiction arises, the elders notify their counterparts from the foreign community to complete customary procedures on the person before both sides meet to resolve the dispute.[298] A dispute resolution meeting is then held between the two communities, co-chaired by elders from both sides. At this time, both sides are presumed equal and no one's customary law is considered superior. Yet, it is not clear how, and under what customary law, the dispute is finally resolved.

3.7 Kipsigis TDRM Procedures

This section looks at the Kipsigis procedural rules applicable in dispute resolution, duration of proceedings, costs, record keeping, and enforcement of decisions and awards. The question of integration with formal courts is discussed as part of referral of disputes between the two fora.

3.7.1 Hearing Process

The Kipsigis have no specific procedures for criminal and personal law disputes. All cases follow a similar hearing process, albeit with distinct cultural rites. The procedural rules, including the reporting of disputes and the manner of execution of the elders' orders, must always be consistent with the Kipsigis customary law.[299] The rules are not recorded but are passed on from one generation to another.[300] This ensures that the rules remain fluid and flexible. The rules were taught during circumcision (*menjo*).[301] The elders also used to mentor young people to take over as elders.[302] The young people were also trained during initiation. An initiate cannot be allowed to go through the initiation ceremony if he has a case pending before the *kokwet*.

A complaint is usually channeled to the village elder, who then informs the other elders.[303] One of the elders is sent to notify the accused person or defendant of the complaint and the specific

[298] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[299] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[300] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[301] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[302] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[303] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.

day and time to appear before the elders.[304] Depending on the magnitude, the elders may hear and determine the matter within the day or fix it for hearing in another day.[305]

As noted, the elders do not operate from a specific 'courthouse' or office.[306] The proceedings normally take place at the site of the dispute (known as *kapkiruog*).[307] For instance, if it is a land dispute, the TDRM process will take place on the land in question.[308] Similarly, if it is a domestic issue, the process will take place at the particular homestead where it occurred.[309] Traditionally, the meeting would be held under a tree.[310] Where the dispute relates to witchcraft, the hearing takes place in 'no man's land', usually besides a road.[311]

During the proceedings, the elders stay neutral to ensure that a just ruling is made which will set a good precedent.[312] The proceedings usually begin with a prayer. The elders then allow the parties to take a traditional oath. Oath taking and cursing are a common practice for all disputes, mostly used to elicit admission. The oath is administered by one of the elders.[313] The parties swear by the name of God and invoke divine intervention like lightning. Historically, there was a stone raised as one takes oath before stating their case or giving testimony. One would also lick the stone, raise it and swear.[314] This binds them to state the truth. If either party refuses to take the oath, judgment is forthwith given against him. If one told a lie, dire consequences would arise.

After oath taking, the complainant or plaintiff is accorded time to present his/her case, followed by the accused person or defendant. The disputants' tone is usually very low and unexcited. The elders listen to both parties and then allow them to call on their witnesses (*baorinik),* if any, to provide testimonies. The witnesses are called in turns and sit separately to avoid complicity.[315] Their testimonies are not taken under oath. After witness testimonies have been

[304] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[305] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[306] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[307] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018. See also Orchardson (n 159) 16.
[308] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[309] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[310] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[311] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[312] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[313] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[314] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[315] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

given, the parties are sent away out of earshot of the proceedings.[316] The members present during the proceedings are called, in the absence of the disputants, to bolster the evidence adduced. They may also ask questions for clarification. Their evidence is highly valued and presumed to be true. The rationale is that, the witness testimonies are usually brief and at times irrelevant due to the fear of saying the truth in the presence of the disputants.[387] It is therefore believed that true evidence is adduced in the absence of the parties, since the members present are not constrained. This additional evidence is also not given under oath.

In addition, friends of the accused person or defendant, or other persons who know them, may be called to give more information. For land matters, the members of the clan or family who understand the history of the land in question may be called to provide background information. Where it becomes necessary to get evidence from an expert witness, a private session will summon that traditional expert witness.[317] The area chief may be invited to be part of these proceedings. The parties are then recalled to respond to emerging questions and then sent away to allow the elders to retire and deliberate on the matter.

3.7.2 Decision Making Process and Referral of Disputes

The elders' deliberations are usually protracted. Their opinion must be based on evidence, normative precedents and the Kipsigis customary law.[318] As a general rule, older persons must speak first due to their presumed expertise and wisdom. The opinion of the oldest person, who has the privilege of speaking first, often carries the day. The initial opinions are reiterated by virtually all elders present and there are few discrepancies especially on matters of principle and technicalities, such as the amount of compensation or fine. A past decision of elders from other areas in the community may be used as precedent in the determination of the matter. Decisions are unanimous.[319] If all the elders concur, the matter is deemed resolved. Depending on the circumstances of the dispute, the verdict may include, *inter alia*: apology, a fine, advice, an order for compensation, restoration or reconciliation.[320]

[316] Saltman (n 284) 38.
[387] ibid 39.
[317] FGD, Kipsigis Myoot Council of Elders, Kericho County, 15 December 2018.
[318] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[319] Saltman (n 284) 38.
[320] FGD, Myoot Council of Elders, Kericho County, 21 July 2018.

In the event of any dissent, another meeting will be scheduled to reconsider the matter.[321] Where the matter is complex, the elders expand the jurisdiction to be more inclusive.[322] This is done by inviting reputable elders (*kiruogik*) from other areas to share their expertise on the matter.[323] Currently, the Myoot Council of Elders comprises senior elders, who resolve matters referred to them by the *kokwet*.[324] They serve as the apex body of the Kipsigis TDRM that provide advice to the *kokwet*, the local administration and politicians.[325] They are also called upon as traditional judges (*kiruogik*) to resolve complex matters.[326]

Once the verdict is reached, the parties are recalled and the chairperson will formally announce it to them. They are then asked whether they accept the verdict.[327] If both parties accept the verdict, the meeting is closed and the now reconciled parties are instructed to share the cost of providing a drink for all those who participated in the proceedings.[328] If a fine is imposed, the accused person is caused to swear that he/she will comply with the deal. The accused person may appeal for revision if s/he thinks the fine is too high. In the event that both or one of the parties reject(s) the verdict, the elders may organise for another meeting, or recommend that the matter be channelled to the magistrates' court. However, this rarely happens since most decisions made by the *kokwet* are considered as fair and accepted by the parties.[329]

Times have changed, and due to the resilience of TDRMs, serious criminal cases like child defilement and rape are now referred to court.[330] Most of the disputes are dealt with locally and rarely end up in court.[331] Any party who is aggrieved by the elders' decision has a right to institute fresh charges in court without involving the elders. This means the elders do not have to authorise the referral of a dispute. A party may also withdraw the matter and approach the court.

[321] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[322] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[323] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[324] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[325] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[326] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[327] Saltman (n 284) 39.
[328] ibid 40.
[329] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[330] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[331] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.

It should be noted that, by taking an oath at the beginning of the proceedings, the parties bind themselves to accept whatever verdict is made by the elders.[332] In some instances, the decision's binding nature is reinforced by the sacrifice of a ram, he-goat or ox which is traditionally supposed to be slaughtered near the site of the dispute (*kapkiruog*) but this depends on the type of dispute.[333] A curse is pronounced against anyone who disobeys the elders' decision.

3.7.3 Enforcement of Kipsigis TDRM Awards

Compliance with the elders' decisions, is estimated at 98% due to the general acceptance that TDRMs are part of communal intercourse.[334] The elders' decisions are normally informed by the cultural norms and beliefs.[335] Depending on the award, the culprit is accorded reasonable

time to comply. This varies from instant (for adultery) to six months (for murder).[336] In the event that the culprit fails to comply with the elders' orders within the specified timeframe, his/her clan members are called to discuss the terms. It is assumed that the clan members have a role to ensure that the culprit complies. In the event that this does not bear fruit, the culprit is summoned by the elders. This often calls for the chief's intervention. One of the elders is sent to alert the chief and police arrest the culprit.[337] This hardly happens since most people fear the convoluted and adversarial nature of court proceedings, and the high costs involved. In addition, the mere fact that the matter will be reported to the chief or police is enough to incentivise compliance. There is therefore a high rate of compliance.

The one universal method of enforcement of awards, and consequence for non-compliance, is the curse, normally administered by the *kokwet* (or a member of the *kaptamason* clan).[338] Even if the matter has escalated to the chief or police, the accused person cannot escape the curse.[339] This sanction is a very real one to the Kipsigis, as its effects are felt not only by the culprit, but also some or all of his/her near relations.[411] In practice, no person would wish to face the

[332] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[333] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[334] FGD, Kabianga Village Elders, 30 June 2018; FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[335] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[336] FGD, Kabianga Village Elders, 30 June 2018.
[337] Kirui (n 121) 68.
[338] ibid.
[339] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[411] Orchardson (n 159) (n 3) 19.

dreaded curse and related rituals. Obedience and discipline are therefore maintained by the belief in the curse.[340] It is believed, based on past experiences, that culprits on whom the curse befall die mysteriously.

3.7.4 Records of Proceedings

In the past, the proceedings were not recorded. This has changed over time and elders can now take records of their proceedings.[341] Although the referral of disputes unsuccessfully resolved by TDRMs to courts is not clear, the records serve as an important reference tools for courts in the event that a matter is referred to court. It suffices to note that elders do not have a specific secretary to take records.[342] At times, a young person is appointed to act as a secretary.[343] The records are kept in one of the elders' house or the chief's office.[344] The elders are constrained

to keep records where a court has referred a matter for reconciliation, in which there are documents requiring critical analysis.[345]

3.7.5 Duration of the Kipsigis TDRM Proceedings

One distinction between litigation and TDRMs is that the latter is expeditious. The time taken to hear and determine a dispute varies depending on its magnitude.[346] Simple disputes, such as petty theft, fighting, and domestic violence, take a few hours to resolve since they do not require many elders.[347] Complex disputes, especially those relating to murder, property, rape and assault, may take up to two weeks to conclude.[348] The TDRM users interviewed in this study expressed their satisfaction in the dispensation of justice by TDRMs compared to litigation which takes long.[349] Thus, local communities prefer TDRMs because of the short period taken to dispense justice.

[340] ibid.
[341] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[342] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[343] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[344] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[345] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[346] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[347] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[348] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[349] FGD with TDRM Users, Kericho, 21 July 2018.

3.7.6 Cost of Accessing Justice through the Kipsigis TDRMs

There is no particular compensation for the elders. Payment is in kind, usually in the form of a ceremony that makes the judgment binding on both parties.[350] It is known as *kimagutit* and is adjusted to the wealth of the successful party and the magnitude of the matter at stake.[351] It varies from traditional milk (*mursik*), beer to an animal (usually a goat, ox or sheep), but the elders may not take it all away.[352] The *mursik* or beer is drunk by all who are present during the proceedings.[353] The ox, sheep or goat is slaughtered and much of it eaten at the location of the dispute resolution.[354] The *kiruogindet* is only allowed to take the two hind legs.[355] The fact that the *kimagutit* is paid in kind, and in consideration of a party's economic status, makes it affordable and culturally acceptable. Cost is, therefore, not an impediment to access to justice through the Kipsigis TDRMs. However, with the changing nature of customary law, some community members today prefer to pay in cash (at least Kshs.100).[356] This is far cost-effective than litigation where the parties have to part with thousands of shillings to access justice.

3.8 Conclusion

The foregoing case study, though distinct from other communities in Kenya, provides an important view of how TDRMs operate. As an embodiment of customary law, the Kipsigis TDRMs are structured into three key phases: *kotigonet*, kokwet and kiruogik (*kiruogindent*). As noted, the primary dispute resolution body is the *kokwet*, comprising village elders. A common characteristic in these levels is emphasis on restorative justice rather than retributive justice makes them victim-friendly and an ideal avenue towards ensuring peaceful reconciliation and community integration. It is evident that dispute resolution is largely grounded on negotiation and arbitration. Mediation lies at both ends of the continuum, and preferably apples to domestic disputes. Enforcement of awards is ritualistic and takes a more

[350] Orchardson (n 159) (n 3) 18.
[351] ibid.
[352] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[353] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[354] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[355] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[356] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

practical approach to ensure high level of compliance by the parties. It recognises the need to reconcile the parties involved, including their families and clans. Chiefs play a critical role in maintaining order and as custodians of records of proceedings. However, a question arises as to whether their presence has direct influence on the elders' decisions. This question is explored in Chapter four based on the natural justice and rule of law principles.

CHAPTER 4 ALIGNMENT WITH THE RULES OF NATURAL JUSTICE

4.1 Introduction

The Kipsigis TDRMs, as demonstrated in Chapter 3, are considered as effective fora for accessing justice especially for most rural people who lack the means to access courts. The community finds the TDRMs fair as they listen to the parties in an open forum and community members are welcome to participate unlike judicial processes, which are typically adversarial.[357] Yet, a question arises whether TDRMs, by their nature, meet the principles of natural justice and the rule of law, particularly the threshold set for realising the right to a fair trial and equality. This chapter examines, based on Rawls' theory of justice, the extent to which the Kipsigis TDRMs blends with natural justice and the rule of law. The chapter is informed

[357] FGD, TDRM Users, Kericho County, 21 July 2018.

by the analysis of the Kipsigis TDRMs in Chapter three, particularly the procedural aspects of the TDRMs.

4.2 Rules of Natural Justice

Natural justice is a fundamental tenet in any justice system. Its application is presumed in each case where a person's rights are at stake. The principle bears the concept of justice, which, according to Rawls, denotes fairness.[358] Similarly, Aristotle defines 'justice' as lawfulness or fairness.[359] 'Fairness', as put by Rawls, is based on the concepts of equal opportunities and liberties.[432] Explaining these concepts further, Rawls introduces two principles, namely: the equal liberty principle; and the difference principle. The former denotes a society that is fair and just by assigning everyone equal opportunities as rights and liberties.[360] In the justice system, this can be achieved only if the parties to a dispute are treated fairly in accordance with the substantive and procedural law regardless of their status in society. The difference principle, on the other hand, refers to equal distribution of opportunities.[361] The role of the principle of

fair opportunity, as noted by Rawls, is to ensure pure procedural justice in the system.[362] The end result of procedural justice is substantive justice.

In a nutshell, the concept of natural justice is closely related to fairness. Justice is defined in this study, as including fidelity to the rule of law, procedural fairness, equal opportunities for all the parties to a dispute, and treatment of like disputes in the like manner. The rule of law doctrine displays, as basic tenets of democratic constitutionalism, the values of independence, consistency, legality, certainty, accountability, efficiency, due process, access to justice, and respect for human dignity.[363] Another important element is equality before the law. This underpins the fact that all classes of people, irrespective of status or gender, is subject to the

[358] Rawls (n 26) 52.
[359] W D Ross, *Aristotle Nicomachean Ethics book V* (Batoche Books, Kitchener 1999). See also Aristotle, *The Nicomachean Ethics*, translated by J A Thomson (London: Penguin Books Ltd 1976) 741. [432] Rawls (n 26) 52.
[360] ibid.
[361] ibid 65-66.
[362] ibid 76.
[363] Jeffrey Jowell, 'The Rule of Law and its Underlying Values' in Jeffrey Jowell and Dawn Oliver QC FBA, *The Changing Constitution* (7th edn, Oxford University Press 2011) 24-25 <http://hcraj.nic.in/joc2014/9.pdf> accessed 21 January 2019.

same law. Equally, all parties to a dispute, regardless of their status or gender, are entitled to be treated equally under the law, and be accorded due process.[364] Such proceedings should be conducted consistent with the procedure prescribed by law; and, where the procedure is not prescribed, the rules of natural justice must be complied with.

Natural justice embodies mandatory procedural requirements bearing on every person entrusted with authority to make decisions touching on the rights, interests, status or legitimate expectations of an individual. The concept traditionally encompasses two due process or procedural maxims, that is: *nemo judex in re causa sua* (rule against bias); and *audi alteram partem* (right to be heard).[438] In the context of TDRMs, the maxims simply refer to the following rules:

(i) Rule Against Bias: That any decision by the TDRM must be impartial. TDRM agents should guard against external influence and conflict of interest, including in conducting investigations; and ensure their decisions are anchored on logical proof or material evidence; and

(ii) Fair Hearing: That persons who are likely to be affected by a decision should be accorded a fair hearing by the TDRM. This includes adequate (and equal) opportunity to present their case and adduce evidence, especially where their rights are in issue,

and to challenge evidence and any rebuttals against them. They also ought to be adequately informed of the dispute beforehand.

4.3 Normative Content of Natural Justice

The concept of natural justice serves as useful benchmark in both civil and criminal law contexts of TDRMs. Failure to observe it is tantamount to suppressing the Bill of Rights, which serves as an important framework for socioeconomic and cultural policies. The Constitution of Kenya, 2010 requires the State to develop suitable measures and standards to achieve progressive realization of the Bill of Rights.[365] Thus, in order to ensure access to justice at the grassroots, the State has to device mechanisms aimed at strengthening TDRMs, including their

[364] Peter Opondo Kaluma, 'The Ultra Vires Rule on its Death-Bed: The Rule of Law as the Basis of Judicial Review in Kenya' (LLM University of Nairobi 2008) 128. [438] ibid 99.
[365] Constitution of Kenya 2010, Article 21(1).

alignment with the Bill of Rights. This may include legislative measures to incorporate the principles of natural justice in the workings of TDRMs. One of the rights relevant to TDRMs is fair administrative action under Article 47(1) of the Constitution 2010. This involves, inter alia, expeditious resolution of disputes, legality and procedural fairness, which are vital principles of natural justice and the rule of law.[366]

The normative content of natural justice is also entrenched in Article 50(1) of the Constitution 2010, which provides for the settlement of disputes 'in a ***fair*** and ***public*** *hearing* before a court or, if appropriate, another ***independent*** and ***impartial tribunal*** *or* ***body***.' The word 'body' includes other dispute resolution avenues, such as TDRMs. When addressing criminal law aspects, the more appropriate reference point should be Article 50(2) on the right to a fair trial. The UN affirms, in reference to paragraph 4 of the Dakar Declaration on the Right to a Fair Trial in Africa, 1999, that the right to a fair trial is absolute and should be advanced by TDRMs.[367]

4.4 Interplay of the Kipsigis TDRMs with the Natural Justice Rules

The foregoing rules of natural justice are thematically discussed below in the context of the Kipsigis TDRMs. It must be emphasised, however, that the terms 'criminal' and 'civil' are not known to the Kipsigis TDRMs; thus, any illustrative evidence offered herein is not categorised as such.

4.4.1 Rule Against Bias

The rule against bias applies to both *criminal* and *civil* disputes, and any dispute resolution body including TDRMs, is required to observe it. Article 50(1) of the Constitution 2010 recognises the standard of 'impartiality' that typifies natural justice. This applies to both civil and criminal disputes. The rationale is to avoid bias in the dispute resolution process that may have a bearing on the outcome of a case. Independence, under Article 50(1), connotes lack of interference and undue influence in decision-making. The Kipsigis TDRMs has a mechanism that checks elements of bias in the dispute resolution process. For instance, where one of the

[366] ibid, Article 47(2).
[367] United Nations (n 131) 45.

parties has blood or family ties to an elder, there is room for disqualification.[368] Where one of the parties is a friend or relative to the elder who is presiding over the case, the elder will delegate his role to one of the elders to avoid injustice.[369]

Yet, owing to the paternalistic nature of the Kipsigis justice system, which is male dominated, an apparent bias may be seen where a woman is standing trial presided over by a male elder. This is common in succession disputes, especially in remote areas where there are still negative perceptions regarding women's property rights.[370] Such disputes are often decided with the biased perception that the woman is not entitled to own property.[371]

Participation of chiefs in the *kokwet* proceedings affects the independence and impartiality of the process. While the chiefs imbue order in the proceedings, their influence should not be ignored. Elements of bribery to tilt the outcome of the cases are also gaining traction. For instance, as one of the TDRM users mentioned, in disputes involving parties with different economic backgrounds, the rich fellows bribe the elders to decide in their favour.[372] There is also external interference with witnesses to give false testimonies. This delays the conclusion of some cases because the elders have to carry out further inquiries to give reasoned decisions. A mitigating measure for this is additional evidence of community members who are present during the proceedings. This evidence is highly valued as true and any false testimonies by witnesses are not considered.

