



Strathmore University
Law School

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF
THE BACHELOR OF LAWS DEGREE**

**THE APPLICABILITY OF TRADITIONAL DISPUTE RESOLUTION
MECHANISMS IN CRIMINAL CASES IN KENYA**

By:

Name: CHEPKOECH CAROL

Registration Number: 077478

Prepared under the supervision of:

MS. LINET NJERI

Date of Submission: January, 2017.

Table of Contents

Acknowledgement	4
Declaration.....	5
List of Abbreviations	6
List of Cases	7
Abstract.....	8
CHAPTER ONE: Introduction to the Study.....	9
1.0 Background.....	9
1.1 Statement of the Problem	11
1.2 Objectives of the research.....	11
1.3 Hypothesis	11
1.4 Theoretical Framework.....	13
1.4.1 Legal Pluralism.....	13
1.4.2 Theories of Justice	14
1.4.2.1 Restorative Justice vis-à-vis Retributive Justice	14
1.5 Literature Review	16
1.5.1 The nature of TDRMs	16
1.5.2 Repugnancy provisions	16
1.6 Research Methodology	18
1.7 Limitations.....	18
1.8 Chapter Breakdown	18
CHAPTER 2: Historical Development of Traditional Dispute Resolution Mechanisms in Kenya.....	20
2.0 Pre-Colonial Period	20
2.1 The Colonial Period.....	21
2.1 The Post-Colonial Period	23
2.3 Recent Developments	24

CHAPTER 3: Applicability of Traditional Dispute Resolution Mechanisms in Criminal Matters	26
3.1 Enabling Constitutional and Statutory Provisions.....	28
CHAPTER 4: The Extent of the Applicability of TDRM in Criminal Cases	32
4.0 The Nature of the Offence	32
4.1 Involvement of Parties.....	34
4.2 The Timing of the Resolution.....	35
CHAPTER 5	37
5.0 Findings	37
5.1 Conclusion and Recommendations	38
Bibliography	40
Texts	40
Journal Articles.....	40
Statutes	42
Case law.....	42
Internet Sources	42

Acknowledgement

I would like to thank all the persons who have been a part of this study.

First and foremost, I want to express my deepest gratitude to the Almighty God for it is by his grace that I have managed to do and complete this study.

My greatest intellectual indebtedness is to Ms. Linet Njeri of Strathmore Law School whose wide-ranging legal thoughtfulness has tremendously contributed to this work.

I thank my family, especially my mum, Jackie for giving me moral and financial support throughout the course of this study.

I would also like to thank my friends, and specifically mention Selipha Nyokabi and Alice Mugo for their tremendous support.

Declaration

I, CHEPKOECH CAROL, do hereby declare that this research is my original work and that to the best of my knowledge, information and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

List of Abbreviations

ADR- Alternative Dispute Resolution.

AJS- African Justice System.

FJS- Formal Justice System.

TDRMs- Traditional Dispute Resolution Mechanisms.

List of Cases

1. *Dry Associates limited v Capital Market and Another, Interested Party Crown Berger (K) Ltd (2012) eKLR.*
2. *Juma Faraji Serenge alias Juma Hamisi v Republic (2007) eKLR.*
3. *Moses Munyendo & 908 others v Attorney General & Minister for Agriculture (2013) eKLR.*
4. *Ndeto Kimomo v Kavoi Musumba (1977) eKLR.*
5. *Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.*
6. *Republic v Amkeyo (1917) EALR 17.*
7. *Republic v Faith Wangoi, Criminal Misc. No. 1 of 2015, High Court of Kenya at Kajiado.*
8. *Republic v Mohamed Abdow Mohamed (2013) eKLR.*
9. *Ruhi vs. Republic (1985) KLR 373.*
10. *Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.*
11. *Timothy Njoya and 6 others v Attorney General and 3 others (2004) 2 KLR.*
12. *William S.K. Ruto Civil suit no. 1192 of 2005 eKLR.*

Abstract

Before the advent of colonialism, Africans had their own mechanisms of dispute resolution which were based on the customary law applicable at the time. These mechanisms, otherwise referred to as traditional dispute resolution mechanisms (TDRMs), had provisions for all kinds of disputes arising including those of a criminal nature. Colonialism resulted in the importation of laws from other jurisdictions, particularly England, specifically through the reception clause. Pursuant to the repugnancy clause, customary law could only be used to the extent that it was consistent with written law and was not repugnant to justice and morality. Article 159 of the Constitution of Kenya (2010) states that in discharging its mandate the judiciary has an obligation to promote Alternative Dispute Resolution Mechanisms, under which it specifically mentions TDRMs. The objective of this study is to establish whether TDRMs are currently applicable in criminal cases in Kenya, and if establish the scope of their application. Chapter 1 lays the background, states the objectives and explains the theoretical framework of this study. Chapter 2 looks into the historical development of TDRMs in Kenya as it pertains to the resolution of criminal disputes. In answering the question as to whether TDRMs are applicable in criminal matters, chapter 3 examines the various enabling constitutional and statutory provisions as well as the jurisprudence that has been developed by the court on the same. Chapter 4 seeks to address the question of the extent of TDRMs in criminal cases; whether it can be used for both felonies and misdemeanours, at what point it can be invoked during a trial and which parties should be involved in the course of resolving disputes through TDRMs. Chapter 5 explains the findings of this study then goes ahead to make the conclusions and recommendations.

CHAPTER ONE: Introduction to the Study

1.0 Background

Prior to the enactment of formal penal codes and statutes in Kenya, the Africans had their own justice systems under customary law within which they resolved disputes arising among themselves, including those of a criminal nature.¹ Traditional Dispute Resolution Mechanisms (TDRMs) therefore refer to mechanisms that have been applied by local communities under customary law in handling conflicts arising among them since time immemorial and which have passed from one generation to another.²

During the colonial regime, written penal codes from other jurisdictions for instance England and India were imported and made applicable in Kenya.³ These laws were originally formulated and designed for the English society. This introduction began by the extension of the Foreign Jurisdiction Act 1890, under which the colonialist obtained powers of control and administration of foreign lands.⁴ Thereafter, English law became the basis of determination of both civil and criminal matters in these jurisdictions.⁵

The reception clause in the Judicature Act enacted in 1967 imported common law, doctrines of Equity as well as statutes of general application in force in England on the 12th of August 1897,⁶ which date came to be known as the reception date. This Act also has a clause limiting the application of African customary law to civil cases where one or both parties are subject to it or affected by it; while subjecting it to repugnancy provisions.⁷

These statutory provisions effectively made customary law inferior to statutory provisions through the repugnancy clause, making it only applicable to the extent that it was not inconsistent with the written law or repugnant to justice, equity and good conscience.⁸ It is stated that some statutes were aimed at promoting government policies relating to land and labour, for instance the Trespass Ordinance⁹ while others were unacceptable to the Kenyan

¹ Coldham S, *Criminal Justice Policies in Commonwealth Africa, Trends and Prospects*, Journal of African Law, 44 at 220.

² Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: A case Study of Republic v Mohamed Abdow Mohamed (2013) eKLR (2014) 1 Alternative Dispute resolution* at 203.

³ Cotran E, *The Development and Reform of the Law in Kenya*, Journal of African Law, Vol. 27, No. 1 (1983) at 42.

⁴ Ogendo H.W.O, *The Tragic African Commons; A Century of Appropriation, Suppression and Subversion*, University of Nairobi Law Journal, Vol 1 (2003) at 110.

⁵ Ogendo H.W.O, *The Tragic African Commons* at 110.

⁶ Section 3(1)(c), Judicature Act, (1967).

⁷ Section 3(2), Judicature Act (1967).

⁸ Coldham S, *Criminal Justice Policies in Commonwealth Africa, Trends and Prospects* at 220.

⁹ Coldham S, *Criminal Justice Policies in Commonwealth Africa, Trends and Prospects* at 221.

people since they sought to criminalize that which was culturally acceptable; for instance, the criminalization of bigamy yet polygamy was acceptable to the Africans.¹⁰

Following this historical development, dispute resolution mechanisms under customary law, otherwise known as TDRMs, have constantly been ranked below the written codes.¹¹ This means TDRMs can only be used if consistent with the constitution or any written law. Consequently, the jurisprudence that has emanated from the courts treated customary law as inferior for a long time.¹²

Despite these challenges, TDRMs have remained resilient over the years.¹³ The highlight of the development of TDRMs was August 2010 that saw the promulgation of the Constitution of Kenya. Article 159 of the Constitution provides that the judiciary is to be guided by several principles in the course of discharging its mandate. One of these principles is alternative forms of dispute resolution; where TDRMs have expressly been mentioned.¹⁴

Article 159 goes further to include the repugnancy clause; stating that the use of TDRMs is not absolute but rather subject to the several conditions. It should not contravene the bill of rights; neither should it be repugnant to justice or morality or results in outcomes that are repugnant to justice or morality; nor be inconsistent with the constitution or any other written law.¹⁵ It is important to note that any law, including customary law that is inconsistent with the constitution is null and void to the extent of the inconsistency.¹⁶ Even so these provisions do not expressly limit the application of TDRMs in criminal matters.

Section 176 of the Criminal Procedure Code¹⁷ titled promotion of reconciliation states as follows:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence not amounting to a felony, and not aggravated in degree on terms of payment of compensation

¹⁰ <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/kenya.html> on 15th February 2016.

¹¹ Kariuki F, *Customary Law Jurisprudence from Kenyan Courts, Implications for Traditional Justice Systems*.

¹² Kariuki F, *Customary Law Jurisprudence from Kenyan Courts, Implications for Traditional Justice Systems*.

¹³ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya*: at 204.

¹⁴ Article 159(2)(c), Constitution of Kenya (2010).

¹⁵ Article 159(3), Constitution of Kenya (2010).

¹⁶ Article 2(4), Constitution of Kenya (2010) states that any law, including customary law, that is inconsistent with the constitution is null and void to the extent of the inconsistency.

¹⁷ Section 176, Criminal Procedure Code CAP 75 (2015).

or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

In light of the foregoing, questions arise pertaining the applicability of TDRMs in criminal cases, and if so what the scope of its applicability is. The inclusion of TDRMs in the Constitution imputes the applicability of both formal and traditional justice systems in Kenya, which results in legal pluralism. A further question arises as to how the two systems can work together without the suppression and subversion of the other.

1.1 Statement of the Problem

The question as to the applicability of customary law is one that has been dealt with from the colonial period. Subject to the repugnancy provisions, the colonial power recognized certain aspects of customary law to be applicable in certain circumstances. Some statutes have expressly provided for the use of customary law, for instance the Provisions in the Marriage Act relating to African customary marriage, the land laws and law of Succession

In the fields where the statutes have expressly allowed for the use of customary law, the court does not necessarily grapple with the question of its applicability. However, for criminal matters the constitutional and statutory provisions do not expressly allow or disallow for its application. This has been problematic since Article 159 has been open to several interpretations. This research therefore seeks to establish the applicability and scope of TDRMs in criminal matters by examining the legislative framework and the jurisprudence from the courts.

1.2 Objectives of the research

The Objectives of this research are as follows:

- a. To examine and establish whether TDRMs are applicable in criminal matters in Kenya.
- b. In the event that TDRMs are applicable in criminal cases, to examine the scope of its applicability.
- c. To make recommendations with regards to the use of TDRMs in criminal matters and the way forward on the same with reference to the findings made.

1.3 Hypothesis

- a. TDRMs are applicable in criminal cases in Kenya.

- b. The scope of its application is not in any way limited. Therefore, TDRMs may be used in dealing with any criminal offence and it may be invoked at any point in a case provided judgement has not been entered.

1.4 Theoretical Framework

1.4.1 Legal Pluralism

Legal pluralism refers to an instance when more than one legal system exists in a single political unit.¹⁸ This happens where a state has recognised, validated and backed different bodies of law for different groups in the society;¹⁹ and particularly in cases where there are multiple institutions administering law as opposed to where all law in a state is administered by a single state institution.²⁰ It exist in the sense that a state recognises alternative systems or repositories of the law.²¹

Legal pluralism can be traced to colonial times, and it was as a result of the recognition given by the colonialist to the indigenous or customary law within the territory they came to dominate.²² This is the case especially in African states for instance in the Kenyan context where the colonial masters recognised some aspects of the customary law of the Africans hence resulting in legal pluralism.²³

Legal pluralism means the state recognises various sources, regimes or systems of law. It therefore in most cases results in the establishment of sub-state regulatory regime tasked with overseeing the alternative systems,²⁴ which means there is customary and statutory adjudication.²⁵ This effectively makes it necessary to define relationship between the pluralistic institutions.²⁶

The concept of pluralism is contrasted with the idea of legal centralism, under which all law should be state sponsored and uniform for all persons; applied equally across all social groups and emphatically superior to, if not exclusive of any other systems or repositories of law.²⁷ In this case they are implemented by a single integrated state institution. Centralism therefore implies that the only existing law is that recognised and administered by the state.

¹⁸ Pimentel D, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, Yale Human Rights and Development Journal Vol. 14 (2011) at 59.

¹⁹ Griffiths J, *What is Legal Pluralism?* Journal of Legal Pluralism and Unofficial Law, Vol. 32 no. 24 (1986) at 5.

²⁰ Griffiths J, *What is Legal Pluralism?* at 6.

²¹ Jackson S.A, *Legal Pluralism and the Nation State: Romantic medievalism or pragmatic modernity?* University of Michigan at 2.

²² Jackson S.A, *Legal Pluralism and the Nation State* at 2.

²³ Sect 3, Judicature Act, Cap 8 (2012).

²⁴ Griffiths J, *What is Legal Pluralism?* at 18.

²⁵ Pimentel D, *Legal Pluralism in Post-Colonial Africa* at 60.

²⁶ Pimentel D, *Legal Pluralism in Post-Colonial Africa* at 60.

²⁷ S.A Jackson, *Legal Pluralism and the Nation State* at 4.