4.4.2 Fair Hearing Rule

The fair hearing principle derives from the maxim, '*audi alteram partem*', which, as noted, means that 'no one should be condemned unheard. It is a fundamental principle of the rule of law that aims to secure proper administration of justice.[373] It is essentially a non-derogable[448]

[368] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[369] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[370] Agnes Cheptooi Kirui, 'Access to Justice for All: An Investigation into the Functioning of the *Kokwet* of the Kipsigis Community of Londiani Division, Kericho District' (Master of Arts Thesis, University of Nairobi 2006) 67.
[371] ibid.
[372] FGD, TDRM Users, Kericho County, 21 July 2018.
[373] Joseph Kipkoech Biomdo, 'Judicial Enforcement of the Right to a Fair Trial Without Unreasonable Delay under Article 50 of Constitution of Kenya' (LLM Thesis, University of Nairobi 2015) 25. [448] Constitution of Kenya 2010, Article 25.

right protected under Article 50(1) of the Constitution, the fact that the right to a fair hearing is, in all circumstances, non-derogable, amplifies the intention to secure this right, as well as the obligation of courts, tribunals and other impartial and independent bodies to ensure both substantive and procedural justice. In *The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney General*,[374] the court emphasised that the right to a fair hearing under Article 50(1) cannot be limited by law or otherwise. According to the UN, the fair hearing principle, as reflected in Article 14 of the ICCPR, applies equally to both criminal and civil cases.[375]

With regard to criminal disputes, the constituent elements of fair hearing, as articulated in Article 50(2), are numerous. These include, among others: the presumption of innocence; the right to prompt notice of the charge; the right to a public trial; the right to have adequate time to prepare a defence; the right to an expeditious trial ('without unreasonable delay'); the right to be represented by a person of one's choice, preferably an advocate; the right to give and challenge evidence; the right to remain silent; and the right to appeal to a higher court (or other higher body). Given the lack of 'civil or criminal' law vocabulary in the Kispigis TDRMs, this section generally demonstrates how the Kipsigis TDRMs align with these elements of the fair hearing rule.

4.4.2.1 Presumption of Innocence

The fair hearing right comprises, inter alia, the accused's right to be presumed innocent until confirmed guilty pursuant to Article 50(2) of the Constitution 2010. Regrettably, the Kipsigis TDRMs are typically embedded in customary law, which, according to the data collected, does not seem to place strong emphasis on the presumption of innocence. In criminal matters, for instance, the Kipsigis elders perceive the accused person as guilty until proven otherwise.[376]

The burden lays on the accused person to prove his innocence beyond reasonable doubt.[377] It is believed that, once a complaint has been made, even if the complainant took no further steps

[374] [2014] eKLR.
[375] United Nations (n 131) 49.
[376] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[377] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

to substantiate his complaint, and the accused did nothing about it, the latter will be viewed by the community with great suspicion.[378]

Thus, the accused has the burden to clear his name by all means - including confession contrary to Article 50(2) (l) of the Constitution, 2010 and Article 14(3) (g) of the ICCPR on the accused person's right not to be compelled to confess guilt. The non-recognition of these important rights, mainly due to the elders' lack of knowledge of the law, deprives the accused person of the right to a fair hearing since they are considered guilty from the onset. This is the inverse of the common law rule that he who alleges must prove beyond reasonable doubt.[379]

In addition, the concept of criminal culpability *(mens rea*) is also not in the vocabulary of the Kipsigis customary law. Thus, where an accused person acts in self-defence, the *kokwet* rarely assess the intention element when determining his/her guilt conscience.

4.4.2.2 Right to prompt notice of the allegations and adequate time to prepare a defence

Once a matter has been reported, the village elder notifies the rest of the *kokwet* who summon the accused person or defendant to appear before them immediately or on a specified day. The accused person is only informed about the details of the dispute at the time of appearance because of the likelihood of absconding. In addition, simple matters, such as petty theft, fighting and domestic violence, are reported and heard within the same day or, where necessary, two days, indicating that the defendant may not have adequate time to prepare his/her defence. Despite this, the defendant is required to answer all questions asked by the elders and cannot be silent as this is a sign of disrespect.[380] Whereas the defendant is allowed to call witnesses, this practice denies him/her the opportunity to adequately prepare for the case, present evidence and arguments, and rebut any evidence procured by the adversary. It is noteworthy that the language used in the Kipsigis justice system is well understood by the parties, which essentially aligns with Article 50(3) of the Constitution 2010. Yet, disputes

[378] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

[379] O W Igwe, 'Proof Beyond Reasonable Doubt and Customary Criminal Law and Practice in Nigeria: A Legal Appraisal' (*ResearchGate*, 21 April 2015) <https://www.researchgate.net/publication/275271198_PROOF_BEYOND_REASONABLE_DOUBT_AND_CUSTOMARY_CRIMINAL_LAW_AND_PRACTICE_IN_NIGERIA_A_LEGAL_APPRAISAL/download> accessed 27 March 2019.

[380] Respondent no 27 in Appendix E.

involving different ethnic groups, especially inter-marriages, require an interpreter where one of the parties does not understand or speak the local dialect used by the elders.

4.4.2.3 Right to a public trial

An ideal dispute resolution mechanism must embrace the core value of transparency or openness. This calls for publicity of proceedings and knowledge of the essential reasoning underlying a decision. Article 50(1) of the Constitution requires that disputes be resolved in a public hearing. The Kipsigis TDRMs have entrenched this value. As noted in Chapter 3, the proceedings of the *kokwet* normally take place publicly and at the scene of the dispute (*kapkiruog*). For instance, if it is a boundary dispute, the *kokwet* will hold proceedings on the land in issue. The mechanism does not, however, incorporate adequate measures to enable child witnesses to testify without fear and with minimal hitches. Although children are treated with some level of secrecy in sensitive matters like child defilement, most disputes involve children narrating details openly and in the presence of the parties.[381] In addition to feeling intimidated while testifying, there is no assurance that the child's security will be guaranteed after the proceedings. The lack of adequate measures imperils children's right to safety during and after the proceedings. This provides a good basis for strict rules to limit TDRMs from handling such matters and refer them to relevant authorities. TDRMs should, however, play a complementary role in the investigation of such cases.

4.4.2.4 Right to expeditious resolution of a dispute

One of the underlying principles that should guide the exercise of judicial authority, as stipulated under Article 159(2) of the Constitution 2010, is that justice shall not be delayed. This principle reinforces the right to have disputes resolved expeditiously, thereby advancing the overriding objectives enshrined in sections 1A and 1B of the Civil Procedure Act.[457] The principle is also amplified in Articles 14 and 7 of the ICCPR and the African Charter on Human and Peoples' Rights (ACHPR). This underscores the need for courts and tribunals to explore other forms of dispute resolution, such as the Kipsigis TDRMs, as complementary avenues of justice given the convoluted and costly nature of judicial mechanisms.

[381] FGD, TDRM Users, Kericho County, 21 July 2018. [457]
Cap 21 Laws of Kenya.

One of the selling points of the Kipsigis TDRMs is that disputes are disposed of without undue delay and procedural technicalities. The Kipsigis TDRMs normally take between 1 day and 2 weeks to conclude a matter. Simple disputes, such as theft, assault, defamation, are resolved within a day or two and do not require many elders. Disputes relating to murder, divorce, succession and property take up to two weeks to resolve due to their complexity. Boundary disputes at times require the elders to secure the services of a surveyor to verify the correct boundaries. The hearing process begins when the defendant appears before the *kokwet* unless the circumstances of the dispute warrant further investigation.

4.4.2.5 Right to be represented and remain silent during proceedings

A key strength of the Kipsigis TDRM is that the parties are given a chance to speak during the proceedings. This in essence accords them the right to be heard. However, the parties are often not represented by a person of their choice, and their right to remain silent is not guaranteed. Culture dictates that a person should not be silent when asked questions by the elders as this is deemed highly disrespectful. This implies that if an accused person opts to remain silent, this may be used against him/her in determining the guilt conscience. The fact that disputants are rarely accorded the opportunity to seek the assistance of and, where appropriate, be represented by a person of their choice, worsens the situation.

4.4.2.6 Right to give and challenge evidence

The Kipsigis TDRMs, as demonstrated in chapter 3, have entrenched the disputants' right to give and challenge evidence. The elders listen to each of the parties and allow them to call on their witnesses (*baorinik)*, if any, to bolster their case. The witnesses are called in turns and sit separately to avoid collusion and coaching.[382] However, the lack of representation denies the parties a chance to examine the witnesses.[459] In addition, immediately after the parties have called all their witnesses, they are sent away denying them the opportunity to challenge the additional evidence derived from the members present. While this is valued as true evidence,[383] it outrightly results to miscarriage of justice as some members may have ulterior motives of framing one of the parties.

[382] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.
[459] Saltman (n 284) 38.
[383] FGD, Kamasian Council of Elders, Kericho County, 21 July 2018.

4.4.2.7 Right of appeal or review

The right to appeal is very vital in the administration of justice. This right is stipulated in Article 50(2) (q) of the Constitution, 2010. However, while the wording of this provision limits the

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right to a higher court, the ends of justice demand that the right is observed even by non-judicial avenues, such as TDRMs. TDRMs aim at striking a social balance between conflicting interests and, because of their flexible and restorative nature, the doors of justice should not be closed as to limit any constitutional right. Thus, any party who is aggrieved by a decision should be accorded an opportunity to appeal to a higher forum for review or reconsideration of the award.

The Kipsigis TDRMs provide the best practice on how this right has been institutionalised. Any party who aggrieved by the *kokwet*'s decision has an opportunity to lodge an appeal before one or more *kiruogindet* or *kiruogik* (traditional judges). The *kiruogindet* comes from any clan of the Kipsigis and is considered an expert. As indicated in Chapter 3, the Myoot Council of Elders comprises senior elders, who often serve as the *kiruogik* when called upon by the *kokwet*. The party also has the option of petitioning the *kokwet* to review the award, if he/she thinks it is onerous. The *kokwet* may hear and determine the petition on their own or with the help of a *kiruogindent*.

During the appeal process, the disputants are accorded an opportunity to argue their dispute. The elder who gave the verdict is called to verify the facts in the appeal. The *kiruogindent*'s (or *kiruogik*'s) decision is normally made by consensus and is final; save that the case can be referred to a magistrate's court if it involves complex issues of law. This rarely happens as most people perceive TDRMs to be fair and cost-effective compared to court; and those who are dissatisfied at times grumble silently and do not pursue judicial avenues. Some of them fear the risk of being cursed in case they challenge the elders' decisions. This does not, however, imply that the Kipsigis customary law forbids a dissatisfied person from going to court after exhausting the traditional structure or while the process is ongoing. The person is entitled to use any forum to his/her advantage, although this may potentially raise issues of forum shopping.

4.4.3 Justice for Women

Restoration of the status quo and a community's dignity is at the heart of TDRMs. Being victim-centred, TDRMs prioritise the victims' rights and the restoration of their status, including their

dignity and security. Yet, negative perceptions prevail against TDRMs based on the postulation that they share little in common with human rights—especially in relation to women. Evidently, the Kipsigis TDRMs have started including women as part of the council of elders. However, the proportion of women in the elders' councils was small (about 9.5%) compared to male elders. This was observed during the FGDs with the Kabianga and Kamasian council of elders, who indicated that the voice of female elders in decision-making is held significant.

Equally, the presence of women has not had the anticipated impact on decision-making to alleviate bias against female parties. The few female TDRM users who provided their views indicated their dissatisfaction especially in cases relating to inheritance and domestic violence which mostly lean towards male parties.[384] While there was a general perception among some elders that women's rights to property are increasingly being recognised by the community, the female respondents expressed a contrary view that land is normally at the disposal of men. Furthermore, it was pointed out that the determination of guilt in family disputes involving husband and wife, is mostly inclined to the wife.

These findings indicate that, although some TDRMs are becoming engendered, they still retain patriarchal elements. This coupled with the reality that the final decision is left to the male elders,[385] not only encumbers women's access to justice, but also the realisation of their socioeconomic rights as enshrined in the Constitution 2010. Access to justice by women is also hindered by barriers, such as persistent fear of intimidation and victimisation by elders or community members. Another notable barrier is the potential lack of privacy and confidentiality in the Kipsigis TDRM process, reducing women's willingness to bring matters involving their personal and intimate rights before TDRMs.

Comparable evidence may be drawn from Muigua's study of the Meru and Luo communities' TDRMs, which indicated that some TDRMs have incorporated women as elders and that there was often room for fair hearing and appeals in matters involving women.[386] Muigua's study revealed that some women matters are not always determined fairly due to inadequate representation as elders, negative attitude towards women elders, limited influence of TDRM

[384] FGD with TDRM Users, Kericho County, 21 July 2018.
[385] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[386] Muigua (n 129) 19.
[464] ibid.

decisions by the women elders, inability of women to articulate issues well, and biased cultural practices and traditions.[464]

To this end, this research underlines the importance of a gender sensitive framework for TDRMs that safeguards the interests of women and other persons with special needs. Participation of women in TDRMs is very vital. This is in consonance with the Constitution of Kenya, 2010, which recognises inclusiveness, equality and protection of the marginalised, as part of the national values.[387] Article 27(3) of the Constitution 2010, emphasises the equal treatment of men and women, including in cultural spheres. The Constitution is also emphatic about equal access to property, and underscores the eradication of discriminatory customs and practices with respect to property ownership.[466] The Land Act No 6 of 2012 seeks, inter alia, to eliminate the culturally prejudiced practices that hinder the participation of women in land management.

Kenya has also ratified a number of regional and international instruments that strongly provide for gender equality and protection of the women and other vulnerable groups like children. Of great relevance to this study is the Maputo Protocol.[388] Article 9 of the Protocol provides for the right to equal participation, including the requirement to put in place affirmative action measures for increased participation of women in decision-making. Further, as a state party, Kenya is required under Article 8 of the Protocol, to take appropriate measures to improve access to justice for women and create awareness about their rights. This is critical especially in rural set ups where TDRMs are predominantly the preferred dispute resolution avenues.

An equally important instrument is the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), Article 3 of which requires states to take appropriate measures to protect women's rights on the basis of equality with men. CEDAW also considers culture as the main barrier to the effective protection of women's rights. It therefore includes a requirement, under Article 5, for states to reform or modify all social and cultural practices that perpetuate inferiority or superiority of either women or men.

[387] Constitution of Kenya, 2010, Article 10.
[466] ibid, Article 60(1) (a) and (f).
[388] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, entered into force in 2003.

These legal protections for women indicate the need for TDRMs to respect the rights of women in the determination of disputes. It is also clear that there are no formal legal bars to women holding leadership positions either at the community level (as elders or chiefs), government or other spheres of leadership in Kenya. Thus, every form of discrimination in TDRMs and customary law cannot constitute a traditional value and should be ruled out.

4.5 Conclusion

The principle of natural justice is a fundamental enabler of access to justice. Any mechanism, judicial or non-judicial, that operates in total disregard of this principle is inimical to the constitutional guarantee of the fair hearing right. This right has received universal recognition as a non-derogable right. Together with the rule against bias, the right forms a critical component for access to justice through TDRMs. To some extent, the Kipsigis TDRMs have attempted to adopt the principles of natural justice, though knowledge of the law is still a missing link. Some of the rights observed by the Kipsigis TDRMs include the right to appeal to a higher body or court, the right to expeditious resolution of disputes, and the right to a public trial. The other rights, as enshrined in Article 50(2) of the Constitution, have not been incorporated. Elements of bias still exist and continue to worsen with the interventions of the local administration in the *kokwet* proceedings. Further, the distribution of opportunities and liberties, as described by Rawls, is not equal. The chapter has demonstrated this, particularly when it comes to the place of women in a patriarchal society. While the Kipsigis TDRMs have recognised women's invaluable role in society, their involvement in dispute resolution has had little impact in ensuring access to justice for women who have no financial muscle to go to court. The next chapter explores this further together with the repugnance clause under Article 159(3) of the Constitution 2010.

CHAPTER 5 CONSTRAINTS TO THE INTEGRATION OF TDRMS WITH THE FORMAL JUSTICE SYSTEM

5.1 Introduction

With continued acceptance of the use of TDRMs as a means of easing the pressure in Kenyan courts, there is a compelling need to strengthen them and enhance interplay with the courts. As demonstrated in Chapter Four, TDRMs exhibit weaknesses that inhibit their alignment with the Constitution 2010. Similarly, a number of constraints affect TDRMs' integration with the formal courts. At the centre of this is the repugnancy clause enshrined in Article 159(3) (b) of the Constitution 2010—a restatement of section 3(2) of the Judicature Act which creates a hierarchy of norms according to which African customary law is of least significance. In light of this, and guided by the contents of chapters three and four, this chapter discusses various constraints to the use of TDRMs and interlinkages with formal courts, with particular focus on the repugnancy test. The key argument is that a TDRM-specific legal framework is necessary to address some of the constraints, most notably the jurisdictional puzzle, misalignment with human rights and natural justice principles, corruption and bias, enforcement of awards, knowledge gaps among the elders, and the nebulous repugnancy test.

5.2 General Constraints to the Use of TDRMs in Kenya

TDRMs are restorative and comparatively cheaper and easy to access than courts. The procedures, as explored in Chapter 2, are informal and easily understood by the users. Whereas their recognition under the Constitution 2010 elevates their status, at least formally, a number of constraints impede their use and integration with the formal justice system as explored below.

5.2.1 Jurisdictional Puzzle

The question of jurisdiction is extensively covered in section 2.5 of this thesis, including the researcher's position on criminal jurisdiction. It suffices to say, however, that the subjectmatter and personal jurisdiction of TDRMs is indeed a puzzle as there is no clear demarcation under the law. For instance, whilst the post-2010 jurisprudence indicates varied application of the concept of 'compensation' under section 176 of the CPC, there is no clear demarcation of the criminal jurisdiction of TDRMs and the method of determining the amount of compensation.

While it is acknowledged that the recognition of TDRMs in Article 159(2) (c) of the Constitution does not exclude criminal cases, there is no formalised structure on how and to what extent TDRMs should exercise their criminal jurisdiction. Case law, together with the

case study of the Kipsigis, reveal this challenge, given the wide jurisdiction exercised by these mechanisms. The cases in *Republic v Mohamed Abdow Mohamed*,[389] *Stephen Kipruto Cheboi & 2 others v R*,[390] and *Republic v Abdulahi Noor Mohamed* (alias Arab),[391] underscore the need to have a guideline on the jurisdiction of TDRMs, including how and when TDRMs should be invoked.