Some African states that practice legal pluralism have managed to harmonize both systems. However, in states where harmonization is yet to occur, inconsistent and competing provisions and the different institutions for each system create tension in that jurisdiction. Sometimes states have created hybrid institutions in an attempt to harmonize the two systems.²⁸

1.4.2 Theories of Justice

In a pluralistic society, there is no single approach of administering justice which is collectively deemed as a key solution to injustice.²⁹ The Black's Law Dictionary defines justice in the context of jurisprudence as a constant and perpetual disposition to render each man his due.³⁰

The Constitution obligates the state to ensure access to justice for all persons.³¹ Justice must be done to all without delay or undue regard to technicalities.³² Following the idea that justice can only be attained if keen attention is paid to the levels of injustice occurring with the realisation that one solution is not sufficient,³³ this study will look at two main theories of justice; restorative justice and retributive justice.

1.4.2.1 Restorative Justice vis-à-vis Retributive Justice

Restorative justice is of the view that crime not only breaks the law but also causes harm to people, relationships, and the community.³⁴ Therefore, a just response must address those harms as well as the wrongdoing.³⁵ It believes that crime causes harm hence the need for justice in repairing such harm, and that the best way to determine how to do that is to have the parties decide together. This can cause fundamental changes in people, relationships and communities, hence resulting in transformation.³⁶

²⁸ Pimentel D, *Legal Pluralism in Post-Colonial Africa* at 61.

²⁹ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010*, Strathmore Law Journal (June 2015) at 25.

³⁰ <http://thelawdictionary.org/justice-n/> accessed on 6th July, 2016.

³¹ Article 48, Constitution of Kenya (2010).

³² Article 159(2), Constitution of Kenya (2010).

³³ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 25.

³⁴ Lijalem E. E, *A Move Towards Restorative Justice in Ethiopia: Accommodating Customary Dispute Resolution Mechanisms with The Criminal Justice System*, Master's Thesis in Peace and Conflict Transformation, University of Tromso (2013) at 1.

³⁵ <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/> on 6th July 2016.

³⁶ <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/> on 17th July 2016.

African customary justice systems largely hinge on restorative justice;³⁷ which seeks to restore relationships, build peace and parties interests as opposed to allocating rights between disputants.³⁸It focuses on the needs of the victims and the offenders, as well as the involvement of the community who all play an active role in the process.³⁹

Restorative justice has also been described as a form of participatory democracy that moves beyond simple majority rule.⁴⁰ Some scholars are of the opinion that since judicial authority emanates from the people, the court should allow people to choose the forum they think is most appropriate.⁴¹ In this case the solution arrived at is likely to be more acceptable to both parties and compliance will be easier to enforce since restorative justice prefers collaborative and inclusive processes that are mutually agreed upon rather than imposed.⁴² If the parties are willing, the best way to do this is to help them meet to discuss those harms and how to bring about resolution. Other approaches are available if they are unable or unwilling to meet. Sometimes those meetings lead to transformational changes in their lives.

According to Howard Zehr, Restorative justice began as a means of dealing with offences viewed as relatively minor, for instance burglary.⁴³ Today, however, restorative justice is available for what would be considered severe forms of criminal violence and efforts are being made to apply it to a situation of mass violence.⁴⁴

On the other hand, retributive justice advocates for a proportionate relationship between the act and the response, and it believe that proportionate pain will vindicate, which most times is not the case.⁴⁵ Retributive justice is the main focus of the formal justice system which is adversarial in nature This means there is usually a loser who has to compensate the winner for loss, and in most criminal cases suffer punishment for their actions.⁴⁶

³⁷ Kiwanda Y, *The Exodus of Law and Legal Methods*, LawAfrica Publishing Ltd, Nairobi (2014) at 177.

³⁸ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: A case Study of Republic v Mohamed Abdow Mohamed (2013)* eKLR Alternative Dispute resolution (2014) Vol 1 at 204.

³⁹ Zehr H & Gohar A, *The little book of restorative justice: revised and updated* at 9.

⁴⁰ Zehr H & Gohar A, *The little book of restorative justice* 2015 at 3.

⁴¹ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

⁴² Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

⁴³ Zehr H & Gohar A, *The little book of restorative justice* 2015 at 2-3.

⁴⁴ Zehr H & Gohar A, *The little book of restorative justice* 2015 at 3.

⁴⁵ Zehr H & Gohar A, *The little book of restorative justice* 2015 at 59.

⁴⁶ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 28.

1.5 Literature Review

1.5.1 The nature of TDRMs

Kenya is diverse in terms of the race, culture and ethnicity of its people.⁴⁷ The constitution has recognised culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and the state has been charged with mandate to promote all forms of cultural expression.⁴⁸

Under the African Customary law, there is no clear distinction between civil and criminal wrongs.⁴⁹ The essence was to as far as is possible make the harm done good,⁵⁰ and as a result promote cohesion and harmony in the society. TDRMs are based on the customary law which has been defined to include traditions, beliefs and practices handed down from generation to generation.⁵¹

TDRMs largely hinge on restorative justice; which aims to restore relationships, build peace and parties interests as opposed to allocating rights between disputants.⁵² It focuses on the needs of the victims and the offenders and involves the community who all play an active role in the dispute resolution process.⁵³ Their key mandate is to promote the harmony and togetherness within the community or society in which they are applicable rather than promoting individual interests.⁵⁴ TDRMs are contrasted with the Formal Justice System is retributive in nature. FJS takes a punitive approach which seeks to cause proportionate harm to the offender.⁵⁵

1.5.2 Repugnancy provisions

Before colonialism, Kenyans applied customary law in determining and resolving disputes. This changed after the colonialist took over and imported statutes from other jurisdictions making the applicable in Kenya. A plural judicial system arose where several laws governed

⁴⁷ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 22.

⁴⁸ Article 11, Constitution of Kenya (2010).

⁴⁹ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 11.

⁵⁰ Browne Orde, *British Justice and the African*, Journal of the Royal African Society Vol. 32, No. 127 (April 1933), pp. 148-159.

⁵¹ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 23.

⁵² Kariuki F, *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

⁵³ Zehr H, *The little book of restorative justice* at 9.

⁵⁴ Muigua K, *Traditional Dispute Resolution Mechanisms Under Article 159 Of The Constitution Of Kenya 2010* at

⁵⁵ Kariuki F, *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

Europeans, Asians, Muslims and Africans. However, the introduction of the new systems did not in any way extinguish TDRMs.⁵⁶

In cases of legal pluralism, there arises tension between the systems in questions and the institutions established by them especially where there is inconsistency.⁵⁷ This lead to the introduction of repugnancy clauses. Pursuant to Article 2 is that customary law that is inconsistent with the constitution or any other written law is null and void to the extent of the inconsistency.⁵⁸ For TDRMs to be applicable, they should not contravene the bill of rights; be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality; nor be inconsistent with the constitution or any written law.⁵⁹

Following the introduction of the formal justice system in Kenya, customary law as *corpus juris* was expressly subordinated to colonial enactments and received principles of common law from England, the doctrines of Equity and statutes of general application.⁶⁰ As a result of this the court would strike out any rules of customary law which they did not like or even declare as custom what was unknown to the African culture.⁶¹ This therefore implies that the inclusion of repugnancy clauses has resulted in suppression and subversion of TDRMs⁶² and has contributed greatly to the destruction of traditional justice systems.⁶³ The continuous subjection of customary laws to the repugnancy provisions by courts has had an effect of undermining the efficacy of TDRMs.⁶⁴

The question of what exactly Article 159 means when it refers to repugnancy to morality also arises. This is especially the case in a society where morality is considered to be relative.⁶⁵ What exactly are the standards of morality and whose definition of morality is to be used as the reference point? It has been argued that behind the repugnancy clause is a grievous misconception of ‘justice and morality’ since it imposes the Western moral codes

⁵⁶ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 23.

⁵⁷ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 23.

⁵⁸ Article 2(5), Constitution of Kenya (2010).

⁵⁹ Article 159(3), Constitution of Kenya (2010). Repugnancy to justice and morality is also included in Section 3 of the Judicature Act (1967).

⁶⁰ Ogendo H.W.O, *The Tragic African Commons* at 111.

⁶¹ Ogendo H.W.O, *The Tragic African Commons* at 112.

⁶² Ogendo H.W.O, *The Tragic African Commons* at 112.

⁶³ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

⁶⁴ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi (July, 2015) at 11.

⁶⁵ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 31.

on African societies who have their own conceptions of justice and morality.⁶⁶ The court should therefore change its attitude and reforms should be made on the formal system in order to elevate the position of customary law as this will redefine the repugnancy clause.⁶⁷

1.6 Research Methodology

This study is primarily a desktop research. This research will be founded on qualitative data obtained from primary sources such as the Constitution of Kenya 2010 and other such statutes as may be deemed relevant. Case law will be another source of information, primarily obtained from the hard copy law reports or from internet sources like kenyalaw.org. Texts are also an important source of relevant material. Secondary sources for instance journals and articles which are relevant in addressing the research questions will also be useful. Moreover, various databases will be used in obtaining material for my research.

1.7 Limitations

This is qualitative research and will be substantially informed by secondary sources as opposed to primary sources of data. Data collection methods such as conducting interviews and rolling out questionnaires will not be used.

1.8 Chapter Breakdown

Chapter 1: Introduction

This chapter contains the structure and contents of the research. It states out the research questions, objectives, hypothesis, literature review, theoretical and conceptual framework as well as the methodology. It introduces the research problem and poses question on the extent of TDRM in criminal cases and at what point in a case it may be invoked.

Chapter 2:

Discusses the historical development of customary law, and in particular TDRMs in the Kenyan from the pre-colonial period, colonial period, after independence as well as recent developments. This purpose of this discussion is to outline the context within which TDRMs are being applied.

⁶⁶ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya* at 11.

⁶⁷ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya* at 11.

Chapter 3.

Examines and establishes the applicability of TDRMs in criminal matters.

Chapter 4:

Discusses the scope of TDRMs in criminal matters. It seeks to answer the questions: in which cases, at what point during proceedings TDRMs can be invoked and which parties are to be involved in the TDRMs process.

Chapter 5:

Makes Findings, Conclusions and Recommendations

CHAPTER 2: Historical Development of Traditional Dispute Resolution Mechanisms in Kenya

Due to the fact that society is dynamic as opposed to static, there is need to study its history as it helps to put the present into perspective.⁶⁸ For this reason, this chapter explains the historical development of TDRMs, beginning with the pre-colonial period, the colonial period, the period after independence was attained and finally the recent development with regards to TDRMs.

2.0 Pre-Colonial Period

All laws reflect the economic, social, political and cultural development of a society; the people's wellbeing depends on their form of government and the laws of their land.⁶⁹ This means law will have merit in the society in which it evolves as it will be tailored to meet the good of such a society.⁷⁰ It follows, therefore, that it is only when an outsider tries to determine the validity of such law that a certain aspect will be found to be repugnant.⁷¹

In most African societies, crime was viewed socially such that any wrongful act or omission had an effect on the social relations.⁷² In as much as punishments were meted out for wrong actions, imprisonment was unheard of in the African society.⁷³ Disputes were settled through customary law mechanisms which placed certain degrees of sanctions depending on the offence in question.⁷⁴ These customary law mechanisms, otherwise referred to as TDRMs, are primarily based on customary law of the particular community to which they apply.⁷⁵

TDRMs were primarily adjudicated by the council of elders. Each African community had a council of elders which was responsible for overseeing the affairs of the community which includes ensuring that there is social order and justice in the community.⁷⁶ Unlike formal

⁶⁸ Friedman B, *Causes of Popular Dissatisfaction with Administration of Justice: A Retrospect (and a Look Ahead)*, Indiana Law Review, 82, (2007) 1193.

⁶⁹ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 1.

⁷⁰ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 1.

⁷¹ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 1.

⁷² Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 2.

⁷³ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982 at 2.

⁷⁴ Onyango P, *African Customary Law System: An Introduction*, LawAfrica Publishing Ltd, Nairobi, 2013 at 29.

⁷⁵ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 203.

⁷⁶ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework* at 7.

courts, the arbiters or elders in traditional courts are not trained judges. Moreover, there is no legal representation or recording of proceedings, and the trial follows the customs and practices of a particular ethnic group.⁷⁷

Apart from law concerning crimes and their punishment, African societies also had law pertaining to the different aspects of society⁷⁸ for instance succession. The existing legal provision of the colonial times has been criticised on ground that it ignored too obvious and profound a divide between one kind of law and another, with all the customary laws being lumped together under the single title of native customary law.⁷⁹ This also ignored the fact that there are several ethnic groups with diverse customary law on different matters including those of a criminal nature.

2.1 The Colonial Period

The colonial settlers propagated the notion that African customary law was primitive and static; and that the Africans who had been recently woken up from their sleep and introduced to civilization ought to have been protected from suddenly going back to their normative system.⁸⁰ Therefore, all the aspects of the customary system that were repugnant to English law were to be abolished.

In most British colonies, the rulers applied indirect rule in governing these states. Under this rule the British conserved, officially recognised and used the existing indigenous systems of rule and law while referring to them as native authorities.⁸¹ As a result, some aspects of customary law and their adjudicative institutions were recognised as an essential part of the apparatus of indirect administration.

In 1860, the English Penal code was made applicable to India, and subsequently the colonialist sought to apply this same statute in the then-declared East Africa Protectorate.⁸² Following the debates as to whether this law was appropriate, the Colonial Office Code was introduced in 1930 which had the effect of diminishing the application of customary law.⁸³

⁷⁷ F Kariuki, *Conflict Resolution by elders; Successes, Challenges and Opportunities* at 6.

⁷⁸ Allott A.N, *What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950* Journal of African Law, Vol. 28, No. 1/2 at 56.

⁷⁹ Allott A.N, *What Is to Be Done with African Customary Law?* at 56.

⁸⁰ AJGM Sanders, *How customary is African customary law?* The Comparative and International Law Journal of Southern Africa, Vol. 20, No. 3 (NOVEMBER 1987) at 407.