5.2.2 Vulnerability to Corruption and Bias

TDRMs are not immune to corruption, a vice that has slowly permeated the mechanisms making them unreliable. Most of the elders interviewed bemoaned the lack of appreciation from the government for the work they do, and this has implicitly turned TDRMs into a profitmaking business. There has emerged an element of bias with some elders and witnesses being influenced through bribes to tilt the outcome of cases especially where the dispute is between a well-off person and a poor person.[392] One informant noted, in this regard, that, 'social setups have changed and now everyone has to eke their own living to survive and this has brought in bad practices like corruption and lack of fairness in some TDRM settings.'[393]

Participation of local administrators, particularly chiefs in the *kokwet* proceedings affects the independence and impartiality of the process. While the chiefs imbue order in the proceedings, their influence should not be ignored. In support of this is an informant's observation that, 'nowadays the chiefs have become partial due to allegiance to one or other political grouping.'[394] In *Joseph Kalenyan Cheboi & Others v William Suter & another*,[395] a group of clan elders (*Osis*) of the *Marakwet* community raised an issue that the Chief who had been ordered by the Court to organise the elders' meetings and submit a report, was a relative of the

plaintiff and hence biased. The Court asked the Chief to step aside and ordered the elders to revisit the dispute without involvement of the government administration.

[389] [2013] eKLR.
[390] [2014] eKLR.
[391] [2016] eKLR.
[392] FGD, TDRM Users, Kericho County, 21 July 2018.
[393] Respondent no 31 in Appendix E.
[394] Respondent no 33 in Appendix E.
[395] *Joseph Kalenyan Cheboi & Others v William Suter & another* [2014] eKLR.

This is also the case with intervention of politicians in TDRM matters, especially members of county assemblies. Further, the Myoot Council of Elders, besides resolving disputes as the *kiruogik*, plays an advisory role for the *kokwet* as well as politicians within the county.[396] This latter role tends to imperil their impartiality and independence.

The entire issue surrounding incentives or support for those adjudicating disputes is undeniably critical. As one informant rightly stated,

> Many [elders] today are selflessly walking long distances, sacrificing their time all without pay. It is not clear that the next generation will be willing to be as altruistic and philanthropic as these elders. Although what is mooted is a non-pay system, it is important to think of incentives. At the very least, writing material, paper and the like.[397]

The same informant went further to state that, 'it would be unfair for the highly paid judiciary to off-load matters to people who play an integral part of adjudication but will not be paid.' These sentiments tell of the need to device some form of incentives for the elders to enable them effectively take on the numerous cases at the grassroots as well as those referred to them by courts.

5.2.3 Potential Misalignment with Human Rights

As demonstrated in Chapter 4, most TDRMs are patriarchal and contravene certain fundamental human rights and freedoms protected under the Constitution. Many of those interviewed as TDRM users and key informants expressed particular concerns over the treatment of children and women. One key informant for instance stated that, 'In Kuria, a divorced woman required to repay dowry irrespective of the number of years of marriage is unjust; forced abortions in crude inhuman ways for a defiled/raped female are hideous.'[398] Some customs and practices also restrict women from owning or accessing property contrary to Article 60(1) (f) of the Constitution 2010.

[396] FGD, Myoot Council of Elders, Kericho County, 15 December 2018.
[397] Respondent no 33 in Appendix E.
[398] Respondent no 33 in Appendix E. Among the Kipsigis, a marriage is legally binding and a husband cannot request the return of dowry, unless she runs away and persists in returning to her parental home. If the wife has borne him children and subsequently runs away, the husband cannot claim the return of dowry, since the children, including those the wife bears after running away remain his.

In some set ups, women's voices are constrained by cultural constraints.[399] This poses an impediment to the realisation of the rule of law principles such as due process, equality, fair hearing and proportionate punitive measures.[479] Some of the sentences imposed are harsh and/or inimical to the law, most notably banishment, corporal punishment, infliction of strict curses and mild punishments.[400]

Children, in contrast with the formal court system where children courts have been established, are not sufficiently protected since TDRMs do not take care of all the special circumstances surrounding children in their processes.[401] This is in contravention of Article 53(1) (d) of the Constitution 2010, seeks to protect children from abuse, neglect, and harmful cultural practices. Section 4(4) of the Children Act, 2001 also provides that children should be given an opportunity to express themselves in all procedural aspects affecting them, and their opinions should be considered in their best interests.

The best interests of the child is depicted under Article 3 of the Convention on the Rights of the Child, 1989 (CRC) as a primary consideration in all matters relating to children. Article 12(2) of the CRC provides for the right of a child to be given an opportunity to present his or her case in any proceedings, either directly or through a representative, in a manner that is in line with domestic procedural rules. Additionally, Article 40(3) (b) of the CRC requires State Parties to put in place legislative and procedural mechanisms and other measures to protect child offenders, including procedures for dealing with them through alternative justice mechanisms. The State should therefore put in place robust child protection mechanisms as well as measures to curtail TDRMs from handling sensitive cases involving children.

5.2.4 Enforceability of TDRM Decisions

Execution of the elders' verdicts through force of social conformity is somewhat problematic today; perhaps because people have developed more confidence in formal courts.[402] Things have changed, and culprits may choose not to pay the imposed fine or compensation or simply flee thus defeating the end of justice. According to one of the informants,

[399] Respondent no 31 in Appendix E. See further explanation in section 4.4.3 of this thesis.
[479] Constitution of Kenya 2010, Articles 27, 47 and 50(1).
[400] Kinama (n 8) 31.
[401] Respondent no 40 in Appendix E.
[402] Respondent no 40 in Appendix E.

> Communities used to be custodians of morals but there are a lot of changes in modern societies. Cultural values that made one adhere to decisions of elders are no longer treasured or taken seriously. We now live in a global village and fear of banishment of an offender that [naturally] ensured compliance with decisions of elders may no longer work.[403]

Existence of complex rituals in some communities appears to help address rebellious and recalcitrant responses, but the danger is where the elders' decision is wrong. As one informant stated, 'that is a high price to pay.'[404] Interestingly, external players such as police and other warranted players, are seen as 'pariahs' as far as ensuring the decisions are enforced.[485] The Kipsigis TDRMs have gone against odds to seek the intervention of the chiefs when faced with the problem of noncompliance. One of the elders is sent to report the dispute to the chief and police so that the culprit may be arrested and charged.[405] However, most disputes hardly reach this point since most people fear the convoluted and adversarial nature of court proceedings, and the high costs involved.

Nevertheless, the intervention of courts is necessary and this can be possible if TDRMs are court-annexed through a statute.

5.2.5 Knowledge Gaps among the Elders

Not all elders are intellectually fit to handle certain disputes.[406] Despite their vast experience, the elders are not aware that the law and the Constitution limit the application of TDRMs. Many of those interviewed had no idea of any limitation or the repugnancy clause. However, where a matter has gone to court, it remains a court matter and the elders' hands are tied unless the same is referred back to them. There are also capacity gaps in relation to the rules of natural justice and fundamental human rights, especially in relation to children.

The Legal Aid Act 2016 provides an important framework for enhancing the capacity of elders. The Act specifically establishes the National Legal Aid Services and mandates it to, inter alia, take appropriate measures to create legal awareness, including on the rights of vulnerable

[403] Respondent no 31 in Appendix E.
[404] Respondent no 33 in Appendix E.
[485] Respondent no 40 in Appendix E.
[405] Agnes Cheptooi Kirui, 'Access to Justice for All: An Investigation into the Functioning of the *Kokwet* of the Kipsigis Community of Londiani Division, Kericho District' (Master of Arts Thesis, University of Nairobi 2006) 68.
[406] Respondent no 40 in Appendix E.
[488] Legal Aid Act 2016, s 3.

persons.[488] This provision essentially advances the use of TDRMs and provides a legal framework for the training of elders on relevant aspects of law, especially human rights and the principle of natural justice, and how they should integrate these aspects in their TDRM processes.

5.2.6 Concluding Observation

The foregoing bottlenecks provide cogent ground for a framework that clearly defines specific principles to guide TDRMs. There are institutional constraints which equally deserve attention as part of revitalising TDRMs. These include: family members not disclosing all their evidence and therefore frustrating the TDRM process; people becoming very busy and fail to appear during the hearing; and delays caused by witness coaching and cheating which forces the elders to adjourn the hearing and do further investigations. Security is another challenge that elders continue to grapple with especially when they deliver a verdict. For instance, family disputes at times turn out to be personal and create a grudge. In some cases, the elders are threatened by unsuccessful parties. Some parties practice witchcraft to influence or threaten the elders.[407]

Moreover, the place and efficacy of traditional justice systems in some communities is diminishing. With most people turning to the police and courts, backlog of cases in formal courts is evidently a serious problem. Unsurprisingly, many of these cases are reverted for ADR or TDRMs. Perceptions that TDRMs are characterised by harmful cultural practices and coercive sanctions have made people to seek justice in formal courts. In addition, the young Kipsigis consider TDRMs as archaic and instead prefer the formal courts. Some claim that TDRMs belong to the old generation and not the elite Kipsigis. Yet, this is the very system that has historically maintained the fabric of the African society.

5.3 Repugnancy Test, A Double-Edged Sword

The Constitution 2010 recognises TDRMs but goes further to limit their application when they are repugnant to justice and morality.[408] This provision partly borrows from section 3 (2) of the

[407] FGD, Kabianga Village Elders, Kericho County, 30 June 2018.
[408] Constitution of Kenya 2010, Article 159 (3) (b).

Judicature Act.[409] The repugnancy clause entrenched in these provisions denotes a situation of distastefulness, disgust, and revulsion.[410] It is implicit from this definition that customary law, under which TDRMs operate, cannot be applied if it is distasteful to justice and morality. Whereas the intention of the clause is to divest TDRMs of their ostensibly 'barbaric'

anachronisms,[411] its nebulous formula creates room for judicial discretion as the yardstick by which TDRMs are adjudged invalid. The ultimate impact is to create a perception among traditional 'judges' that courts are targeting TDRMs through this test, even with reasonable grounds, thereby weakening the interlinkage between both systems of justice.

5.3.1 Brief History of the Repugnancy Test

The precise origin of the repugnancy test is not clearly known. Nevertheless, literature links the test to the Roman and canon law.[412] The test was introduced to Kenya by the colonial powers, who introduced a foreign legal system thus impeding the natural pace of social ordering.[413] The British administration established a Supreme Court and subordinate courts to administer this system of law. The law required the courts to deal with cases based on the Civil Procedure and Penal Codes of India and other Indian laws then in force in Kenya, in addition to the substance of common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897.[496] Additionally, most of the laws introduced in the country were similar in content with the English Acts.[414]

An analogous system of courts was created for the natives, with limited application of customary law.[415] These courts were empowered to apply African customary law to Africans[416] provided it was not repugnant to justice or morality.[500] Unfortunately, the double formula

[409] Cap 8 Laws of Kenya.
[410] Leon Shaskolsky Sheleff, *The Future of Tradition: Customary Law, Common Law & Legal Pluralism* (London: Routledge 2013) 125.
[411] Remigius N Nwabueze, 'The Dynamics and Genius of Nigeria's Indigenous Legal Order' (2002) 1 Indigenous Law Journal 153, 176.
[412] Mikano E Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' (2015) 15(2) African Studies Quarterly 85-106.
[413] Eugene Cotran, 'The Development and Reform of the Law in Kenya' (1983) 27(1) Journal of African Law 4261. [496] ibid.
[414] These include the Crown Lands Ordinances of 1902, and Land Titles Ordinance 1908, among others.
[415] Ndima (n 164) 2.
[416] Muslim law was also applicable pursuant to Article 57 of the Native Courts Regulations Ordinance, 1897. [500] Native Courts Regulations Ordinance, 1897, section 2(b); Order-in-Council, 1897, section 52; Native Tribunals Ordinance, 1930, section 13(a).

comprised of 'justice' and 'morality' was defined according to the colonialist's understanding of civilisation. This was affirmed by a British in one of the colonial courts in East Africa, that 'the only standard of justice and morality which a British court in Africa can apply is its own British standard.'[417]

Thus, Africans did not have a say on what was considered morally right or just. As noted by Ibhawoh, the British's viewed morality from the lens of civilised values.[418] The repugnancy clause was basically premised on the so-called 'higher and more universal' standards of British justice and morality.[419] The clause was often invoked to alter customary law practices that were viewed as barbaric and uncivilised when gauged within the British's understanding of civilisation.[420] Where the custom failed the test, the British officials decided the matter on the basis of presumed universal standards of natural justice, equity and conscience.[421] To the formal courts, African customary law was outdated and uncivilised.[422] The murder of twins and trial by ordeal were some of the customary practices considered uncivilised.[423] In the infamous case of *R v Amkeyo*,[424] Hamilton CJ, addressing a question of marriage under African customary law, avowed that 'the elements of a native customary marriage were materially distinct from a civilised form of marriage.[425]

This veiled bigotry against foreign law had indeed been condemned by James LJ, in *In Re Goodman's Trust*,[426] who observed that it is an insular vanity to think that every other legal system is nothing but an unclean thing that should be rejected.[511]

[417] *Gwao bin Kilimo v Kisunda bin Ifuti* (1938) 1 TLR (R) 403.
[418] Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford, United Kingdom: Oxford University Press 2013) 59.
[419] ibid 58.
[420] ibid 59.
[421] ibid.
[422] See, for example, *Re Southern Rhodesia* (1919) AC 211.
[423] ibid.
[424] [1917] 7 EALR 14.
[425] See Nwabueze (n 493) 176-177.
[426] [1881] 17 Ch. D. 266.
[511] ibid [298].

Arguably, the British view may have been informed by the variation of African customary laws across different tribal communities in Kenya, and the fact that these laws were undocumented. Yet the so called 'civilised' colonial values were entrenched in the common law, even as the values of traditional Kenyan societies were entrenched in the African customary law. These systems of law were different because they were informed by different cultures and developed in response to different circumstances. It is unfortunate that Kenya inherited the British legal system together with the repugnancy test without providing proper guidance on the double formula that deprived the test of objective application. One of the Informants supported this observation, thus;

> It is unfortunate that the repugnant clause found its way to the 2010 Constitution. The clause was an imperial tool to elevate western values over indigenous values and to propagate imperialism. Its use, therefore, in a transformative constitution is unfortunate.[427]

5.3.2 Why the repugnancy test should be removed

The repugnancy test, though regarded as the 'trinity of legal virtues',[428] was applied to perpetuate prejudice against customary law in favour of Western ideals. As noted, the test represented the British's view that age-old African laws were inferior to their common law; and that the legitimacy of native norms and customs was certainly to be tested based on a standard defined by their ideals.

Kenyan law does not define the repugnancy test, including its double formula of 'justice' and 'morality'. In addition, courts have not construed the double formula in the context of the customs or TDRMs in issue. As may be noted from a raft of cases, the repugnancy test is applied based on the court's understanding of 'justice' and 'morality'. For instance, in *Wambugi w/o Gatimu v Stephen Nyaga Kimani*,[429] the Court pointed out, in reference to section 3(2) of the Judicature Act, that African customary law was applicable so far as the court was satisfied that the custom in question was notorious as to be taken judicial notice of.

Further, the doctrines of precedent and judicial notice applied by courts in their evaluative function may weaken customary law. For instance, a customary law applied in a case by a

[427] Respondent no 34 in Appendix E.
[428] Nwabueze (n 493) 175.
[429] [1992] 2 KAR 292 (Court of Appeal).

superior court may be used as precedent in evaluating the validity of a custom or practice of a different community. Invariably, judicial officers borrow standards and values from other jurisdictions or use their own models to draw evaluative latitudes. This introduces foreign norms contrary to the decision in *Nyali Limited v Attorney General*[430] that common law may only apply in foreign lands with alterations that fit local contexts since the people in those lands have their own customary systems that they treasure.

In some cases, courts have relied on a foreign custom to test the repugnancy of an unrelated custom or practice. The local custom or practice is in this case held inferior compared to the foreign custom. In *Katet Nchoe and Nalangu Sekut v R*,[431] the court borrowed the definition of the repugnancy clause from the Constitution of Ghana, Article 26(2) of which prohibits customary practices that are dehumanising and injurious to both the social and physical well-

being of a person. The court held, in reference to this provision, that female genital mutilation was repugnant to justice and morality because it caused pain. Although this finding was somewhat rational, it seems to imply that male circumcision, which is equally a customary practice, is permitted because it does not cause pain.

In a nutshell, customary law, though now recognised as one of the sources of law under Article 2(4) of the Constitution, has limited influence in Kenya's legal system. The question that one would ask is why the inclusion of the repugnancy test in the Constitution specifically targets TDRMs as opposed to the substantive law governing such mechanisms. This is despite the fact that TDRMs are widely used at the grassroots to achieve the ideal of justice that satisfies the users. As one Informant noted, the definition of justice in the rural setting where TDRMs are used, is different from the classic western understanding of justice.[432] The customs and traditions that typify TDRMs are time tested and premised on wisdom and experience. Thus, one should not pin them down lightly based on an ambiguous test, unless there are reasonable grounds which have to be judicially determined in line with the Constitution 2010. One of the Key Informants noted, in this regard, that,

[430] [1955] 1 All ER 646.
[431] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.
[432] Respondent no 34 in Appendix E.

> Provided repugnancy is not read as belittling African culture, … it is right to have it for practices that are truly abhorrent e.g., cannibalism, throwing baby twins in forests, marriage of underage girls. The repugnancy clause read in terms of [the] entire Constitution is fine.'[433]

Although the repugnancy test has an appreciable effect, clarity on the double formula may help to offer proper guidance and achieve predictability. As one informant noted, 'We need an African perspective of what is repugnant, immoral or unjust, then subject TDRMs to our standards.'[434]

Nevertheless, this study posits that since the ultimate intent of the repugnancy test is to infuse a human right thinking into the substantive law applied by TDRMs, the 'Bill of Rights' and the 'Constitution or any written law', as outlined in Article 159(3), are sufficient thresholds and hence the clause should be removed from the Constitution.

5.4 Conclusion

The interplay between TDRMs and formal justice system, viewed within the foregoing constraints and weaknesses, is generally weak. This portrays weak legal pluralism in which the state legal system is considered universal and superior compared to the other sources of law. This, as demonstrated in Section 1.8.1 of this study, is characterised by multiplicity of legal sources, like in Kenya, but with an overriding official law. Whilst the general constraints explored above contribute to this state of play, the major barrier emanates from the nebulous repugnancy test, which as rightly put, is a double-edged sword. It is a double-edged sword because of its intent as an imperial tool to elevate western values over indigenous ones; and its nebulous nature that creates a huge field of judicial discretion in which the court's opinion becomes the litmus test against which the validity of customary law and TDRMs is declared. Though a 'trinity of legal virtues', at least within a human rights perspective, it is not guaranteed that the court's opinion will not be pegged on a foreign understanding that is not in consonance with customs and practices of the parties to the dispute. There is therefore a need to remove the repugnancy clause from the Constitution or provide a clear definition to ensure predictability in the application of TDRMs. The law should seek to address the constraints that faced the

[433] Respondent no 33 in Appendix E.
[434] Respondent no 31 in Appendix E.

Land Dispute Tribunals (LDTs) (discussed in Chapter 6), to revitalise TDRMs and integrate them with the formal court system.

Overall, compared to the formal justice, the strengths of TDRMs overweigh the constraints and, thus, the mechanisms need to be revitalised consistent with the Constitution and integrated with the formal justice system. Whether codification is an ideal model for integration is a question that requires in-depth interrogation. This question forms the corpus of the next chapter based on the experience of LDTs and case studies of Rwanda and South Africa, to provide insight on how Kenya ought to address some of the constraints and integrate TDRMs with the formal justice.