⁸¹ Allott A.N, *What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950*, Journal of African Law, Vol. 28, No. 1/2 at 58.

⁸² Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform* at 4.

⁸³ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform* at 4.

The repugnancy provision was first introduced by Article 20 of the East Africa Order in Council as promulgated in 1897.⁸⁴ However, this provision made no attempt to define what exactly repugnancy meant. It has been stated that for a custom to meet the repugnancy threshold, it must be consistent with the rights and duties underlying the concept of justice and equity as determined by the common law system.⁸⁵

The colonial legislature accordingly outlawed a number of customary practices and institutions, and subsequently conferred on the central courts the power to declare custom invalid whenever they considered it to be contrary to natural justice or morality.⁸⁶ The repugnancy clause, appeared to give the appellate courts and supervising officers the authority to delete what they did not like from the institutions of the customary law under their care.⁸⁷ Therefore, they could modify substantial and procedural aspects of customary law to bring them in line with their ideas and institutions.⁸⁸

In some jurisdictions, Judicial or native courts supervisors were appointed, and their key mandate within the colonial administration was to supervise the work of the African courts.⁸⁹ To administer formal law in Kenya, a Supreme Court and subordinate courts were established and several professional lawyers brought in from the United Kingdom to be judges of the Supreme Court and resident magistrates in the first class subordinate courts; while the rest of the magistrate courts were manned by administrative officers, for instance district commissioners.⁹⁰

The attitude of the colonialist judges towards customary law was that English law was paramount and customary law, though applicable, was an inferior system.⁹¹ This is evidenced by the case *Republic v Amkeyo*,⁹² which is one of the indicators of how customary law was treated as inferior from the onset.⁹³ One would question why there was indifference

⁸⁴ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform* at 4. Also, see Article 20, East Africa Order in Council (1897).

⁸⁵ Onyango P, *African Customary Law System: An Introduction*, LawAfrica Publishing Ltd, Nairobi, 2013 at 43.

⁸⁶ AJGM Sanders, *How customary is African customary law?* at 407.

⁸⁷ Allott A.N, *What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950*, at 59.

⁸⁸ Allott A.N, *What Is to Be Done with African Customary Law?* at 59-60.

⁸⁹ Allott A.N, *What Is to Be Done with African Customary Law?* at 58-59.

⁹⁰ Cotran E, *The Development and Reform of the Law in Kenya* at 42.

⁹¹ Cotran E, *The Development and Reform of the Law in Kenya* at 43.

⁹² *Republic v Amkeyo* (1917) EALR 17. In this case, the judge compelled a woman who had been married under customary law to testify against her husband regardless of spousal privilege stating that she was not a legal wife.

⁹³ Kariuki F, *Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems* at 4.

to African customary law yet common law was basically the customary law of the English people.

2.1 The Post-Colonial Period

Initially, the African institutions functioned freely according to the traditions. However, reforms were gradually introduced and as a result these courts' jurisdiction, personnel and their procedure were largely similar to those of the formal justice system.⁹⁴ As a result, at the verge of independence, African courts bore little or no resemblance to the original traditional institutions;⁹⁵ this being largely due to the fact that the formal courts were adversarial in nature which resulted in greatly watered-down forms of TDRMs.⁹⁶ Consequently, the laws which Kenya and other African countries inherited at independence had been significantly shaped by the colonial experience. Some of the projects of law reform which have either taken place or are now under discussion trace back to initiatives and discussions which occurred during the latter part of colonial rule.⁹⁷

At the verge of independence, integration of the special customary laws in the regular territorial court system was proposed following several conferences held in the 1950s.⁹⁸ It is important to contrast the concept of integration with unification of laws. Whereas integration creates a law which brings together laws of different origins without totally obliterating; the contrasting concept of unification which imposes a uniform law.⁹⁹ In the sphere of criminal law Kenya agreed prior to independence that unification was essential.¹⁰⁰

The independence Constitution provided that all criminal offences were to be codified as part of the written law in a period of three years following the attainment of independence.¹⁰¹ The necessary steps were to be taken to ensure that customary criminal offences were made part of the written criminal law before 12 December, 1966 which was the deadline; however, nothing was done.¹⁰²

⁹⁴ Allott A.N, *What Is to Be Done with African Customary Law?* at 59.

⁹⁵ Allott A.N, *What Is to Be Done with African Customary Law?* at 58-59.

⁹⁶ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 4.

⁹⁷ Allott A.N, *What Is to Be Done with African Customary Law?* 56.

⁹⁸ Allott A.N, *What Is to Be Done with African Customary Law?* at 58-59.

⁹⁹ Allott A.N, *What Is to Be Done with African Customary Law?* at 65.

¹⁰⁰ Allott A.N, *What Is to Be Done with African Customary Law?* at 65-66.

¹⁰¹ Section 77(8), Repealed Constitution of Kenya (1963).

¹⁰² Cotran E, *The Development and Reform of the Law in Kenya* 47.

After independence, the repugnancy clause was retained under section 2 of the Judicature Act 1967.¹⁰³ Furthermore, Section 77 of the independence constitution provided:¹⁰⁴

‘No person shall be convicted of any criminal offence unless that offence is defined and a penalty prescribed by written law.’

This provision made it unconstitutional for any person to be charged with an offence which had not been prescribed by written law, regardless of whether the same was a criminal offence in customary law.

Due to the multiplicity of tribal laws from each ethnic group, the Courts experienced a difficulty in ascertaining and applying the particular customary law applicable to a specific case. It was also unclear what the limits of the operation of customary law are, and this is due to the fact that customary law is fluid owing to its being uncodified.¹⁰⁵ In some jurisdictions, only the law ‘currently being lived’ by its subjects was regarded as true customary law and therefore applicable.¹⁰⁶ In ascertaining the customary law to be applied, Kenyan courts made use of assessors¹⁰⁷ or even witnesses who are experts of such customs¹⁰⁸ whose role was to prove the various customary provisions applicable in the circumstances at hand.¹⁰⁹ However, the role of assessors in criminal proceedings has since been scrapped off.

2.3 Recent Developments

Article 159 of the Constitution of Kenya (2010) is the first express constitutional provision formalizing the use of customary law in resolving cases. It includes TDRMs as one of the principles that should guide the judiciary in discharging its mandate.¹¹⁰ This Article also includes a repugnancy proviso and states that TDRMs can only be used where it does not contravene the bill of rights.¹¹¹ Moreover, the Criminal Procedure Code mandates the court to promote conciliation as well as encourage and facilitate amicable settlement of some

¹⁰³ Section 2, Judicature Act (1967).

¹⁰⁴ Section 77, Repealed Constitution of Kenya (1963).

¹⁰⁵ Allott A.N, *The Judicial Ascertainment of Customary Law in British Africa*, *The Modern Law Review*, Vol. 20, No. 3 (May, 1957), at 244.

¹⁰⁶ Bennett T.W, *Re-Introducing African Customary Law to the South African Legal System*, *The American Journal of Comparative Law*, Vol. 57, No. 1 at 2.