CHAPTER 6 THE QUESTION OF CODIFICATION OF TRDMs

6.1 Introduction

TDRMs are pivotal channels for enhanced access to justice at the grassroots. The Constitution 2010 recognises the role of TDRMs and requires courts and tribunals to promote their use in the resolution of disputes. Nevertheless, as demonstrated in Chapter Five, the use of TDRMs is subject to various constraints, such as non-adherence to the Bill of Rights and natural justice principles, lack of clarity in respect of jurisdiction, sentencing and interplay with formal courts. Drawing on the experience of Rwanda and South Africa, this chapter explores codification as a possible model for integrating TDRMs with the formal court system and aligning them with the values and imperatives of the Constitution 2010. Specifically, the chapter draws on the perspectives from the *Abunzi* justice system of Rwanda and South Africa's traditional courts. It also discusses the repealed Land Dispute Tribunals (LDTs) as Kenya's home-grown experience.

6.2 Codification as a Mode of Integration

The question of codification is contestable especially in the context of TDRMs. In the instant study, the key issues are whether codification of TDRMs is tenable given their diversity and that of community customary laws; and if tenable, whether it mechanically rob cultural practices, beliefs and value systems of their dynamism and adaptability which distinguishes them from the formal legal system.

Proponents of codification rightly argue that it gives certainty and precision to what had previously been confusion and uncertain.[520] The source of this uncertainty is twofold. First, customary law, being unwritten, relies on human memory and, thus, involves high level of discretion, distortion and elite capture.[521] This allegedly makes it unreliable, non-transparent and inimical to international human rights and the rule of law.[522] Second, the uncertainty is exacerbated by judicial discretion in cases where customary law is challenged on grounds of the nebulous repugnancy test and other standards. Codification is therefore seen as a means of

[520] Brendan Tobin, *The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries* (WIPO & UNU, 2008) 32.
[521] ibid 1.
[522] ibid 3.

getting rid of these uncertainties and ensuring that customary law is not open to arbitrary alteration by traditional authorities.[435] It is also considered a means of making the legal system an accurate biography of the people.

Nevertheless, arguments for codification have met severe criticism, and correctly so, because of a number of reasons. First, customary law is typified by a system of cultural practices, rules and principles with a juridical effect.[524] This system is in constant evolution and varies from community to community. Thus, codifying or assimilating customary law into a positive law system will inevitably rob it of its lived ritual taste and open doors for progressive limitation of its remit.[436] Codification would entail the exclusion of many observed cultural practices, beliefs and values and might be completely disregarded by many communities as not reflecting their cultural norms.[437] Bennett and Vermeulen observe, in this context, that since customary law is a system of living law developed by tribal peoples themselves, any attempts to codify it will undoubtedly be an imposition by outsiders.[438] Kenya has over 43 tribes, with different cultural systems. Such vast systems, if codified, may cause rigidity and eventual annihilation of customary law. Even a general code ostensibly reflecting certain commonalities in the diverse cultural systems cannot suffice without disastrous effects.

[435] ibid 32.
[524] ibid 9.
[436] ibid 32.
[437] M Odje, 'The Repugnancy Doctrine and the Development of Customary Law in Nigeria' in Y Osinbajo and A U Kalu (eds), *Towards a Restatement of Customary Law in Nigeria* (1991) 36.
[438] T W Bennett and T Vermeulen, 'Codification of customary law' (1980) 24(2) Journal of African Law, 219.
[528] Shadle (n 175) 411.

The question of codification of customary law in Kenya emerged in early 1900s.[528] Proposals to reduce African customary law to written law were vigorously opposed by most British administrators as likely to fundamentally erode its fluid or evolutionary nature.[439] Opponents of this move contended that a fluid, uncodified law provided far greater leeway to shape the African society than a code.[440] The push for codification gradually diminished and by late 1920s, few colonial administrators talked in favour of this.[441] However, the colonial administration had already formally recognised TDRMs as early as 1897, comprised of tribal chiefs and council of elders.[442] These mechanisms, referred to as 'native courts', were allowed to administer the uncodified African customary law and customs within their area of

jurisdiction, subject to the repugnancy test.[443] Accordingly, only those who were presumed to 'know the African', were allowed to resolve intra-African legal disputes.[444] Even so, it was Africans who determined the real content of the applicable customary law. The district officers, however, interpreted customary law based on public opinion, which transformed alongside customary law. The British therefore allowed customary law to remain flexible and situational.[445]

In 1902, the colonial administration strengthened the powers of tribal chiefs through the East Africa Native Courts Amendment Ordinance No 31 of 1902. It also established official headmen with powers to resolve petty native cases at the village level. Both types of native courts were limited to tribal members, especially in the villages where the courts sat.[446] Efforts to revitalise the role of elders following the conferment of more powers on chiefs and headmen, were successful through the Native Tribunals Rules of 1911.[447] Further, vide the Native Authority Ordinance No 22 of 1912, the Governor was empowered to 'appoint any Chief or other Native or any Council of Elders to be Official Headmen or Collective Headmen.'[448]

[439] ibid.
[440] ibid 412.
[441] ibid 413.
[442] Native Courts Regulations Ordinance, 1897 section 57.
[443] Order-in-Council, 1897, Article 52.
[444] Shadle (n 175) 413.
[445] ibid.
[446] Abel (n 176) 583 – referring to the Courts Ordinance, No 13 of 1907, s 10(1) (East Africa Protectorate).
[447] Native Tribunal Rules 1911, s 2(1) (Apr. 4, 1911) (East Africa Protectorate).
[448] Native Authority Ordinance No 22 of 1912, s 2(1) (East Africa Protectorate).

Little was altered until 1930 when several native tribunals were established under the Native Tribunals Ordinance,1930. Like their predecessors, the native tribunals were required to apply African customary laws prevailing in their areas of jurisdiction. The tribunals were presided over by panels of the revitalised elders, constituted based on the customary law of their area of jurisdiction and serving exclusively within their own tribe.[449] However, the operation of the tribunals was not immune to interference from the provincial commissioners, who were mandated to establish them. The tribunals had powers to impose fines or imprisonment orders with or without hard labour, or any other punishment authorised under customary law except corporal punishment, provided it was proportional to the nature and circumstances of the offence and not repugnant to 'natural justice and humanity'.[450] Every person sentenced by a native tribunal to imprisonment was to be detained in a place authorised by a provincial commissioner.[451]

Appeals from the native tribunals lay to the Native Appeals Tribunals,[452] and then to District[453] and Provincial Commissioners. Vide the Native Tribunals (Amendment) Ordinance No 38 of 1940, the Islamic *liwali* or *mudir* was included as an intermediate appellate authority. This structure was reformed later through the African Courts Ordinance No 65 of 1951, which replaced native tribunals with African courts. As independence approached, the colonial administration unsuccessfully pushed for codification through the Restatement of African Law project. The African courts were abolished through the Magistrates' Courts Act 1967. In spite of this, majority of Kenyans continued to resolve most of their disputes locally under African customary law. Yet, the abolition of native courts should have been heralded by the establishment of village councils or other legitimate mechanism capable of resolving local and customary related disputes. Later attempts to do this involved the enactment of the Land Dispute Tribunals Act of 1990, which established land tribunals in specific districts, with representation from elders, to adjudicate on land and succession issues based on 'recognised customary law'.

[449] Abel (n 176) 583.
[450] Native Tribunals Ordinance 1930, s 15.
[451] Native Tribunals Ordinance 1930, s 16.
[452] ibid, section 33(1).
[453] ibid, sections 34(1) and (2). Appeals were later transferred to the District Officer under the Native Tribunals (Amendment) Ordinance No 31 of 1933. [544] Cotran (495) 43.

It is explicit, from the foregoing, that the colonial administration was keen on ensuring that customary law remained fluid despite the codification of TDRMs—first as native courts, then native tribunals and lastly African courts. As Cotran notes, the rationale behind this was that the justice system predating colonisation would be allowed to continue operating based on native laws and customs, and administered through councils of elders under the supervision of and control by administrative officers who were presumed to have a better understanding of the natives.[544]

The same spirit that informed those who vigorously opposed codification remains relevant today. Customary law has continually changed to meet new circumstances, and any efforts to codify it will erode its evolutionary character. If there is need for codification, it should be a law that provides, based on the Constitution, a framework within which TDRMs should operate without codifying or restating the applicable customary laws. The drafters should ensure as much as possible that the law does not affect the flexibility of customary law.

The Kenyan case study of LDTs demonstrate the country's post-independence attempts to integrate TDRMs with the formal court system, but also the challenges that should be addressed if a similar approach is to be adopted.

6.2.1 Kenya's Failed Experiment with the Land Disputes Tribunals (LDTs)

LDTs were established in specific districts under the Land Dispute Tribunals Act of 1990 (hereinafter "the LDT Act")[454] (now repealed). The LDTs were quasi-judicial in character, exhibiting some elements of formal justice system. They were the 'courts of first instance' for disputes of a civil nature relating to agricultural land, notably boundaries to land, trespass to land, and an entitlement to occupy or work land.[455] This included disputes arising from the Land Control Board proceedings. The LDT Act barred magistrates' courts from hearing such disputes unless the court had already heard the dispute. If any of the disputes was brought to the courts, the courts were required to discontinue the proceedings and refer them to the relevant LDT. The Courts also had powers to refer matters to LDTs pursuant to rule 7 of the

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[454] Land Disputes Tribunals Act, 1990, s 4.
[455] ibid, s 3(1).

Land Disputes Tribunals (Forms and Procedure) Rules, 1993. The LDTs were expressly required to observe the law relating to limitation of actions and the doctrine of *res judicata*.[456]

The tribunals were composed of a panel of two or four elders appointed for each district by the Minister in charge of land and a chairman selected by the District Commissioner from the panel of elders.[548] The elders were sourced from the local communities and were presumed to understand the local language and share a similar custom. It appears, therefore, that the intention under the LDT Act was to have participation of local members or elders of the district where the dispute arose. This was, in the researcher's view, commendable in addressing land issues. However, the involvement of the local administration in the appointment of the panels raises a question whether the process was informed by relevant customary laws and community opinions regarding the experience and customary law knowledge of the elders. Though the composition was explicitly provided for under the Act, there were no guidelines on how relevant communities would participate, not even under the Land Disputes Tribunals (Forms and Procedure) Rules, 1993.

The LDT Act provided for rules of procedure with clear timelines for filing claims, service to parties and hearing, including how matters would escalate to the High Court. The LDTs were required to adjudicate upon claims and base their decisions on 'recognized customary law', after hearing both parties.[457] Yet, there was no clarity on the meaning of 'recognised customary law'. The elders, who were presumed to be the sources, were selected largely on advice from chiefs.[458] Participation of lawyers in the LDT proceedings was prohibited under the Act. Although the LDTs were primarily guided by customary law, they applied procedural rules like those applicable in ordinary courts. This is quite distinct from the TDRMs, which are not rulebased. Importantly, the LDTs were fairly affordable and accessible compared to courts.

The LDT Act required each party in a dispute before the LDT to be accorded an opportunity to interrogate the other party's witness(es).[459] This requirement aligned, at least on paper, with

[456] ibid, s 13(3).
[548] ibid, s 4.
[457] ibid, s 3(7).
[458] Andrew Harrington and Tanja Chopra, 'Arguing Traditions Denying Kenya's Women Access to Land Rights' (Justice for the Poor, 2010) 14.
[459] Land Disputes Tribunals Act, 1990, s 3(7).

the natural justice principles. In addition, the LDTs were required to give reasons for their decisions, briefly outlining the issues and determination thereof.[460] The Registrar was permitted to assist, where appropriate, in the adjudication of claims by the LDTs. This reinforced the linkage between LDTs and the formal courts, albeit with increased dangers of interference with the elders' independence.

Importantly, decisions of the LDTs would be filed in the magistrates' court together with any relevant depositions or documents. The LDT Act required the magistrates' court to enter judgment in line with the decision of the LDT and issue a decree enforceable in line with the Civil Procedure Act.[461] The wording of this provision was in mandatory terms, that the court's role was merely to adopt the LDT award as judgement on application and thereafter issue a decree. The court had no mandate to vary, rescind and/or set aside the decision. Appeals lay first to the Land Disputes Appeals Committee constituted for the Province in which the land in issue was situated, and subsequently to the High Court.[554] The decision of the Appeals Committee was final on any issue of fact (including a question of customary law), and no further appeals were permitted. The decision of the Committee on a point of law was subject to appeal to the High Court.

6.2.1.1 Lessons from the Land Disputes Tribunals

The LDTs provide a Kenyan perspective on regulated informal justice systems. A key lesson from the LDTs is how courts intervened in the enforcement process, something that can be adopted to strengthen the integration of TDRMs with the formal court system. Under the LDT Act, decisions made by the LDTs would be filed with the magistrates' court, which in turn would enter judgment and issue a decree enforceable pursuant to the Civil Procedure Act. As correctly observed in *Florence Nyaboke Machani v Mogere Amos Ombui*,[462] the magistrates' courts did not have jurisdiction to review or rescind the decisions of LDTs. If the High Court annulled the LDT's award on a question of law, the consequent adoption of that award as judgement by the magistrates' court was of no effect.[463] In addition, the provision of rule 7 of the Land Disputes Tribunals Rules of 1993 allowed the court to refer any dispute for resolution

[460] ibid, s 3(8).
[461] ibid, s 7(2).
[554] ibid, s 8.
[462] [2018] eKLR.
[463] *Peter Atambo Magoya v Stella Osebe* [2019] eKLR.

by the appropriate LDTs. This strengthened links between the courts and the LDTs, something that could inform the integration of TDRMs with the formal justice systems.

However, any option preferred for integrating TDRMs should be carefully crafted to avoid the pitfalls that faced the LDTs as discussed further below.

6.2.1.2 Why the Land Disputes Tribunals Were Repealed

The proposal to repeal the LDT system was one of the subjects in the drafting of the National Land Policy. The initial proposal, under the Draft National Land Policy, was to repeal the LDT Act of 1990 and enact a new legislation to establish more appropriate land disputes tribunals at the district and community levels alongside the Judiciary.[464] The final National Land Policy retained the proposed organisational structure with new LDTs having a direct link to the High Court,[465] but left it open for the government to decide the machinery that would be a more appropriate replacement of LDTs at the local and district levels.[559] However, this proposal was technically ignored in the land law reform process that saw the enactment of new land laws in 2012. Although the rationale for this move has not been explicitly settled in literature, the researcher was able to identify critical issues that probably formed the basis for the abandonment of LDTs.

(a) Jurisdictional Challenges

A key challenge that faces TDRMs today is lack of clarity on their jurisdiction, both personal and subject matter. While a clear framework for TDRMs may be necessary to integrate them with the formal courts, jurisdictional issues similar if such a framework does not clearly delineate the jurisdiction of TDRMs. This was one of the bottlenecks that faced the LDTs, despite being entrenched under the LDT Act.

The jurisdictional quagmire partly emanated from an assumption that LDTs had the same jurisdiction as that of the Panels of Elders under the Magistrates Jurisdiction (Amendment) Act No. 14 of 1981. This Act was premised on the perception among politicians that courts were

[464] John Bruce, *Kenya Land Policy: Analysis and Recommendations* (USAID Kenya, 2008); Ministry of Lands, *Draft National Land Policy* (n.d.) 50.
[465] Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy* (2009) 60.
[559] ibid 59.

not doing a good job in adjudicating over land disputes.[466] The Act was later replaced by the LDT Act of 1990 that established LDTs. While the Panel of Elders had all the jurisdiction of LDTs under section 3(1) of the LDT Act, a minor difference existed, for instance, in relation to questions of "beneficial ownership of land' which the Panels of Elders had the jurisdiction to determine under section 9A (1) of the Magistrates Jurisdiction (Amendment) Act, 1981. Additionally, section 9A (2) of this Amendment Act prevented the Panel of Elders from determining disputes over title to land. The LDT Act did not contain such provisions. However, considering the similarity in the composition of the LDTs and the Panels of Elders, there was an assumption by the LDTs that they had all the jurisdiction that was given to the Panels of Elders. This potentially resulted to confusion and disorder manifest in the numerous court cases challenging the jurisdiction of LDTs. The Court, in *Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex-parte Peter Maru Kariuki*,[467] attributes this disorder and confusion to 'bad law' – that is, the LDT Act.

Illustrative caselaw reveal a number of times the decisions of the LDTs were declared null and void for lack of jurisdiction. In *Republic v Chairman Borabu Land disputes Tribunal & 2 Others Ex parte Florence Nyaboke Machani*[468] and *Republic Ex parte Peter Nicholas Mauti v Keumbu Land Disputes Tribunal & 2 Others*,[469] the decisions of the LDTs were properly challenged in judicial review proceedings and the courts clearly pronounced themselves that, where the LDTs acted in excess of their jurisdictions, the awards could not stand. The question

of jurisdiction also arose in *Peter Atambo Magoya v Stella Osebe*,[470] in which it was contended that the Mosocho LDT lacked jurisdiction to deal with the dispute lodged before them as it related to title/ownership, which fell outside their mandate under the LDT Act 1990. The LDT's decision required the Appellant to surrender his title so that it would be cancelled and given back to the Respondent; which, according to the Court, entailed a determination that affected registered title. The Court held, based on section 3(1) of the LDT Act, that the LDT had indeed

[466] *Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex-parte Peter Maru Kariuki* [2005] eKLR.
[467] [2005] eKLR.
[468] [2014] eKLR.
[469] [2016] eKLR.
[470] [2019] eKLR.

acted *ultra vires*, emphasising that any claim relating to ownership and/or title to land could only be handled by the High Court.

Similarly, in *David Kimani Karogo v Thika Land Disputes Tribunal & 2 others*,[471] the Applicant argued that both the Thika LDT and the Provincial Land Disputes Appeal Tribunal in Nyeri did not have jurisdiction to arbitrate the dispute as it related to competing titles registered under the Registered Land Act, Cap 300 (now repealed). The Court, having considered section 3(1) of the LDT Act, found and held that both tribunals acted without jurisdiction and/or exceeded their jurisdiction.

In *Gibson Semele Mato v Eastern Province Land Dispute Committee & Another*,[472] the court held that;

> Makueni District Land Tribunal Appeals Committee had no jurisdiction to determine questions of ownership and title to land registered under the Registered Land Act and that in doing so, the Tribunal acted *ultra vires* and the entire proceedings became a nullity.

Similar challenges are likely to emerge if the criminal and civil jurisdiction of TDRMs is not explicitly provided.