¹⁰⁷ Republic v Mohamed Iddi Omar (2006) eKLR.

¹⁰⁸ Onyango P, *African Customary Law System: An Introduction* at 56.

¹⁰⁹ Kiwanda Y, *The Exodus of Law and Legal Methods*, LawAfrica Publishing Ltd, Nairobi (2014) at 181.

¹¹⁰ Article 159(2)(c), Constitution of Kenya (2010).

¹¹¹ Article 159(3), Constitution of Kenya (2010).

criminal cases.¹¹² This article is said to be a recognition of the fact that TDRMs is vital in promoting access to justice among many communities in Kenya.¹¹³ However in implementing TDRMs, caution has to be taken to ensure these mechanisms are not completely merged with the formal system as this will defeat the entire purpose of introducing TDRMs like in the case of Arbitration.¹¹⁴ The formal justice system and the traditional justice system should be treated as complementary to each other and therefore citizens should be at liberty to choose the most appropriate and affordable system for themselves.¹¹⁵

¹¹² Section 176, Criminal Procedure Code CAP 75 (2015).

¹¹³ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 4.

¹¹⁴ Muigua K, *Alternative Dispute Resolution and Article 159 of the Constitution*, at 36.

¹¹⁵ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 7.

CHAPTER 3: Applicability of Traditional Dispute Resolution Mechanisms in Criminal Matters

This chapter seeks to examine and establish the applicability of TDRMs with regards to criminal matters. It analyses the enabling constitutional and statutory provisions as well as the jurisprudence on the same as expounded by the courts.

Access to justice is a right enshrined in the Constitution of Kenya¹¹⁶ and several other international human rights instruments. It refers to real, meaningful access to the justice system; and is essential in maintaining any democracy, and this explains the persistent concern worldwide over access to justice systems.¹¹⁷ The justice system encompasses several institutions which play a role in promoting the rule of law in democratic societies. In as much as these institutions were traditionally equated to the courts, it is now generally accepted that justice need not only be dispensed by the formal justice system.¹¹⁸

The court in *Dry Associates Limited v Capital Markets Authority* explained that access to justice includes ‘...the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.’¹¹⁹

Since injustice comes in different forms, there is no single approach to addressing injustice especially in a pluralistic society.¹²⁰ Justice can only be attained if a person is keen on the level of injustice that is occurring yet sensitive to the fact that one solution is insufficient to deal with all forms of injustice.¹²¹ The reliance on one form of justice in managing conflict can impede access to justice.¹²² A multidisciplinary approach is necessary in facilitating the

¹¹⁶ Article 48, Constitution of Kenya (2010).

¹¹⁷ Hurter E, *Access to justice: to dream the impossible dream?* The Comparative and International Law Journal of Southern Africa, Vol. 44, No. 3 (November 2011) at 408.

¹¹⁸ Hurter E, *Access to justice: to dream the impossible dream* at 409.

¹¹⁹ *Dry Associates Limited v Capital Markets Authority & Another, Interested Party Crown Berger (K) Ltd* [2012] eKLR.

¹²⁰ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 25.

¹²¹ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 25.

¹²² Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 22-23.

full realization of the right to access justice.¹²³ Therefore, in order to administer justice effectively, it is necessary to incorporate TDRMs and other alternative justice systems into the formal justice system. This means TDRMs are absolutely necessary in promoting access to justice among many people in Kenya,¹²⁴ particularly those that are marginalized and are unable to access the formal justice system.

For this reason, the Constitution which is the supreme law of the land¹²⁵ recognizes several other sources of law in Kenya including customary international law, treaties that Kenya has ratified, Common law in the form of precedent and doctrines of equity.¹²⁶ This indicates the presence of legal pluralism in Kenya since multiple legal systems co-exist at the same time.¹²⁷

In recognizing these sources of law, the constitution includes a proviso to the effect that customary law that is inconsistent with the constitution is null and void to the extent of the inconsistency.¹²⁸ Article 159 is the constitutional provision that forms the basis for the application of TDRMs in Kenya. It documents TDRMs as a fundamental principle to be promoted by the judiciary in the course of discharging its mandate.¹²⁹

The wording of Article 159 however is said to be open to wide interpretation. It would appear that though it is written that courts may be guided by TDRMs, they are however not bound by it and may choose to depart from it.¹³⁰ TDRMs have been classified as an ‘alternative’ system,¹³¹ which term is positively misleading as it places a reliance on the court system as the main representation of the exercise of sovereignty by the people.¹³²

It has been asserted that negotiation, mediation, reconciliation among other ADR mechanisms existed in the traditional justice system, and therefore these concepts are not new in Kenya since they are practices that have been in application for a very long period.

¹²³ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 1.

¹²⁴ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 4.

¹²⁵ Article 2, Constitution of Kenya (2010) states that the constitution is the supreme law of the land. This doctrine is referred to as constitutional supremacy.

¹²⁶ Article 2, Constitution of Kenya (2010).

¹²⁷ Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 25.

¹²⁸ Article 2, Constitution of Kenya (2010).

¹²⁹ Article 159(2), Constitution of Kenya (2010).

¹³⁰ Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform* at 10.

¹³¹ Article 159 (2) (c), Constitution of Kenya (2010).

¹³² Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010* at 27.

Therefore, the recognition of TDRMs in the Constitution is merely a restatement of customary jurisprudence.¹³³

Since judicial authority emanates from the people, the court should allow people to choose the forum they think is most appropriate.¹³⁴ This argument is supported by the case *Ndeto Kimomo v Kavoi Musumba*¹³⁵ where the judge stated that if parties to a dispute have agreed to decide their case by taking oath, they are in effect withdrawing from the court's jurisdiction and invoking another jurisdiction.¹³⁶

In as much as the question as to whether TDRMs can be used to resolve the matters that previously fell exclusively under the ambit of criminal law has remained a grey area in Kenya,¹³⁷ it has been proposed that criminal cases should generally be resolved through TDRMs except for serious criminal offences that require the intervention of the courts.¹³⁸

In South Africa for instance, the Black Administration Act empowers traditional leaders to deal with certain common law, statutory and customary law offences where both the offender and the victim are African and to impose punishment where a person is found culpable subject to several limits included in the law.¹³⁹ A magistrate has power to hear appeals over the decision made by a traditional leader as well as to a party that has defaulted from complying with the decision of the traditional leader comply.¹⁴⁰

3.1 Enabling Constitutional and Statutory Provisions

Social contract theory postulates that before the formation of a society people lived in a state of nature; where life was brutal, short, nasty, solitary and poor. Therefore, the people came together and formed a society, where they donated some of their rights to the state in exchange for protection of their remaining rights. The underlying assumption here is that the rights of the people are inherent and therefore not granted by the state since they preceded the state.

¹³³ Muigua K, *Alternative Dispute Resolution and Article 159 of the Constitution*, at 27.

¹³⁴ Kariuki F, *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 205.

¹³⁵ *Ndeto Kimomo v Kavoi Musumba* (1977) eKLR.

¹³⁶ Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya* at 204.