(b) Corruption

Whether codification can curb corruption in TDRMs depends on the extent of involvement of the local administration in the selection of elders and the dispute resolution processes. One of the reasons why LDTs became dens of corruption was due to political influence mainly by provincial administrators, who controlled the affairs of the elders for personal gain.[473] This topdown process aggravated corrupt practices and resulted to members who were either incompetent or lacked connection to their areas of jurisdiction.[568] Equally, given the emotive

nature of land in Kenya, involvement of powerful politically appointed officials affected the integrity of the process due to political influence.[474] This partly explains why the LDTs were clogged up with cases. While initially the LDTs were efficient in handling disputes, they increasingly fell short because of the complexity of land issues coupled with the incompetence

[471] [2017] eKLR.
[472] Nairobi Misc. CA 331 of 2003.
[473] Harrington and Chopra (n 550) 14.
[568] ibid.
[474] ibid 15.

of the elders and corruption.[475] As a result, there was a gradual build-up of case backlog with most cases ending up in the High Court.[476] There were also elements of bias, lack of transparency and conflict of interest especially where an LDT member was actively involved in the resolution of a dispute involving a family member.[477]

(c) Inadequate Human Rights Safeguards

Despite their entrenchment in an Act of Parliament, the LDTs were faced with capacity challenges in relation to the rules of natural justice and fundamental human rights, particularly those of children and women, resulting to protracted dispute resolution processes.[478] In particular, the repealed LDT Act did not provide for any safeguards for women. As noted by Harrington and Chopra, some LDTs prevented women's attendance and participation in the hearing processes.[574] In a gender-related study in Kenya, it was noted that participation of women as elders in the LDTs was disallowed because customary law was not open to that.[479]

The procedures of the LDTs also denied women an opportunity to appeal against discriminatory decisions.[480] Although the LDT Act provided for appeals to the Appeals Committee and subsequently to the High Court, section 8(8) thereof stated that '[t]he decision of the Appeals Committee shall be final on any *issue of fact* [that is, a question of customary law] and no appeal shall lie therefrom to any court.'[481] The LDT Act therefore insulated customary law decisions from judicial review, denying women a chance to defend their rights in court. The LDT Act stated specifically that 'no appeal shall be admitted to hearing by the

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[475] Land Development and Governance Institute, 'An Assessment of the Performance of the Environment and Land Court: Scorecard Report' (2013) 1.

[476] Allan Odhiambo, 'CJ under the spotlight as land disputes crisis looms' *Business Daily* (21 November 2011) <https://www.businessdailyafrica.com/corporate/CJ-under-the-spotlight-as-land-disputes-crisis-looms--/5395501277048-jw5pk8/index.html> accessed 6 November 2019.

[477] Harrington and Chopra (n 550) 14.

[478] ibid 14.

[574] ibid 15.

[479] The International Women's Human Rights Clinic, 'Women's Land and Property Rights in Kenya—Moving Forward into a New Era of Equality: A Human Rights Report and Proposed Legislation' (Georgetown University Law Centre, 2008).

[480] ibid.

[481] Emphasis added. Section 8(1) of the LDT Act expressly stated that '[a] question of customary law shall for all purposes under this Act be deemed to be a question of fact'.

High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.'[482]

6.3 Case Study of Rwanda and South Africa

Rwanda and South Africa offer comparative experiences on how TDRM may effectively be integrated with the formal justice system without impacting on the fluid nature of the mechanisms.

6.3.1 The *Abunzi* Committee of Rwanda

Rwanda provides a very interesting case study because of its history of conflict and protracted healing process. Geographically, Rwanda is divided into 5 provinces, 30 districts (*akarere*), 416 sectors (*imerenge*), 2148 cells (*utugari*) and 14837 villages (*imudungu*). A sector and cell are equivalent to Kenya's division and location respectively. Of great relevance to this study is the *Abunzi*[483] dispute resolution mechanism. This mechanism operates typically based on unwritten customary law and is not subject to the repugnancy test. Article 176 of the revised Constitution of Rwanda provide that unwritten customary law remains applicable provided it has not been replaced by written law, is not inconsistent with the Constitution, laws, orders and regulations, and does not violate human rights or prejudice public security or good morals.

The *Abunzi* is a dispute resolution mechanism set up in every cell and sector for conciliating parties in conflict to promote national unity and peaceful coexistence among Rwandans. Recognised under Article 141 of the Constitution of Rwanda 2003 as first instance avenues for certain disputes defined by law, the *Abunzi* typifies the ideal synergy between TDRMs and judicial mechanisms. The mechanism embodies the concept of mediation and is *a priori* free and locally accessible, with about 2564 committees in operation at the cell and sector levels.[484]

The main law that governs the *Abunzi* committees is Law N° 37/2016 of 08/09/2016 (hereinafter, 'the Law'), which repealed Organic Law N° 02/2010/OL of 09/06/2010. Article 2 of the Law establishes the *Abunzi* Committee at the cell level and Abunzi Committee of appeal

[482] Land Disputes Tribunals Act 1990, s 9.

[483] The term *abunzi* literally refers to 'those who reconcile'. These are local mediators in Rwanda who have the mandate to resolve disputes through mediation.

[484] Ruben De Winne and Anne-Aël Pohu, *Mediation in Rwanda: Conceptions and Realities of Abunzi Justice (2011-2014)* (RCN Justice & Démocratie, 2015) 1.

at the sector level. Each Committee comprises 7 members of integrity who must all be residents of the Cell or Sector, elected for a renewable term of 5 years by the Cell Council or

the Sector Council respectively from among people other than high authorities, cabinet members, parliamentarians, staff of judicial organs, security services, local administrative entities and others whose duties are incompatible in accordance with relevant laws.[485] The role of the members is to act as mediators in disputes up to a certain value before they are brought before formal courts. One oft-cited criticism against TDRMs is that they are not genderinclusive. To alleviate this, Article 6 of the Law provides that 30% of the members must be women. The members serve on voluntary and non-remunerative basis; and are subject to a code of conduct as determined by an Order of the Minister of Justice. Under Article 32 of the Law, the *Abunzi* Committee may suspend one of its members for a period not exceeding one month on grounds of partiality or any other misconduct.

The Law establishes a Bureau in each Cell and Sector to coordinate and supervise the activities and performance of the *Abunzi* Committees.[582] The Bureau is however not allowed to instruct the *Abunzi* on how to settle disputes. All activities of the *Abunzi* Committees fall within, and are supervised by, the Ministry in charge of Justice in collaboration with the Ministry in charge of local government.[486] The Ministry supports them in the performance of their duties through trainings and supply of equipment. In the researcher's view, state intervention in the form of supervision and monitoring is critical but may dilute the *Abunzi*'s institutional independence if it is too much, introducing a top-down, retributive approach.

6.3.1.1 Jurisdiction and Competence of the Abunzi Committee

Under the repealed law, the *Abunzi* Committee had jurisdiction over both civil and criminal disputes. Following concerns that the Committees did not adequately avert crime,[487] the new Law limits the subject-matter jurisdiction to any civil matter relating to: movable and immovable assets and succession thereto where their value does not exceed three million Rwanda francs; and family matters other than those requiring rendering a decision on civil

[485] Law No37/2016 of 08/09/2016 Determining Organisation, Jurisdiction, Competence and Functioning of an *Abunzi* Committee, Articles 6 and 7 [hereinafter 'Law No37/2016 of 08/09/2016']. [582] Law No37/2016 of 08/09/2016, Article 9.

[486] Law No37/2016 of 08/09/2016, Article 33.

[487] James Karuhanga, 'Abunzi Jurisdiction: Changes in Law Will Curtail Crime' *The New Times* (26 September 2016) <https://www.newtimes.co.rw/section/read/203838> accessed 23 June 2019. [585] Law No37/2016 of 08/09/2016, Article 10.

status.[585] The Abunzi Committee has no jurisdiction over disputes involving the State, its organs or associations and companies with legal personality, whether private or public.

An *Abunzi* Committee is competent to settle a dispute if it is: in the territorial jurisdiction of the subject-matter; of the respondent's place of residence, where the subject-matter is movable property; or of the applicant's place of residence through mutual agreement with the respondent.[488] In the event that the summoned party has no known identification or place of domicile or residence in Rwanda, the dispute is referred to the relevant court.[489] Where the dispute involves land located in different territorial jurisdictions of *Abunzi* Committees, the committee that has jurisdiction over the place of location of the portion of land and in which both parties reside, is competent to settle the dispute.[490] However, if both parties do not reside in the same jurisdiction, the committee having jurisdiction over the place of location of the portion of land and in which one of the parties resides is competent to settle the dispute.[491] If both parties do not reside in the same jurisdiction where the land is located, the committee having jurisdiction over the place of location of the bigger portion of the land is competent to settle the dispute.[492]

6.3.1.2 Reporting of Disputes

All disputes at the Cell level are first submitted orally or in writing to the Executive Secretary of the Cell who fills specific forms and submits them to the competent *Abunzi* Committees. The Executive Secretary categorises the disputes and submits all criminal disputes to relevant judicial police organs. Each Sector also has an Executive Secretary who receives disputes and submits them to the respective *Abunzi* Committee. In the absence of the Executive Secretary, the dispute is received by the deputy secretary. The Executive Secretary of the Cell or Sector is precluded from taking part in the hearing process.

Upon receiving the dispute, the *Abunzi* Committee summons the respondent (with notification to the applicant) to appear before it within 7 days from the date the summons is served. In case

[488] ibid, Article 11(1), (2).
[489] ibid, Article 11.
[490] ibid, Article 12(1).
[491] ibid, Article 12(2).
[492] ibid, Article 12(3).

of non-appearance, the respondent is summoned again and informed that the *Abunzi* will render their decision on the scheduled date in his/her absence. If the party fails again, a decision is rendered by default. However, if there are reasonable grounds for non-appearance, the *Abunzi* reschedule the conciliation session for another date with notification to both parties.

6.3.1.3 Conciliation Process

The parties are allowed to agree on a panel of three *Abunzi* from the *Abunzi* Committee to whom they refer their dispute. In case they fail to agree, each party chooses one Abunzi and both are required to agree on the third one. In the event that both parties choose the same *umwunzi*, the latter chooses the other two from the *Abunzi* Committee. The parties are not required to refuse *umwunzi* or *abunzi* chosen through this procedure. The other members of the *Abunzi* Committee, who are not selected as part of the Panel, are allowed to participate in the conciliation session but have no right to vote.

The *Abunzi* Panel is required to select from among its members a chairperson and rapporteur who must be literate. The *Umwunzi* cannot sit on the panel if he/she is involved, or has an interest, in the dispute. In these circumstances, the *umwunzi* is required to withdraw from the panel on his/her initiative or pursuant to a motion by the applicant. Where the dispute involves all or majority of the *Abunzi* Committee members at the Cell or Sector level, the chairperson of the Committee should notify the Coordinator of *Abunzi* activities at the district level of the issue in writing within 15 days. The Coordinator, in collaboration with the Executive Secretary of the Cell or Sector in which the problem is noticed, seeks support from the *Abunzi* of the nearest Cell or Sector to settle the dispute. The rationale is to ensure impartiality in the hearing and determination of disputes.

The *Abunzi* hearing procedure is outlined in Article 17 of the Law. This is normally an open process. However, the *Abunzi* may decide to have a closed session based on the nature of the dispute. During the session, each party is heard and allowed to call witnesses. The role of the *Abunzi* Panel is to help both parties to reach at a compromise. Where the parties fail to do so, the Panel renders a decision in line with the law, culture of the place where the dispute is being settled or their own conscience, provided the decision is not contrary to written law. The parties may seek the assistance of a lawyer, but the latter cannot represent or plead for them. There is

also a provision for an interpreter, whose fees should be borne by the person seeking his/her services. Every person, being neither an applicant nor a respondent, is entitled to intervene in the dispute under consideration by the Panel if he/she is likely to be affected by the verdict.

The dispute should be settled within one month from the day it was submitted to the *Abunzi* Committee. The decision is made by consensus or, where there is no such consensus, by an absolute majority of votes. The decision must be recorded in minutes signed on each page by all members of *Abunzi* Panel and the concerned parties. The verdict must be written and signed by the *Abunzi* on every page and made available within a period not exceeding 10 days from the day the decision was rendered; otherwise, the concerned *Abunzi* may face disciplinary sanctions. The chairperson of the *Abunzi* Panel is required to notify the parties of the written verdict within 5 days from the day it was made available.

6.3.1.4 Appeals

A verdict rendered in the absence of either party may be subject to opposition within 10 days from the day of its notification.[493] Such a verdict is not subject to appeal before the expiry of the period of opposition. The request for opposition is submitted to the Executive Secretary who in turn submits it to the entire *Abunzi* Panel that rendered the verdict. Any party who is aggrieved by the *Abunzi's* decision at the Cell level is entitled to appeal at no cost, to the *Abunzi* Committee at the Sector level within 30 days of notification of the written verdict.[494] Any party who is dissatisfied with the verdict of the *Abunzi* Committee at the Sector level may, within 30 days of notification of the verdict, appeal to the competent Primary Court.[495] This is subject to court fees. The Court considers only those parts of the verdict challenged by the applicant and to which objections were raised at the *Abunzi* Committee. The Court may, where necessary, request the minutes drafted by the *Abunzi*.

6.3.1.5 Enforcement of the Abunzi Committee's Verdict

Execution of the *Abunzi*'s verdict is by consent.[496] In case of non-compliance, the prejudiced party may apply for enforcement of the verdict in line with the laws relating to enforcement of proceedings. In this regard, the prejudiced party request, orally or in writing, the President of

[493] ibid, Article 24.
[494] ibid, Article 25.
[495] ibid, Article 27.
[496] ibid, Article 29.

the Primary Court with jurisdiction over the place where the verdict was rendered to append an enforcement formula. This application is not subject to court fees. However, the President must, before appending an enforcement order, receive a written statement from the Executive Secretary of the Sector where the verdict was rendered, certifying that the verdict was rendered by the *Abunzi* Committee and that it is no longer subject to appeal or referral to any court. The President cannot refuse to issue the order unless the verdict or its execution is inimical to public order, in which case he/she informs the *Abunzi* Committee that rendered the verdict to correct it.

6.3.2 South Africa

Like Kenya, South Africa has plural legal system. The colonialist influence on the country's legal system is also apparent both in the substantive and procedural law. Before 1994, customary law and systems in South Africa remained inferior to common law, which was often used as the yardstick.[497] The status of customary law was elevated by the Interim Constitution (200 of 1993), Principle XIII of which provided that, 'indigenous law, like common law, shall be recognised and applied by the courts', consistent with the fundamental rights enshrined in the Constitution and relevant legislation. This Constitution was repealed by the 1996 Constitution, which identifies customary law as a source of law forming part of the legal mix. Section 211 (3) of the 1996 Constitution specifically requires courts, including traditional courts, to apply customary law where applicable, subject to the Constitution and any statute that specifically deals with customary law. This provision, like Article 2(4) of the Constitution of Kenya 2010, places customary law in the same footing with other sources of law in South Africa. Both Constitutions entrench a clear appreciation of customary law as an important body of law and the fact that the Constitution holds supreme and shall be promoted. However, unlike Kenya, customary law and TDRMs in South Africa are not subject to the repugnance test. The only recognised yardstick is the Bill of Rights[498] and values and imperatives of the Constitution and other relevant legislation.

[497] Christa Rautenbach, 'Traditional Courts as Alternative Dispute Resolution (ADR) Mechanisms in South Africa' F Diedrich (ed), *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (Verlag Dr Kovac Hamburg 2014) 288.
[498] SA Constitution, 1996, s 39(2).
[597] SA Constitution, 1996, s 30.

The1996 Constitution accords everyone the right to culture in line with the Bill of Rights.[597] Further, under section 31 of the Constitution, persons belonging to cultural or linguistic community have a right to enjoy their culture. These provisions, together with section 235 on self-determination, affirm the right of traditional communities to resolve disputes using their own justice structures. The 1996 Constitution explicitly underscores this fact by recognising the institution, status and role of traditional leadership and customary law. Section 212 of the 1996 Constitution specifically outlines traditional leaders' roles and envisages the enactment of a law to provide guide them.

In line with this, South Africa enacted the Traditional Leadership and Governance Act 2003, which outlines the role of traditional leaders as custodians of customary law, including their

role in the administration of justice.[499] The Act establishes the Commission on Traditional Leadership Disputes and Claims with the mandate of investigating and making recommendations on all claims and disputes related to traditional leadership.[500]

6.3.2.1 Traditional Courts in South Africa

The 1996 Constitution expressly provides for the retention of traditional courts established pursuant to the Black Administration Act No. 38 of 1927 (hereinafter "the BAA").[501] These courts are 'formal' by virtue of operating under state law. However, the procedures applied are fairly informal and based on customary law of the particular area. There are also 'informal' or unofficial TDRMs in South Africa which are not legally recognised but are widely used in rural places. The first level is the family council. If a dispute is unresolved at this level, it proceeds to the sub-headman and his adviser(s) for resolution. The methods used here are mediation and reconciliation. If the dispute is still unresolved, it is referred to the competent 'formal' traditional court manned by legally recognised traditional leaders. In most of these levels, the key actors are traditional leaders—referred to as 'elders' in Kenya. For instance, among the Kipsigis, *kotigonet*, which is mostly at the family level, is the first instance forum. The difference with the Kenyan structure is the lack of clear linkage between the TDRMs and ordinary courts.

[499] Traditional Leadership and Governance Framework Act No 41 of 2003, sections 19 and 20(1) (f).
[500] ibid, 22.
[501] SA Constitution, 1996, s 166(e) and Schedule 6, s 16(1).

The 'formal' traditional courts in South Africa are also found in rural places and are presided over by traditional leaders selected pursuant to the BAA. They have jurisdiction with respect to civil and criminal matters. However, traditional leaders are not trained as to distinguish between criminal or civil cases, and their understanding of common law is wanting.[502] Cognisant of this need, the South African Judicial Education Institute (SAJEI) has been training and continues to educate all traditional leaders to enhance their capacity.[503]

Nevertheless, the difference between criminal and civil jurisdiction is clearly outlined in legislation. With respect to criminal jurisdiction, traditional leaders (black chiefs, headmen and deputy chiefs) have power to hear and determine offences at common law and Black law and custom except serious offences outlined in the Third Schedule of the BAA, namely treason,

murder, rape, culpable homicide and robbery.[504] This limited jurisdiction can only be exercised with authorisation of the Minister of Justice and Constitutional Development. The question of personal jurisdiction is somewhat defined, in that the traditional leaders only have jurisdiction if both parties are Africans. The Act allows them to impose any penalty under customary law other than death, mutilation, grievous bodily harm or imprisonment, a fine exceeding R100 or two head of large stock or ten head of small stock, or corporal punishment.[505] Likewise, the proposed Traditional Courts Bill 2017[506] clearly delineates the criminal jurisdiction of traditional courts under Schedule 2 thereof.

Traditional leaders have civil jurisdiction pursuant to section 12(1) of the BAA. This is, however, subject to a number of conditions, namely: the leaders must have the Minister's approval; the dispute must have arisen out of indigenous law or custom; both parties must be black Africans; and both of them or the defendant must be residents of the traditional leader's area of jurisdiction.[507] The traditional leader cannot determine divorce, nullity or separation of marriage issues.[607] Under the proposed Traditional Courts Bill 2017, traditional courts have jurisdiction over customary law civil cases relating to disagreements between community

[502] Christa Rautenbach, South Africa: Recognition of Traditional Courts: Loose Ties between two Judicial Systems (Conference Paper, May 2012) 17.
[503] Republic of South Africa, *The South African Judiciary Annual Report 2017/18* (The Judiciary, 2018) 9.
[504] BAA, s 20(1)(a).
[505] BAA, s 20(2).
[506] Bill published in Government Gazette No. 40487 of 9 December 2016.
[507] BAA, s 12(1).
[607] BAA, s 12(1).

members; and provide advice in respect of initiation, customary law marriages, custody and guardianship of minor or dependent children, succession and inheritance, and customary law benefits. The procedure applied in civil disputes are premised on the particular community's customary law—generally outlined under the 1967 Regulations.[508] Under these Regulations, a traditional leader cannot adjudicate a matter in which he has personal or pecuniary interest.[509] The traditional court is required under the Regulations to complete a four-fold record of civil proceedings immediately after a case has been concluded and send a copy to the responsible magistrates' court. The latter should then register the traditional court's judgement within two months. In case the traditional leader is illiterate, he/she may orally present the particulars of the judgement to the clerk of the magistrates' court, who is to prepare the written record.

A person who is dissatisfied with the decision of traditional leaders may appeal to the magistrates' court in the district where the trial took place.[610] This clearly sets out the interplay

between traditional courts and the formal courts. This link is also augmented by the intervention of the magistrates' court in cases where the execution of traditional courts' judgement has become problematic; as well as the power of the ordinary courts to develop customary law pursuant to section 39(2) of the 1996 Constitution. Further, under Clause 14(1) of the proposed Bill, a traditional court may refer a dispute to the magistrates' court or small claims court if it is of the view that it has no jurisdiction to deal with the dispute, or the dispute involves a complex question of law, or non-compliance with summonses or orders of the court.[510]

In criminal disputes, the traditional leader has power to arrest the defaulter and bring him or her before the magistrates' court within 48 hours. The court may order the person to pay the fine imposed by the traditional court, failure to which the person is subjected to up to three months imprisonment. Appeals in relation to civil claims are not admissible where the claim or the value of the subject-matter is less than R10, unless the issue has been certified by the magistrate court to involve an important point of law. Unless it is a question of execution of judgment, the proceedings in the magistrates' court are not typically an appeal but a re-trial

[508] Government Notice R2082 in Extraordinary Government Gazette 1929 of 29 December 1967.
[509] Rautenbach (n 82) 25.
[610] BAA, s 20(6).
[510] Traditional Courts Bill 2017, cl 4(4)*(b)*(ii) and 9(4)*(b)*(ii).

since the court commences proceedings afresh. The same is replicated in Clause 14(1)*(b)* of the Traditional Courts Bill.

Despite the importance of traditional courts in advancing access to justice, especially in rural areas, a few challenges abound. For instance, the exclusion of other racial groups from the jurisdiction of traditional courts is a contestable one, particularly when viewed within Rawls' theory of justice and the principle of equality under section 9 of the 1996 Constitution. There is also no legal representation or record keeping, though the presiding traditional leader is required, after judgement, to complete a civil record of proceedings and submit to the competent magistrates' court. The Traditional Courts Bill 2017 attempts to address this challenge by requiring traditional courts to prepare a record of proceedings, which includes a summary of the facts of the dispute and its decision and order, among others. With respect to exclusion of legal representation, the reasoning could be to avoid the formality and legalese that typify the ordinary court proceedings. The exclusion is echoed in Clause 7(4) of the Traditional Courts Bill, albeit with a provision that a party to a dispute may be assisted by any person of his or her choice. It is implicit that the person chosen should not have a legal background.

6.3.2.2 Traditional Courts Bill 2017

The Traditional Courts Bill seeks to align the law governing traditional courts with the 1996 Constitution. The Bill was in the advanced stage at the time of this study, following amendments by the Portfolio Committee on Justice and Correctional Services in 2017 to address contentious clauses. On 12 March 2019, the Bill was approved by South Africa's National Assembly and referred to the National Council of Provinces for consideration.[511] The Bill seeks to boost the effectiveness, efficiency and integrity of traditional courts in line with the values of the 1996 Constitution. Importantly, the Bill addresses the question of inclusivity, by requiring traditional courts to observe and respect the rights reflected in the Bill of Rights during proceedings, with particular reference to women and vulnerable persons, including inter alia children, the elderly, persons with disabilities, the youth and the indigent.[512] Equally, under

[511] Business of Parliament, 'National Assembly Agrees to Traditional Courts Bill' (*Press Release*, 12 March 2019).
[512] Traditional Courts Bill 2017, cl 7(3).

Clause 5(1) of the Bill, the membership of traditional courts must include both women and men. The courts must be in the forefront in promoting equal participation of women as parties and adjudicators, in line with the constitutional value of non-sexism.[513] The Commission for Gender Equality is required to report, as part of the annual report to Parliament, on the promotion of gender equality in traditional courts.[514] The parties to a dispute must be present during the proceedings and any interested parties must be allowed to participate without discrimination.[515]

The Bill addresses the question of conflict of customary laws to the effect that, where there are two or more customary laws applicable in a dispute, the court must apply the law that the parties expressly agree should apply.[516] If there is no such agreement, the court should apply the law applicable in its area of jurisdiction as a matter of precedence. In the alternative, the court may apply the law with which the parties or the facts in issue have closest connection.[517]

The Bill explicitly entrenches specific rules of natural justice that must be observed, namely that the parties must be accorded a fair hearing; and that the decision must be impartial. As noted, the Bill prohibits legal representation. However, a party has a right to be represented by a person of his or her choice, who should not act in a legal capacity. The proceedings must be

in the language commonly spoken in the traditional court's area of jurisdiction; otherwise, an interpreter must be provided.

6.3.3 Key Lessons for Kenya

It is explicit from the foregoing that Rwanda and South Africa have made significant progress in strengthening TDRMs to promote access to justice at the grassroots. A question however arises as to whether these country case studies are in all respects ideal for Kenya, given her cultural diversity. Nevertheless, as discussed below, the case studies demonstrate important insights on how Kenya ought to strengthen the interplay between TDRMs and the formal or ordinary courts.

[513] ibid, cl 5(2), (3)*(a)*.
[514] ibid, cl 5(2), (3)*(b)*.
[515] ibid, cl 7(7).
[516] ibid, cl 7(5)*(a)*.
[517] ibid, cl 7(5)*(b)*.

Clear regulatory framework: In both countries, there is a law that clearly defines the jurisdiction, competence and functioning of the mechanism. This is within the spirit of ensuring complementarity between the court system and community justice systems. South Africa's Black Administration Act has been in existence for many years. The Traditional Courts Bill 2017 represents a move towards transforming and aligning the regulatory framework with the current developments in the justice system.

Jurisdictional question: The subject-matter jurisdiction of TDRMs in Kenya remains unclear, as demonstrated above.[518] Lessons can be drawn from Rwanda and South Africa with respect to the Law No37/2016 of 08/09/2016, the BAA as well as the Traditional Courts Bill 2017. Whereas the *Abunzi*'s jurisdiction is limited to civil disputes, South Africa's traditional courts have both criminal and civil jurisdiction as defined in the respective legislation. To avoid ambivalence, Kenya should enact a framework that clearly sets out the jurisdiction and competence of TDRMs in line with the spirit and purport of the Constitution of Kenya 2010. South Africa's attempt to enact the Traditional Courts Bill, currently in advanced stage, provides important insight.

Case Transfers, Appeals and Reviews: The interlinkage between *Abunzi* and the ordinary courts in Rwanda is ensured through appeals from the *Abunzi* at the Cell level to the *Abunzi* of the Sector and then the Primary Court. The enabling legislation provides clear timelines for filing appeals. Important insights may also be drawn from South Africa's traditional courts, which are recognized in law and have a clear referral framework with the small claims and magistrates' courts. For instance, under the BAA, the magistrates' courts may intervene where

the execution of traditional courts' orders is problematic. Under the Traditional Courts Bill 2017, a traditional court may refer a dispute to the magistrates' court or small claims court if it is of the opinion that it is not competent to deal with the dispute, or the dispute involves a complex question of law.

Execution of awards: The link between the *Abunzi* and the court system is strengthened further by the intervention of ordinary courts (through the Primary Courts) in the execution of the *Abunzi* decisions. The Primary Court must confirm from the Executive Secretary of the

[518] See Section 2.5.1 of this thesis.

particular Sector that the verdict was rendered by the *Abunzi* Committee and that it is not before any court or subject to appeal.

Constitutional and human rights standards: Constitutional values and imperatives are explicitly upheld and there is continuous capacity building, for instance through the SAJEI. South Africa's Traditional Courts Bill requires traditional courts to observe and respect the rules of natural justice and the Bill of Rights during proceedings, with particular reference to women and vulnerable persons, such as children. The traditional court membership must be gender representative. Equally, in Rwanda, the Law provides that 30% of the *Abunzi* Committee members must be women.

Validity test for TDRMs: In both countries, neither customary law nor TDRMs (*Abunzi* and traditional courts) are subject to the repugnance test. The tests applied are the Bill of Rights, the Constitution and other applicable laws, orders and regulations. Rwanda's Constitution introduces public security and good morals to this mix, although the two are also part of the limitations of rights and freedoms,[519] including freedom of expression and access to information under Article 38, as well as promotion of national culture under Article 47 of the Constitution. Whereas the researcher is not fully opposed to the repugnance test as enshrined in the Constitution of Kenya 2010, the fact that the test is vague and subject to varied interpretations as to what constitutes justice and morality, justifies the need for reconstruction.

Oversight of TDRMs: Like the *Abunzi* system in Rwanda, establishment of an oversight body is invaluable to coordinate and supervise the activities and performance of TDRMs and ensure compliance with the Constitution. Such a body should however not direct TDRMs on how to deal with disputes. Oversight by the state also provides an opportunity for supporting TDRMs through trainings and supply of necessary resources.

In a nutshell, Kenya needs, albeit cautiously, to revitalise TDRMs within the framework of judicial transformation. It will, however, take time for such democracy-promoting systems to be effective if the existing weaknesses and barriers are not addressed.

[519] Constitution of the Republic of Rwanda, 1994, Article 41.

6.4 Conclusion

Despite the emergence of dominant 'western' courts, TDRMs have remained resilient, not only in Kenya but also in other jurisdictions in Africa such as Rwanda and South Africa. The British operated their 'western' courts side by side with the formally recognised TDRMs without codifying the diverse customary laws in Kenya. It is clear that, in a plural legal system, the interplay between TDRMs and the 'western' or ordinary courts, as complementary justice avenues, cannot be gainsaid. Compared to Kenya, Rwanda and South Africa have made significant progress in integrating TDRMs with ordinary courts. Both countries have enacted legislation with respect to the organisation, jurisdiction and functioning of TDRMs, including key guiding principles and the rules of natural justice. In spite of the cultural diversity, Kenya should consider developing a similar framework to regulate the functioning of TDRMs in line with constitutional values and rights, and enhance the integrity and effectiveness of TDRMs as well as their interplay with the ordinary courts. Kenya's LDTs provide a good example of how TDRMs can be revitalised, albeit cautiously to maintain their fluid nature. However, the constitution and functioning of TDRMs should be divorced from politics and local administration to avoid the impediments that faced the LDTs. These propositions are furthered in chapter seven of this thesis.

CHAPTER 7 CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

TDRMs form an essential component of the Kenyan justice system. This form of justice is dynamic, and so is the law that undergirds it. It is indeed a clear reflection of the 'living law' that is talked of by Eugen Ehrlich.[621] The rise of the colonial-induced formal law has been positively received; perhaps, because it breathes civilization into the Kenyan justice system. Its dominance, however, means Kenya has a weak legal pluralism. Within this puzzle are TDRMs and their normative framework, which have remained resilient and robust due to the fact that they derive from, and define, the values and norms of indigenous people. This state of affairs is partly based on the nature of the inherited formal justice system, most notably, its complex, adversarial, retributive, expensive, case-backlogged, and now corrupt nature. This is one of reasons that prompted the inclusion of TDRMs in Article 159(2) (c) of the Constitution 2010.

Countries, such as Rwanda, which have successfully integrated TDRMs with the formal justice system started with a legal recognition, which Kenya has met.

However, as demonstrated in this study, mere recognition is not enough especially in a setting where one strand of a system subordinates the others, for instance through the nebulous repugnancy clause. It calls for a reassessment of the entire TDRM framework to identify other areas that need to be strengthened, and how, to promote the use of this invaluable avenue to complement the formal justice system, at least as 'grassroots' justice. Whether a legal framework is necessary is simply what this study sought to investigate. Using a case study of the Kipsigis TDRMs, and based on the theories of Justice, Legal Pluralism, Sociological Jurisprudence and Restorative Justice, the study sought to respond to the following questions:

1. What is the structure, functioning and jurisdiction of the Kipsigis TDRMs?
2. How does the procedure applied by the Kipsigis TDRMs conform to the human rights and natural justice norms?
3. What are the hindrances to the promotion and integration of TDRMs with the formal justice system in Kenya?

[621] See sections 1.8.2 and 1.8.3.

4. How can the TDRMs be promoted and integrated with the formal justice systems as complementary avenues of access to justice in Kenya?

It was hypothesised that, lack of a clear-cut legal or policy framework defining the jurisdiction (both personal and subject-matter), principles and procedures of TDRMs, enforcement of awards, and referral of cases between courts and TDRMs, hinders their promotion and integration with the formal justice systems. The argument put forth is that perceptions around TDRMs are often pegged on the presumed misalignment with the Constitution, particularly the Bill of Rights and the natural justice principles. Whether this, together with the nebulous repugnancy test, should be the key reform targets for effective integration has been extensively explored in this study.

This chapter lays down the findings of the study and the recommendations on how Kenya ought to strengthen TDRMs and integrate them with the formal justice system. This includes a proposal for partial integration of TDRMs as opposed to full integration with defined roles

visà-vis the formal justice system. The ensuing section summarises the findings of the study in response to the first three research questions as highlighted above.

7.2 Summary of the Findings

Regarding the first research question, the study points out the general acceptance by communities, based on feedback from elders and TDRM users interviewed, that TDRMs are pivotal avenues to access to justice. As restorative mechanisms, the Kipsigis TDRMs consider the disputes as a problem of the whole clan or community and emphasise on reconciliation and restoration of social harmony. As an embodiment of customary law, they are structured into three key phases: *kotigonet*, kokwet and kiruogik (*kiruogindent*). Dispute resolution along these phases is characterised by a high level of public participation, flexible rules and procedures, selection of elders based on status and lineage, and voluntary and collaborative decision-making based on consensus. This affirms the theory of restorative justice and further justify the need to promote TDRMs as grassroot justice avenues complementary to the formal justice mechanisms.

The study also identifies a jurisdiction puzzle arising from the broad typology of disputes resolved by the Kipsigis *kokwet*. Whereas the Magistrates Act 2015 and section 176 of the CPC have attempted to provide for matters that may be resolved based on customary law, the wide jurisdiction exercised by TDRMs warrant the development of a framework to limit this. The Kipsigis *kokwet*, for instance, have powers to hear disputes involving boundary, marriage, succession and property, assault, theft, rape and homicide (*rumiisyeet*), among others. The question of personal jurisdiction, especially with the increasing rate of community intermarriages, is not clearly delineated both in law and practice. Courts have not settled this puzzle either, given the conflicting positions exhibited in *R v Mohamed Abdow Mohamed*,[520] *Stephen Kipruto Cheboi & 2 others v R*,[521] and *Republic v Abdulahi Noor Mohamed*.[522] In contrast, Rwanda and South Africa have made significant progress with respect to Law No37/2016 of 08/09/2016 Determining Organisation, Jurisdiction, Competence and Functioning of the *Abunzi* Committee; the Black Administration Act 1927 as well as the Traditional Courts Bill 2017. Ghana, though not a focus of this study, has enacted the Alternative Dispute Resolution Act 2010, Part 3 of which prohibits the application of

[520] [2013] eKLR.
[521] [2014] eKLR.
[522] [2016] eKLR.

customary arbitration in criminal matters, unless it is so ordered by a court. Similarly, in South Sudan, the Local Government Act 2009 provides, under section 98(2), that customary law courts have no jurisdiction to hear and determine criminal cases except those of a customary nature referred to them by a competent formal court.

Moreover, the study affirms that the Kipsigis TDRMs are an embodiment of customary law structured into three hierarchical phases: *kotigonet*; *kokwet*; and *kiruogik* (*kiruogindent*). Dispute resolution along these phases is characterised by a high level of public participation, flexible rules and procedures, selection of elders based on status and proven integrity, and voluntary and collaborative decision-making based on consensus. This affirms the theory of restorative justice and further justifies the need to promote TDRMs as grassroot justice avenues complementary to the formal justice mechanisms. All disputes (whether civil or criminal) follow a similar hearing process, albeit with distinct cultural rites. The procedural rules, including the reporting of disputes and the manner of execution of the elders' orders, must always be consistent with the Kipsigis customary law. The rules are not recorded but are passed on from one generation to another. This ensures that the rules remain fluid and flexible. In the past, the proceedings were not recorded. This has changed over time and elders can now take records of their proceedings. Compliance with the elders' decisions, is estimated at 98% due to the general acceptance that TDRMs are part of communal intercourse. The one universal method of enforcement of awards, and consequence for non-compliance, is the curse, normally

administered by the *kokwet*. The clan members have a role to ensure that the culprit complies. Non-compliance at times leads to the chief's intervention.

Arising from the Kipsigis dispute resolution processes is the lack of a clear referral system between TDRMs and courts. A bottom-up indicator for referral could be an appeal, execution of awards, application for opposition or revision of the elders' verdict as in the *Abunzi*, determination of a question of law, lack of jurisdiction, among others. The top-down approach is within the spirit and intent of Article 159(2) of the Constitution on promoting the use of TDRMs. However, the fact that there is no clear framework that stipulates what cases should directly be referred to courts, based on the said indicators, and how this should be done—for instance, whether the elders' records are necessary, whether the cases will be heard afresh, and applicable timelines—creates difficulties in integrating TDRMs with formal justice system. For instance, among the Kipsigis, the accused person may appeal to the *kokwet* for revision if

she or he thinks the fine is too high. In the event that both or one of the parties reject(s) the verdict, the elders may organise for another meeting, or recommend that the matter be referred to court. However, this rarely happens. In the same vein, there is no particular scenario, at least on record, where the *kokwet* have sought the intervention of the court in executing their verdict.

Rwanda and South Africa have successfully tackled this issue through legislation. For instance, there is a strong interlinkage between the *Abunzi* and the ordinary courts of Rwanda, through appeals from the *Abunzi* at the cell level to the *Abunzi* of the Sector and then the Primary Court. This is further strengthened by the intervention of the Primary Courts in the execution of the Abunzi verdicts. The Primary Court must confirm from the Executive Secretary of the particular Sector that the verdict was rendered by the *Abunzi* Committee and that it is not before any court or subject to appeal. Similar insights may be drawn from South Africa's traditional courts, which are recognized in law and have a clear referral framework with the small claims and magistrates' courts.

The second research question relates to how TDRMs align with human rights and natural justice norms. As noted in Chapter Four, the Kipsigis TDRMs have attempted to adopt the principles of natural justice, though knowledge of the law is still a missing link. Some of the rights observed by the Kipsigis TDRMs relate to appeal to a higher body, expeditious determination of disputes 'without unreasonable delay', and the right to a public trial. The other rights entrenched in Article 50(2) of the Constitution, have not been incorporated. Elements of bias still exist and continue to worsen with the interventions of the local administration in the *kokwet* proceedings. Further, the distribution of opportunities and liberties, as described by Rawls, is not equal. While the Kipsigis TDRMs have recognised women's invaluable role, their involvement in TDRM processes has had little impact in ensuring access to justice for women who have no financial muscle to go to court. Protection of children is not guaranteed, though the Kipsigis TDRMs have taken cognizance of this need.

South Africa's Traditional Courts Bill requires traditional leaders to observe the rights enshrined in the Bill of Rights during proceedings, with particular reference to women and vulnerable persons, such as children. The membership of the traditional courts must include both women and men. Equally, Rwanda's Law No37/2016 of 08/09/2016 provides that 30% of the *Abunzi* Committee members must be women.