¹³⁷ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 10.

¹³⁸ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 10.

¹³⁹ F Kariuki, *Conflict Resolution by elders; Successes, Challenges and Opportunities* at 7.

¹⁴⁰ F Kariuki, *Conflict Resolution by elders; Successes, Challenges and Opportunities* at 7.

Sovereignty of the people comprises in their power to constitute a framework for the government, choose those to run the government and to be involved in the running of the government.¹⁴¹ The principle of sovereignty was undocumented in the now-repealed constitution.¹⁴² However, the Kenyan courts recognized its existence even without being documented; evidenced by the *Njoya case* where it was held that sovereignty is an inherent entitlement that precedes the constitution itself.¹⁴³ This means that sovereign power is to be inferred even in the absence of express constitutional provision;¹⁴⁴ and such constitutional abeyance on sovereignty of the people does not impede its existence. Therefore, even before the enactment of the constitution in 2010, sovereignty in Kenya vested in the people of Kenya.¹⁴⁵

Under the constitution, all sovereignty is vested in the people of Kenya and shall be exercised only in accordance with the constitution.¹⁴⁶ This sovereignty may be exercised either directly or indirectly, through the democratically elected representatives.¹⁴⁷ This sovereign power is also donated to three key state organs; parliament and legislative assemblies in the county, the national executive and the county executive committees as well as the judiciary and independent tribunals; but whose power can only act in accordance with the constitution.¹⁴⁸

The people in this case are the source of political power, from which specific political powers are derived.¹⁴⁹ Article 159 (1) provides that judicial authority is derived from the people and vests in and it is to be exercised by courts and tribunals established by or under the Constitution.¹⁵⁰ Therefore, judicial powers in Kenya belong to the people; but has been donated through social contract to the courts and tribunals to exercise them on behalf of the people.

Sovereignty is therefore understood as autonomy, in that it allows state organs to act without internal and external interference, while explaining the existence of checks and balances.¹⁵¹ Subsequently, Kenyan courts have held that the principle of sovereignty as enshrined the

¹⁴¹ Nabuweze B.O, *Presidentialism in Commonwealth Africa* (1974) 292.

¹⁴² Mbondenyi M.K, Ambani J.O, *The New Constitutional law of Kenya*, Claripress Ltd, Nairobi, 2012, 39.

¹⁴³ Timothy Njoya and 6 others v Attorney General and 3 others (2004) 2 KLR.

¹⁴⁴ Mbondenyi M.K, Ambani J.O, *The New Constitutional law of Kenya* at 40.

¹⁴⁵ Mbondenyi & Ambani, *The New Constitutional law of Kenya*, 39.

¹⁴⁶ Article 1(1), Constitution of Kenya (2010).

¹⁴⁷¹⁴⁷ Article 1(2), Constitution of Kenya (2010).

¹⁴⁸ Article 1(3)(c), Constitution of Kenya (2010).

¹⁴⁹ Lumumba P.L.O, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi (2014) at 60.

¹⁵⁰ Article 159(1), Constitution of Kenya (2010).

¹⁵¹ Lumumba and Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* at 58-59.

constitution encompasses the concept of public participation,¹⁵² as was in the case *Moses Munyendo & 908 others v Attorney General & Minister for Agriculture*.¹⁵³ Public participation has been documented in Article 10 under the national values and principles of governance;¹⁵⁴ which binds all state organs, state officers, public officers and persons in the course of applying or interpreting the constitution, or enacting, applying and interpreting any law, or making and implementing public policy.¹⁵⁵ Furthermore, the Constitution seeks to promote the cultural practices and traditional knowledge of the Kenyan communities.¹⁵⁶

The use of TDRMs in resolving disputes is a way through which the Kenyan people are able to exercise their sovereignty directly, particularly where the persons involved directly in the dispute resolution process are not part of the formal justice system but rather just members of the community from which the disputants are. This is also consistent with the value of public participation as enshrined in Article 10.

Article 159 (1) provides several principles which the courts and tribunals are bound to promote in the course of discharging their mandate which include *inter alia* promoting the use of ADR mechanisms in conflicts management where TDRMs have been specifically mentioned.¹⁵⁷ However, this article goes ahead to include a proviso to the effect that TDRMs cannot be used in a way that either contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.¹⁵⁸

The rationale of the constitutional recognition of TDRMs is to validate alternative forums and processes that provide justice to Kenyans.¹⁵⁹ The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards.¹⁶⁰

The Criminal Procedure Code also mandates the court to promote encourage and facilitate reconciliation and settlement of proceedings in an amicable way in cases of common assault

¹⁵² Lumumba and Franceschi, *The Constitution of Kenya, 2010: An Introductory Commentary* at 65.

¹⁵³ *Moses Munyendo & 908 others v Attorney General & Minister for Agriculture* (2013) eKLR.

¹⁵⁴ Article 10(2)(a), Constitution of Kenya (2010).

¹⁵⁵ Article 10, Constitution of Kenya (2010).

¹⁵⁶ Article 11, Constitution of Kenya (2010).

¹⁵⁷ Article 159(1), Constitution of Kenya (2010).

¹⁵⁸ Article 159(3), Constitution of Kenya (2010).

¹⁵⁹ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 11.

¹⁶⁰ Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, at 11.

or for any other offence not amounting to a felony, and that which is not aggravated in degree. This settlement may be done on terms of payment of compensation or on other terms approved by the court, after which the court may order that the proceedings to be stayed or terminated.¹⁶¹ This provision may be interpreted as allowing for the use of TDRMs, but subject to limitations depending on the nature of the offence in question.

Furthermore, Section 204 allows a complainant to withdraw a criminal case any time before the final order is passed provided he satisfies the court that there are sufficient grounds permitting him to do so; after such withdrawal, the court may acquit the accused.¹⁶² This provision has been used a basis for withdrawal of criminal cases resolved through conciliation particularly in the case of *Republic v Faith Wangoi*,¹⁶³ where the appellant had been charged with the offence of operating an unregistered private school Contrary to Section 50(2) (b) as read with Section 4(a) of Basic Education Act 2013. They entered into negotiations with the complainant and eventually came to a consensus, after which they sought to have the case withdrawn by the court under section 204. It therefore follows that section 204 can be used as a basis to withdraw a case that has been resolved through TDRMs.

The jurisprudence emerging from Kenyan courts is such that disputes of a criminal nature can be resolved through TDRMs. In the case of *R v Mohamed Abdow Mohamed* the court allowed for the withdrawal of a murder case after the parties resolved the matter according to their customary law.¹⁶⁴ The interpretation of Article 159 in this case was that it did not limit whatsoever the applicability of TDRMs only to civil matters. Subsequent cases however seem to affirm the applicability of TDRMs in criminal cases but with limitations on the offences that can be resolved; as seen in the case *Stephen Kipruto v R* where the court was of the opinion that TDRMs are only appropriate for misdemeanours and not felonies.¹⁶⁵

¹⁶¹ Section 76, Criminal Procedure Code (2015).

¹⁶² Section 204, Criminal Procedure Code (2015).