Finally, it is evident that, though TDRMs are recognized as vital avenues for access to justice at the grassroots, a number of weaknesses and constraints hinder their use and integration with formal courts. These include the fact that they are not gender-responsive, no clear jurisdiction, child rights are not adequately protected, capacity gaps among the elders (especially in relation to human rights), corruption and bias, security risks especially when elders deliver a verdict, misalignment with fundamental human rights as stipulated in the Bill of Rights, and the nebulous and 'foreign' repugnancy test. Firstly, the study demonstrates in respect to the test that some TDRMs endorse certain customary law practices that are inimical to Kenya's Bill of Rights, which warrant the limitation encapsulated in Article 159(3) (c) of the Constitution. The study, however, finds that, since the ultimate intent of the test is largely to infuse a human right thinking into TDRMs, the 'Bill of Rights' and the 'Constitution or any written law', as enshrined in Article 159(3) (a) and (c), are sufficient thresholds. Secondly, the fact that the double formula of 'justice' and 'morality' are not properly defined creates a huge field for judicial discretion, with the ultimate impact on the use of TDRMs and their integration with formal courts.

In Rwanda and South Africa, neither customary law nor TDRMs are subject to the repugnance test. The tests applied are the Bill of Rights, the Constitution and other applicable laws, orders and regulations. Rwanda's Constitution introduces public security and good morals to this mix, although both elements are also part of the limitations of rights and freedoms, including freedom of expression and access to information under Article 38, as well as promotion of national culture under Article 47 of the Rwanda Constitution. Customary law in South Africa was historically subject to the repugnancy test, but this was later revised under the Interim Constitution (200 of 1993), Principle XIII of which provided that, 'indigenous law, like common law, shall be recognised and applied by the courts', consistent with the fundamental rights enshrined in the Constitution and relevant laws. This is now reflected in section 211(3) of the 1996 Constitution of South Africa.

The foregoing findings affirm the hypothesis and the arguments put forward for this study by demonstrating the apparent weaknesses of TDRMs; and the need for a clear-cut framework that provides for, inter alia, the jurisdiction and functioning of TDRMs, and minimum procedural and substantive standards for TDRMs, with a view to strengthening and integrating them with the formal justice systems. The study provides practical solutions to these gaps in the subsequent sections.

7.3 Conclusions

The study concludes that TDRMs form an important component in Kenya's plural legal system. They are uniquely styled in a manner that reflects a community's social life and the values that the community places on the need to resolve their disputes using their accepted norms. In this respect, and as an embodiment of customary law, TDRMs promote justice at the grassroots where all the values and principles of the community concerned are protected and preserved. Their emphasis on restorative justice rather than retributive justice makes them victim-friendly and ideal fora for ensuring peaceful reconciliation and community integration.

Furthermore, the recognition of TDRMs under Article 159(2) as one of the alternative forms of justice legitimises their use to promote social justice. However, as this study demonstrates, TDRMs are faced with a number of drawbacks that need to be addressed to strengthen them. These mainly relate to clarity on the jurisdiction of TDRMs, the extent of limitation under the law particularly the ambiguous repugnancy clause in Article 159(3) (b), misalignment with the Bill or Rights and the rules of natural justice, and institutional weaknesses exhibited by TDRMs. The case study of the Kipsigis demonstrates the importance of these mechanisms, yet their incongruence with the rules of natural justice due to apparent elements of bias and bribery to tilt the ends of justice, provides a case for reform to strengthen and integrate them with the formal justice system. The nature of integration talked of in this study should be partial, encompassing alignment with the workings of formal justice system through a legal framework that promotes predictability in the use of TDRMs, their interplay with courts and sound principles as rules of guidance for TDRM practitioners to promote the course of justice. This suggestion finds a comparable backing from Rwanda and South Africa, though Kenya should be cautious on what to borrow.

The study also concludes that Article 159(3) (b) of the Constitution, on the repugnancy test, should be one of the targets in this reform. The test typically represents an imperialist tool that was historically used to weigh customary law and TDRMs against western ideals that define justice and morality. The retention of the clause under the new Constitution implies that, whereas customary law has implicitly been elevated as a source of law under Article 2(4) of the Constitution, the fact TDRMs, being a key functional area of customary law, are subject to the nebulous repugnancy test is unfortunate and indirectly puts the entire system of customary law at peril. The study argues that, since the spirit and intent of the repugnancy test is to imbue

a sense of human rights and constitutionalism into TDRMs, the Bill of Rights and the Constitution and other written law, as captured in Article 159(3), are sufficient tests. The researcher's position is that the repugnancy clause should be removed. However, if the country is of the view that the advantages of retaining the repugnancy test outweigh the disadvantages, clarity on its double formula is critical, at least under a legislative framework. The rules of natural justice can also serve as pivotal procedural standards for TDRMs if reflected in such legislation and simplified guidelines are provided to TDRMs practitioners to guide them.

7.4 Recommendations

Majority of the informants were supportive of partial integration of TDRMs into or otherwise alignment with the workings and aims of formal justice system, through legislation or policy, with some resources and oversight from the state. The rationale is to allow TDRMs a bit of flexibility, based on the fact that culture evolves over time while laws may remain static thus eroding the viability of TDRM systems if fully integrated. Cognisant of this finding, this study proposes the enactment of a TDRM-specific law to provide for basic guidelines for TDRMs and align their functioning with the formal court system (for instance smooth referrals, recognition and enforcement of awards, and appeals and reviews). This and other connected suggestions are discussed further below.

7.4.1 General Recommendations

Target implementation actors include the national government through the Executive and the Judiciary, civil society and county governments.

(a) State Support for TDRMs

The state should provide support to TDRM forums through resources to facilitate training and awareness programmes and basic equipment for the elders. This include providing the elders with copies of the Constitution in Swahili and gradually in local languages. The upshot of this is to increasingly get buy-in from communities to get rid of harmful customary practices that they themselves perceive as good.

(b) Training and Awareness Programmes

There is need to implement continuous training programmes targeting TDRM practitioners to deepen their knowledge on relevant provisions of the Constitution particularly the Bill of

Rights. At the very least, principles of natural justice and equality ought to be emphasised. This should be a collaborative responsibility between the Judiciary through the Judiciary Training Institute (JTI) or paralegals, and civil society actors such as Haki Jamii, FIDA, Kenya Human Rights Commission and Kituo Cha Sheria, among others. County Governments should be part of this mix given their constitutional role to promote diversity. JTI should establish a special training programme for all magistrates, Court Users Committees (CUCs) and registry clerks on TDRMs. There is also need to re-introduce customary law and TDRMs as a course unit in institutions of higher learning. Joint public education and awareness campaigns on the need to embrace TDRMs, and why they may be a preferred dispute resolution forum, are critical. Training and reference manuals should also be prepared for TDRM practitioners and those undertaking awareness creation and education. Vernacular radio programmes that are educational could highlight key aspects that underly TDRMs.

7.4.2 Recommendations to the Judiciary

The ongoing task spearheaded by the National Committee on Criminal Justice Reforms (NCCJR) includes a component on the decriminalisation, declassification and reclassification of petty offences under the formal penal law. The outcome of this particular component should feed into the proposed legal framework on the criminal jurisdiction of TDRMs.

In addition, the Judiciary should assign paralegals or CUCs the role to provide advisory and training to TDRM practitioners, chiefs and other local administrators. A special registrar may be established in each court station to assist, support and review TDRM related issues. The Judiciary should also conduct regular assessment of TDRMs through research with a view to developing a TDRM or alternative justice system (AJS) handbook. The basic principles of natural justice, as reflected in the Constitution and the proposed legislation, may be clearly defined and codified in a form of practice directions or 'elders' guide or standard toolkit. These can be made easy to understand and use for TDRM forums. A catalogue or archiving system may also be established to store TDRM minutes and records for learning, growth in customary jurisprudence, and as cultural memories and heritage.

Based on its powers under Article 159(2), the Judiciary, or courts in general, should provide clarity on the repugnancy clause to avoid a situation where TDRMs will be pinned down merely based on a judge's erroneous interpretation of 'justice' and 'morality'. In the event that the

proposed legal framework is enacted, courts should promote the use of TDRMs on matters that the law states should only be taken to court as a last resort.

7.4.3 Recommendations to TDRM Practitioners (Elders)

TDRM practitioners should embrace the natural justice principles in their processes and ensure the rights of the parties are observed in sentencing, gender representation in their operations, and proper protection of children. Disputes which are not within their jurisdiction should be referred to court as prescribed in the proposed legislation. In order to ensure effective enforcement of decisions, the elders should adopt a culture of recording their proceedings, decisions and reasons for the decisions. Observations made during the study reveal that some of the TDRM practitioners are educated people in society, most of them retired teachers and chiefs. This may not be the same observation in Turkana or Mandera, but the emphasis being made here is that records speak and should thus be kept in any form. The rationale is to assist courts in assessing the verdicts in case of an appeal or referral arising from disputes related to execution of TDRM verdicts.

7.4.4 Recommendations to Local Administrators

As noted from the Kipsigis TDRMs, chiefs play a critical role in maintaining order during TDRM hearings and in the enforcement of certain decisions as well as resolving certain minor disputes such as family and boundary disputes. While doing this, they should embrace the principle of impartiality, taking a neutral position. The work of dispute resolution should be left to the TDRM practitioners, and chiefs should intervene when called upon, or maintaining security in the process. In the interest of ensuring observance of the Bill of Rights, chiefs can play a role to guide the elders especially regarding the rights of children and other vulnerable persons. This is in the spirit of eliminating harmful practices. Court orders enforcing TDRM awards can be served on the assistant chiefs and other actors, such as children departments, to monitor compliance.

7.4.5 Legislative Recommendations

(a) Removal of the Repugnancy Clause

The study demonstrates that the repugnancy test currently under Article 159(3) (c) of the Constitution 2010, was historically meant to modify customs that the colonialists considered barbaric and uncivilised. The researcher appreciates this intention considering that most

TDRMs still apply discriminatory and oppressive cultural practices. This warrants the need to put in place minimum standards for TDRMs to ensure both substantive and procedural justice.

However, it suffices to note that Kenya boasts of a very progressive and transformative Constitution, which has a robust Bill of Rights. Article 2(4) of the Constitution 2010 is very explicit that the application of customary law must be consistent with the Constitution. TDRMs are also subject to the Bill of Rights, the Constitution and any written law as stipulated in Article 159(3) (a) and (c). The Constitution is further explicit regarding the application of international treaties that Kenya has ratified; and requires the state to enact and implement legislative measures to realise its obligations. It is in light of these explicit provisions that the study recommends the removal of the nebulous repugnancy test since its ultimate aim as a validity test for TDRMs and customary law is sufficiently met by the Constitution itself. The study considers the Constitution and its expansive Bill of Rights as effective benchmarks for TDRMs to ensure substantive and procedural justice.

(b) Enactment of a TDRM-Specific Legislation

It is recommended that a legislation be enacted to formally recognise and uphold the use of TDRMs and establish a clear nexus with the formal justice system. The legislation should be designed consistent with the values and imperatives of the Constitution 2010, the Bill of Rights and other written laws. The legislation will provide guidelines for TDRMs and align them with the workings and aims of formal courts, particularly through execution of TDRM awards, transfer or referral of disputes, appeals and opposition against TDRM decisions, as well as oversight. The criteria for defining jurisdiction of TDRMs should be informed by the circumstances of each case and the customs of the diverse communities in Kenya. This should be done through studying and documenting the nature of cases which are frequently resolved by TDRMs and any commonalities, building on the AJS Baseline Policy work done by the AJS Taskforce under the Judiciary. Importantly, the drafters of the proposed law should build on the foundation and experiences from the LDTs, taking into account the pitfalls that led to their abandonment as demonstrated under Section 6.2.1.1 of this thesis.

Contents of the Legislation

The proposed TDRM legislation should include the following key aspects, among others:

(a) *Objects of the Law*, notably to affirm the role of TDRMs or AJS, enhance access to justice through TDRMs, affirm the values of diverse customary laws in Kenya, and determine the jurisdiction and general structure and functioning of TDRMs, and for connected purposes.

(b) *Definition of Terms*, such as traditional dispute resolution mechanisms, justice, natural justice, decision, verdict, award, minutes, customary law, and other applicable terms.

(c) *Guiding Principles*, reflecting the provisions of Article 10, 27(3), 47 and 50 of the Constitution. The principles include, inter alia: the need to align TDRMs with the Constitution 2010; promotion of restorative justice through TDRMs; continuous development of skills and capacity of TDRM practitioners; and preservation of the values entrenched in different customary laws through TDRMs.

(d) *Validity Test for TDRMs:* The proposed legislation should recognise the Constitution together with the Bill of Rights and any written law, as the primary benchmark for TDRMs. The repugnancy clause under Article 159(3)(b) of the Constitution, should therefore be removed. Constitutional values and imperatives should be upheld to ensure substantive justice.

(e) *Jurisdiction of TDRMs:* Recognising that uneven jurisdiction is not desirable for Kenya, the proposed law should explicitly specify the subject matter jurisdiction of TDRMs (civil and criminal) based on the nature of each case and the customs, traditions and practices of the diverse communities in Kenya as well as section 176 of the CPC. This should include the upper limit in terms of value, in the case of disputes relating to property. TDRMs should not apply to matters involving the State and its organs, or companies with the legal personality. They should be made the first option for disputes which fall within their jurisdiction as may be defined in the proposed legislation. This is in keeping with the objective of reducing case backlogs in formal courts. The law should also specify the personal competence (natural persons) based on factors such as: territorial jurisdiction of the subject matter, parties' place of domicile or residence, and what happens when one of the parties has no known place of domicile or where the parties do not reside in the same jurisdiction.

With respect to criminal matters, a provision should be included in the proposed legislation to the effect that TDRMs should exercise their jurisdiction within the remit of section 176 of the CPC and only extend to capital offences where the parties, the victims or other stakeholders involved in the matter have consensually and voluntarily submitted to the TDRM process and the court is satisfied that the ends of justice have been met. The law should be clear on the role of the Director of Public Prosecution (DPP), who is empowered under Article 157(6) (c) to discontinue any criminal proceedings at any stage before judgement is delivered.

(f) TDRM Practitioners' Selection, Registration and Terms of Reference: A requirement should be included to the effect that TDRM practitioners shall serve on a voluntary and non-remunerative basis, and be persons of high integrity, respectability and conciliation skills and knowledge of the customary law of the community concerned. The practitioners shall be registered by an oversight body established under this law for ease of coordination and facilitation. A provision may also be included requiring the state shall provide support through equipment, such as writing materials, to facilitate their work. Gender aspects should be incorporated to ensure equal participation of men and women. The rationale is imbuing a gendered perspective at the grassroots, an ideal mechanism for nurturing a population that values all gender groups. A provision that 30% of the TDRM members must be females suffices.

(g) General or Minimum Procedural Requirements, taking into account the diversity of TDRMs across over 43 tribes in Kenya. These comprise, among others: the rules of natural justice; representation by a person of one's choice who is not a lawyer; quorum (though this varies in practice depending on the community); what happens when a person fails to appear when summoned by elders; the right of any interested persons to intervene; minutes of proceedings; written decision/verdict; contents of TDRM verdict (e.g. parties' names, submissions, and decision agreed upon by the parties; any objections, date and place of dispute resolution, and signature or fingerprints of the parties involved); requests for revision or clarification of the verdicts; remedies that can be granted; sanctions that may not be imposed by TDRMs, among others. In addition, the law must specify that the Bill of Rights must be observed during the TDRM hearing process, with particular reference to

the rights of disadvantaged persons; and that the parties involved must be accorded a fair hearing by impartial TDRM practitioners.

(h) Transfers, Appeals and Reviews: The law should provide that if a party is not satisfied with the TDRM award, he/she may seek remedies provided for by law, which include taking the dispute either to the small claims court (if in force) or the Resident Magistrates' court within a specified period of time. It should also have a provision for transfer or referral of disputes for lack of jurisdiction or where a question of law or fact arises; and whether the court may hear the matter afresh. Where the court issues an order, the same should be served with the national police or local administrators within the area of the dispute and TDRM practitioners should monitor compliance. The court can set aside a settlement on similar grounds like those of setting aside a consent judgment. Clarity should be made as to costs, records, appearance of parties, legal representation as well as the points to be examined by the court. A reverse referral framework should be included where matters can be transferred from courts to TDRMs.

(i) Escalation of Matters to Higher TDRM forums: A requirement may be included to the effect that all TDRMs in Kenya should establish first level appeal forums to which all TDRM appeals and oppositions by third parties may be heard before referring them to court or other appropriate mechanism for review or appeal (as the second level). Like the Kipsigis community's Miyoot Council of Elders as well as *Abunzi* system of Rwanda, the TDRM appeal forums should comprise elders of higher and most respectable rank in society.

(j) Execution of TDRM Awards: in case a party is non-compliant with the elders' verdict, the prejudiced party may apply to court, which shall issue orders and serve them on the local chief, national police within the location of the dispute or the TDRM forum that resolved the dispute and other relevant authorities to monitor compliance. The court shall register the award and adopt it as court judgement subject to checks and balances. The court may also append an execution formula, if one is lacking, based on the customary law applicable to the dispute as agreed by the parties. A provision may be included on alternative forums for disputes relating to execution of awards. Magistrates may need to have a special day in each month to receive orders that require court intervention in enforcement.

(k) *Code of Conduct for TDRMs:* A provision should be included in the law requiring the Office of the Chief Justice or other relevant government agency or authority to develop and enforce a Code of Conduct for TDRM practitioners and interpreters. The Code of Conduct should highlight, at the very least, the rules related to the suspension or withdrawal of members in case of personal or pecuniary interest, misconduct, corruption and collusion. Suspension shall depend on a community's customs and norms. The Code of Conduct will be useful in taming vices such as corruption and bias in the functioning of TDRMs. A simplified version of the Code of Conduct should be accessible for training and use by TDRM practitioners nationwide.

(l) *Establishment of a Hybrid Institution for enforcement of TDRMs law:* The law may establish an oversight institution to be known as the Council of Customs Traditions and Mechanisms of Justice (CCTMJ) to provide oversight, benchmarks and training, and facilitate supply of equipment on a needs' basis, to TDRMs. The institution should draw upon the authority of both formal justice and traditional justice in terms of composition, and reflect the two-thirds gender rule. The sitting of this institution can be at the Chief Registrar's Office (national level) with devolved units/offices in each county which will be required to regularly report to the national-level institution. It may be impossible and undesirable to oversee everything in its entirety, but the CCTMJ is necessary to ensure proper coordination of TDRMs and ensure they are aligned with the workings of the courts. The involvement of the local administration should not be limited to avoid the challenges that saw the repealing of the LDT Act of 1990.

(m) *Prohibited Practices:* A non-exhaustive list of prohibited conduct should be included in the schedules, illustrating and emphasizing customary practices that are harmful and contrary to the Bill of Right.

7.5 Contribution to Research

The study generates important data which could help to improve the operationalisation of TDRMs in Kenya and attempts to proffer an appropriate approach towards codification. It points out the repugnancy test as a potential area for further research, specifically to provide an African perspective on the test and its impact on the development of African customary law and TDRMs.

7.6 Implementation Plan

The implementation plan below outlines specific timelines within which the recommendations put forward in this thesis can be implemented as well as the responsible actors.

MAIN OBJECTIVE: To strengthen TDRMs and integrate them with the formal justice systems.					
Expected Outcomes	**Key actions/ activities**		**Timeframe**	**Lead Actors**	**Key Indicator / Monitoring Mechanism**
	Long Term	**Immediate/short-term**			
Improved infrastructure, environment and capacity of TDRMs for enhanced access to justice at the grassroots.	State support through targeted allocation of resources for the promotion of TDRMs – to facilitate training and awareness programmes and provide infrastructure for TDRMs	- Conduct a resource needs assessment of TDRMs. - Begin conversations with relevant stakeholders	3 years	- Judiciary (through resource mobilisation to support TDRMs) - County Governments - National Treasury	- Auditor General's report - Controller of Budget's reports
Enhanced understanding of the appropriate jurisdiction of TDRMs, and compliance with the Constitution	Establishment and implementation of a robust Training and Awareness Programme for TDRM practitioners, chiefs and other actors involved in alternative justice systems.	- Mapping and identification of all TDRMs practitioners across the country. - Development of a training manuals/ curriculum. - Identification of resource persons - Development of a TDRM /AJS handbook (elders' guide – practice directions) in Kiswahili and English –	4 years	- Judiciary (include JTI and paralegals, CUCs) - County Governments, - Civil society Organisations - FIDA, Cradle, Kituo Cha Sheria, Katiba Institute, Kenya Land Alliance, etc.	○ Annual progress/ implementation report ○ Training manual/ curriculum ○ TDRM handbook/ guide

		covering relevant provisions from the		- Ministry of Lands and Physical Planning - ODPP	

MAIN OBJECTIVE: To strengthen TDRMs and integrate them with the formal justice systems.					
Expected Outcomes	**Key actions/ activities**		**Timeframe**	**Lead Actors**	**Key Indicator / Monitoring Mechanism**
	Long Term	**Immediate/short-term**			
		Constitution and other written laws, basic principles of natural justice and human rights, and a code of conduct for elders			
Increased knowledge on the role of TDRMs and how courts can work with them within the existing and proposed legal framework	_	Establish a special training programme for judicial officers (magistrates, CUCs and registry clerks, etc.) and ODPP on TDRMs.	1 year	- Judiciary - JTI - ODPP	○ Number of judicial and officers and prosecutors trained ○ Implementation report

Increased knowledge on customary law and the role of ADR (including TDRMs) for advancing access to justice	Re-introduce customary law and TDRMs as a course unit in institutions of higher learning.	Engaging relevant institutions to have constructive discussions around the need for such a course unit in the curriculum – CLE to lead.	2 years	- Council of Legal Education (CLE) - Higher Learning Institutions - Ministry of Education	Implementation report
Enhanced accountability and monitoring of TDRMs	Establishment of: - CCTMJ - Special Registrar in each court station to assist, support and review TDRM related issues.	Judiciary to engage relevant stakeholders, including Parliament. *(Based on when the legislative framework will be ready)*	3 years	- Judiciary - Ministry of Sports, Culture and Heritage - Parliament – National Assembly	○ Legislative framework on TDRMs ○ Report
Improved knowledge on customary law	_	Establish a case catalogue/ archive for TDRMs within the	3 years	○ Judiciary ○ Kenya Law	○ A functional archiving system
MAIN OBJECTIVE: To strengthen TDRMs and integrate them with the formal justice systems.					
Expected Outcomes	**Key actions/ activities**		**Timeframe**	**Lead Actors**	**Key Indicator / Monitoring Mechanism**
	Long Term	**Immediate/short-term**			
jurisprudence in Kenya Enhanced accountability of TDRMs.		Judiciary for ease of auditing, learning, growth in customary law jurisprudence, and as cultural memories and heritage.			for TDRM case records for reference and ease of auditing. ○ Implementation report

Formal recognition and enhanced complementarity between TDRMs and the formal justice systems.	Enactment of a TDRMSpecific Legislation (in English and Kiswahili) with clear jurisdiction, integrated case referral framework, oversight mechanism, benchmark standards, among others.	- Research and documentation of the nature of cases handled by TDRMs and any commonalities. - Constructive dialogue between relevant stakeholders to achieve consensus on various TDRM aspects to inform the enactment of the law.	3 years	○ Parliament ○ County Assemblies ○ AG	Report
	Constitutional amendment to remove of the repugnancy clause – through a constitutional amendment process	Engage relevant stakeholders, including Parliament and promoters of any constitutional amendment.	3 years	Parliament	○ Amendment Bill ○ Implementation Report

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APPENDICES

APPENDIX A: INFORMED CONSENT

APPENDIX A-1 TDRM PRACTITIONERS (ELDERS) AND USERS

NAME OF RESEARCHER: Joseph Kiplagat Sergon

Doctor of Philosophy (PhD) Candidate

School of Law, University of Nairobi

P.O Box 30197-00100, Nairobi

TOPIC**: Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community**

Dear Respondent,

I would like to have an interview with you on use of traditional dispute resolution mechanisms in Kenya. Questions will focus on the importance of these mechanisms, the relationship between these mechanisms and formal courts, and how to strengthen and integrate them with the formal justice system. The data generated from this interview will be used specifically in this post-graduate study. As a respondent, you are entitled to remain anonymous for purposes of confidentiality of your contribution. If you choose to be anonymous, your name will only appear in this consent form for purposes of tracking the specific stakeholders that I have engaged in the study. You are also entitled to raise any questions for clarification in the course of the interview.

SECTION A: INTERVIEWEE

Personal Information:

Full names: _____

Gender: _____ (Male/Female)

Age: _____

County: _____

Preferred language: _____ Phone Number: _____

I have read and understood this information and I hereby give consent:

	YES	NO
to take part in this research		
for my name to be used in this research		
for the interview transcript(s) to be archived		
that the information collected is made public		

Signed: _____ **Date**: _____

SECTION B: TO BE COMPLETED BY THE INTERVIEWER ONLY

I hereby agree to take part in this study subject to above conditions

Name of interviewer: _____

Signed: _____ Date: _____

Place of Interview: _____

APPENDIX A-2: INFORMED CONSENT FOR KEY INFORMANTS

NAME OF RESEARCHER: Joseph Kiplagat Sergon

Doctor of Philosophy (PhD) Candidate

School of Law, University of Nairobi

P.O Box 30197-00100, Nairobi

TOPIC**: Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community**

Dear Respondent,

I would like to have an interview with you on use of traditional dispute resolution mechanisms in Kenya. Questions will focus on the importance of these mechanisms, the relationship between these mechanisms and formal courts, and how to strengthen and integrate them with the formal justice system. The data generated from this interview will be used specifically in this post-graduate study. As a respondent, you are entitled to remain anonymous for purposes of confidentiality of your contribution. If you choose to be anonymous, your name will only appear in this consent form for purposes of tracking the specific stakeholders that I have engaged in the study. You are also entitled to raise any questions for clarification in the course of the interview.

SECTION A: RESPONDENT

Personal Information:

Full names: _____

Gender: _____ (Male/Female)

Profession/Occupation: _____

Phone/Email: _____

I have read and understood this information and hereby give consent:

	YES	**NO**
to take part in this research		
for my name to be used in this research		
for the interview transcript(s) to be archived		
that the information collected is made public		

Signed: _____**Date**: _____

SECTION B: TO BE COMPLETED BY THE INTERVIEWER ONLY

I hereby agree to take part in this study subject to the above conditions

Name of interviewer: _____

Signed: _____ Date: _____

Place of Interview: _____

APPENDIX B: INTERVIEW GUIDE FOR KEY INFORMANTS – JUDGES, MAGISTRATES, LAWYERS AND OTHER PROFESSIONALS

General

1. Traditional dispute resolution mechanisms in Kenya are widely viewed by many communities as the most likely way of achieving an outcome that satisfies their sense of justice. In your view, do they realize that ideal?

Jurisdiction

2. Do you think it is important to document the specific types of cases resolved through TDRMs? Why?

3. (a) To what extent should traditional dispute resolution mechanisms apply to criminal cases?

   (b) In your opinion, do you think there is need to clearly define the jurisdiction of TDRMs? How can this be done considering the diversity of TDRMs in Kenya?

Constitutional Limitation of TDRMs

4. The application of TDRMs is limited in so far as they are repugnant to justice and morality, among other grounds in Article 159(3) of the Constitution. Please give your opinion about the repugnance clause and its impact on the development and integration of TDRMs with the formal justice system?

Challenges

5. In your view, how adequate is the enforceability of elders' decisions through force of social conformity?
6. Do you think women and children rights are effectively protected and fulfilled by TDRMs? In your view, how can this situation be improved to increase the confidence in TDRMs?
7. Often the traditional dispute resolutions rulings depend on the knowledge and moral values of the individual elder. What is your opinion regarding the elders' intellectual rigour in investigating claims and apportioning fault?
8. What is your view about the vulnerability of TDRMs to partiality and corruption?

9. What other challenges are associated with TDRMs? How would you address these challenges to ensure justice to parties who submit cases to TDRMs?

Improving the Legitimacy of TDRMs

10. What basic fair trial standards should be adopted to enhance the legitimacy of TDRMs and in particular improve the quality of their decisions made by elders? Should those standards be clearly defined and in what form?
11. Do you support:
    (a) partial integration of TDRMs into or otherwise alignment with the workings and aims of formal justice, i.e. with TDRMs receiving formal recognition, some resources and oversight from the state?
    (b) full integration with a defined role vis-à-vis the formal justice system?
12. Should there be a hybrid institution that oversees their application – that draws upon the authority of both formal justice and 'traditional' justice?
13. What is your opinion about formalisation of TDRMs as a means of integrating them into the formal justice system, e.g., clearly defining jurisdiction and case referral system?
14. How else can the state regulate the application of TDRMs without affecting their flexibility and restorative nature?
15. How would you improve the enforceability of traditional justice decisions?
16. (a) The right to appeal is integral to an accountable and transparent legal system. Should there be a judicial or other mechanism of appeal for the parties who are unsatisfied by the decision of elders?

    (c) If yes, which mechanism would you propose?
17. What other general reform strategies would you recommend for the improvement and integration of TDRMs into the formal justice system?

APPENDIX C: FOCUS GROUP INTERVIEW GUIDE - TDRM PRACTITIONERS (ELDERS)

My name is Joseph Kiplagat Sergon, a Student at the University of Nairobi. I am doing research on the topic, **'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community'**

The data obtained from this discussion will be useful in evaluating the importance of traditional dispute resolution mechanisms, their interplay with the formal courts, and how to strengthen

and integrate them with the formal justice system. However, there may be occasions where aspects of it will be used for publication in academic journals, books, or at conferences.

Date: _____ day of _____, 2018.

Interview location (county or city): _____

Place of interview (in detail): _____

Observations on who is present

No. of Members in the FGD: _____ (____ Male / _____ Female)

QUESTIONS

Part I: The Nature and Types of TDRMs

The first series of questions is to help us understand the methods used in your community to resolve disputes, key issues and conflicts, roles played by different groups (women, youth, etc), penalties imposed, and enforcement mechanisms.

1. (a) Which mechanisms are preferred by your community members in settling or resolving their disputes?

Traditional dispute resolution mechanisms	
Formal mechanisms (courts & formal arbitration)	

   (b) What factors lead to the conclusion that they prefer the above mechanisms?
2. Who resolves conflicts in your community? What is the name of that organ in Kipsigis? Describe the organ's structure and characteristics?
3. Describe the main characteristics of the traditional mechanisms named above?
4. Is the chief/provincial administration part of the dispute resolution organ? If so, how or what role do chiefs play?

Part II: TDRM Procedures among the Kipsigis

The second series of questions is to understand the Kipsigis TDRM procedures – from when a case is brought before you as elders to the point of enforcement.

5. Who gives you facilities for your hearings and related activities as elders?
6. (a) What types of disputes come before you? (family, land, environmental, cattle rustling, etc)
   (b) Do you receive criminal cases? Which ones?
7. (a) Describe the process that you use when a dispute is brought to you?
   (b) Are they private or open sessions?
8. How many elders constitute a quorum for you to commence the hearing process?
9. (a) How do witnesses testify in a dispute?
   (b) Do you have expert witnesses in your custom?
   (c) Are there instances where the witnesses lie? How do you deal with such witnesses?
10. How do you ensure that the parties in a dispute have an opportunity to present their side of the story?
11. Do you take records of the proceedings? Who is the custodian of the records?
12. Is there any private session where the elders sit to make a verdict/decision?
13. (a) How do you ensure that your decision is consistent with your past decisions?
    (b) How do you transmit the knowledge regarding past decisions to the next generation?
14. What penalties are meted out to wrongdoers?
15. What happens if a party is dissatisfied with the elders' decision?
16. Are there any special rules that apply to women, children and persons living with disabilities?
17. Do you receive disputes between different communities? If yes, what disputes?
18. How do you rebuild the relationship between parties to a dispute? Do you perform rituals? If yes, which ones?

Part III: Timelines

19. How many cases did you handle in 2016/2017 or 2017/2018? On average, how many per year?
20. What is the frequency of sittings? (daily, weekly, monthly, or quarterly)

21. How long does a dispute take to conclude? (Number of weeks, months, etc)

Part IV: Linkages with Formal Courts

22. Do the disputes you handle end up in formal courts? Why?
23. Do the people who appear before you go to Court even where they not referred?
24. What factors do you consider when referring a dispute to court?
25. Have you ever received any dispute referred to you directly by courts? Which disputes are commonly referred to you?
26. Are there any instances where a case which is pending in a court of law comes before you as elders? If so, do you take it up or refer to the courts? **Part V: Compliance with Decisions**

27. How do you ensure that parties have complied with your decisions?
28. What is the level of compliance with your decisions?
29. What do you do to those who fail to comply?
30. How helpful are local authorities?

Part VI: Strengths and Weaknesses/Challenges

The third series of questions covers the strengths of TDRMs over the formal justice system, and the key challenges/weaknesses that need to be addressed to integrate TDRMs with the formal justice system.

31. Would you advice the members of your community to bring cases to you instead of taking them to courts? If yes, why?
32. What challenges are facing you as elders and how should they be addressed?
33. What role do political leaders play in your work? Is it desirable? Should it be limited?
34. Do you need the intervention of the government to address the challenges?

Part VII: Recommendations

35. What measure(s) do you suggest should be taken to strengthen your linkages between you and the courts?

APPENDIX D: FOCUS GROUP GUIDE FOR TDRM USERS My name is Joseph Kiplagat Sergon, a Student at the University of Nairobi. I am doing research on the topic, **'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community'**

The data obtained from this discussion will be useful in evaluating the importance of traditional dispute resolution mechanisms, their interplay with the formal courts, and how to strengthen and integrate them with the formal justice system. However, there may be occasions where aspects of it will be used for publication in academic journals, books, or at conferences.

Date: _____ day of _____, 2018.

Interview location (county or city): _____

Place of interview (in detail): _____

Observations on who is present

No. of Members in the FGD: _____ (____ Male / _____ Female)

QUESTIONS

1. Between TDRMs and judicial justice system, which avenue do you prefer in resolving your disputes? Why?

2. (a) Have you ever submitted a dispute to the elders?
   (b) What was the key issue (land, livestock, theft, etc)? How was your dispute resolved?
   (c) Please tell us whether the elders gave you an opportunity to defend yourself or present your case? Did the elders listen to all the parties concerned? Did they accord you an opportunity to defend or explain your case? Please elaborate.

3. (a) Were you satisfied with the decision of the elders? How satisfactory was the decision?
   (b) If not, what other mechanism did you use to get satisfactory ruling and how did you get there (e.g. by referral from council of elders)?
4. Have you ever been referred to court by the council of elders? What factor was considered?

5. In your view, are women litigants treated in the same way as men litigants? Are there special rights accorded to different categories of litigants – women, children, persons living with disabilities, etc.?
6. What do you suggest to improve the efficacy/efficiency of traditional dispute resolution both within and outside your community?

APPENDIX E: LIST OF RESPONDENTS

	Description of Respondent	Place of Interview	Date of Interview
	TDRM Practitioners (Elders)		
1	Male Elder, 70 years old, Vice Chairman Myoot CE	Kericho Town	15 December 2018
2	Male Elder, 66 years old, Secretary – Myoot CE	Kericho Town	15 December 2018
3	Male Elder, 67 years old, Vice Chairman Myoot CE	Kericho Town	15 December 2018
4	Male Elder, 70 years old, Treasurer, Myoot CE	Kericho Town	15 December 2018
5	Male Elder, 82 years, Chairman, Myoot CE	Kericho Town	15 December 2018
6	Male Elder, 70 Years old, Kabianga	Kericho Town	30 June 2018
7	Male Elder, 57 years old, Kabianga	Kericho Town	30 June 2018
8	Male Elder, 73 years old, Kabianga	Kericho Town	30 June 2018
9	Male Elder, 74 years old, Kabianga	Kericho Town	30 June 2018
10	Male Elder, 60 years old, Kabianga	Kericho Town	30 June 2018
11	Male elder, 68 years old, Kabianga	Kericho Town	30 June 2018
12	Male elder, 57 years old, Kabianga	Kericho Town	30 June 2018
13	Female elder, 43 years old, Kabianga	Kericho Town	30 June 2018
14	Male elder, 50 years old, Kamasian CE	Kericho Town	21 July 2018
15	Male elder, 51 years old, Kamasian CE	Kericho Town	21 July 2018
16	Male elder, 64 years old, Kamasian CE	Kericho Town	21 July 2018
17	Male elder, 78 years old, Kamasian CE	Kericho Town	21 July 2018
18	Male elder, 56 years old, Kamasian CE	Kericho Town	21 July 2018
19	Male elder, 80 years old, Kamasian CE	Kericho Town	21 July 2018
20	Male elder, 59 years old, Kamasian CE	Kericho Town	21 July 2018
21	Female elder, years old, Kamasian CE	Kericho Town	21 July 2018
	TDRM Users		
22	Female, 42 years old	Kericho Town	21 July 2018
23	Male, 24 years old	Kericho Town	21 July 2018
24	Female, 32 years old	Kericho Town	21 July 2018
25	Female, 43 years old	Kericho Town	21 July 2018
	Chiefs/Assistant Chiefs		
26	Male Assistant Chief, 48 Years old, Kericho	Kericho Town	30 June 2018
27	Male former chief, 52 years old, Kericho	Kericho Town	30 June 2018
28	Male Assistant chief, 43 years old, Kabianga	Kericho Town	30 June 2018
29	Female Assistant chief, 46 years old, Kabianga	Kericho Town	30 June 2018
	Key Informants – Judges, Magistrates, Lawyers and ADR Practitioners		
30	Male Lecturer & Advocate	Nairobi	3 October 2018
31	Female Legal practitioner -Advocate	Nairobi	11 October 2018
32	Male Legal Practitioner - Advocate	Nairobi	13 October 2018

33	Female Legal Practitioner & Academia	Nairobi	15 October 2018
34	Male Lecturer and Advocate	Nairobi	16 October 2018
35	Male Lawyer	Nairobi	19 October 2018
36	Male Magistrate	Nairobi	25 October 2018
	Description of Respondent	**Place of Interview**	**Date of Interview**
37	Male Advocate, accredited Arbitrator and Mediator	Nairobi	25 October 2018
38	Male, Academia & Civil society	Nairobi	25 October 2018
39	Female Judicial Officer	Nyeri	26 October 2018
40	Female Magistrate	Nairobi	30 October 2018
41	Male Lawyer	Nairobi	7 November 2018