¹⁶³ *Republic v Faith Wangoi*, Criminal Misc. No. 1 of 2015, High Court at Kajiado.

¹⁶⁴ *R v Mohamed Abdow Mohamed* (2013) eKLR.

¹⁶⁵ *Stephen Kipruto Cheboi & 2 others v R* (2014) eKLR.

CHAPTER 4: The Extent of the Applicability of TDRM in Criminal Cases

In light of the discussion in the foregoing chapter, it can be seen that TDRMs are generally applicable in criminal matters. The Constitution provides that it is the supreme law in Kenya and therefore binds all persons and state organs at both levels of the government.¹⁶⁶ Any claim or exercise of authority can only be valid if authorized by the Constitution.¹⁶⁷ Any law that is inconsistent with the constitution is null and void to the extent of the inconsistency, and any act or omission is invalid if it contravenes the constitution.¹⁶⁸

Furthermore, the key constitutional provision on the use of TDRMs includes a proviso; to the effect that TDRMs cannot be used in a manner that contravenes the bill of rights, is inconsistent with the Constitution or any other written law, or is repugnant to justice or morality or results in outcomes that are repugnant to justice or morality.¹⁶⁹

Following this doctrine of constitutional supremacy which is evidently documented in Kenya and the proviso in Article 159, TDRMs ought to be used in a manner that is consistent with the constitutional provisions. The same must also be applied consistently with the applicable statutes, otherwise the whole process of dispute resolution will be null and void.

4.0 The Nature of the Offence

Section 176¹⁷⁰ provides as follows:

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence not amounting to a felony, and not aggravated in degree on terms of payment of compensation or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

Following the wording of this provision, it can be interpreted to mean that out of court settlement and other conciliatory mechanisms are not to be used for each and every criminal offence. Therefore, it is important to look at the nature of the offence in question in order to determine whether the same can be resolved by way of TDRMs.

¹⁶⁶ Article 2(1), Constitution of Kenya (2010).

¹⁶⁷ Article 2(2), Constitution of Kenya (2010).

¹⁶⁸ Article 2(4), Constitution of Kenya (2010).

¹⁶⁹ Article 159(3), Constitution of Kenya (2010).

¹⁷⁰ Section 176, Criminal Procedure Code CAP 75 (2015).

Offences under criminal law are classified primarily into two types: misdemeanors and felonies. A felony is a crime typically one involving violence which is regarded as more serious than a misdemeanour, and usually punishable by imprisonment for more than one year or by death; a felony is an offence of a graver or more atrocious nature than a misdemeanour.¹⁷¹

In *Juma Faraji Serenge alias Juma Hamisi v Republic* [2007] eKLR,¹⁷² Justice Maraga stated as follows in his ruling (paragraph 6 &7):

'To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176 of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason...'

To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.'

Similarly, the judge in the case of *Stephen Kipruto v R* was of the opinion that TDRMs are only appropriate for misdemeanours and not felonies.¹⁷³

In the case of *Republic v Abdulahi Noor Mohamed*,¹⁷⁴ the court followed the precedent set in *R v Julius Faraji Serenge*. In interpreting Article 159 and Section 176, the judge stated that it is quite evident that application of ADR mechanisms including TDRMs in criminal proceedings was intended to be a very limited; and therefore, its application should be limited to criminal cases involving misdemeanors and not felonies. Therefore, the application for time to negotiate an out of court settlement was disallowed because the charge against the accused was a felony and reconciliation as a form of settling the proceedings was prohibited. Furthermore, the request for withdrawal was being made after the case had been heard to its logical conclusion and this was too late. Nevertheless, the court explained that

¹⁷¹ <http://thelawdictionary.org/felony/> on 17th December, 2016.

¹⁷² *Juma Faraji Serenge alias Juma Hamisi v Republic* [2007] eKLR.

¹⁷³ *Stephen Kipruto Cheboi & 2 others v R* (2014) eKLR.

¹⁷⁴ *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR.

the Constitution and the written laws recognized TDRMs as means of enhancing access to justice.

4.1 Involvement of Parties

While trying to resolve the case at hand through TDRMs, it is important to ensure that the right parties are involved in the process. Parties to a criminal proceeding are primarily the complainant, prosecution and the accused¹⁷⁵ who should be adequately involved in the process of dispute resolution.

Section 204 of Criminal Procedure Code provides that a complainant may withdraw a criminal case any time before judgment is entered provided he proves to the court that there are sufficient grounds to allow the same.¹⁷⁶ But the question as to who exactly is the complainant in criminal matters is one that the court has grappled with in several cases.

In the case *R v Faith Wangoi*,¹⁷⁷ the appellant had been charged with the offence of operating an unregistered private school Contrary to Section 50(2) (b) as read with Section 4(a) of Basic Education Act 2013. They entered into negotiations with the complainant and eventually came to a consensus, after which they sought to have the case withdrawn by the court under section 204.¹⁷⁸ The trial Magistrate however declined to grant such a withdrawal on the ground that the prosecution had not consented to this agreement. The appellate court in this case discusses the definition a complainant; which is a person who ledges a complaint either with the police or any other lawful authority¹⁷⁹ whereas a complaint means:

*...an allegation that some person known or unknown has committed or is guilty of an offence.*¹⁸⁰

It therefore follows that a complainant is a person who alleges that another person, either known or unknown has committed or is guilty of an offence. In making its decision, the court also referred to *Ruhi v Republic*¹⁸¹ where the High Court had stated that the term complainant as used in the Criminal Procedure Code includes both the prosecution and the person so described in the particulars of the charge. It was held that the prosecution ought to have been

¹⁷⁵ Kiage P, *Essentials of Criminal Procedure in Kenya*, LawAfrica Publishing Ltd, Nairobi (2010) at 2-5.

¹⁷⁶ Section 204, Criminal Procedure Code (2015).

¹⁷⁷ Republic v Faith Wangoi, Criminal Misc. No. 1 of 2015, High Court at Kajiado.

¹⁷⁸ Section 204, Criminal Procedure Code CAP 75 states: “if a complaint, at any time before the final order is passed in a case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused”

¹⁷⁹ Section 2, Criminal Procedure Act CAP 75 (2015).

¹⁸⁰ Section 2, Criminal Procedure Act CAP 75 (2015).

¹⁸¹ Ruhi vs. Republic (1985) KLR 373.

informed and to have consented to the outside-of-court settlement for withdrawal of proceedings to be granted.

A complainant is one who is directly, immediately and personally affected by the offence in question; it therefore follows that the state by virtue of having an interest to protect the rights of all its citizens is also a complainant.¹⁸² The state is also in charge of legislating what exactly would constitute an offence, a breach of which directly harms the state.¹⁸³ In the case of *William Ruto & Anor v Attorney General*¹⁸⁴ the court stated *inter alia* that:

‘...the state is the complaint in every criminal case...’

In the light of the foregoing, the prosecution is also considered a complainant in a criminal case. Therefore, a personal complainant cannot make any such withdrawal without the consent of the prosecution.¹⁸⁵ This means the process of resolving the case out-of-court must adequately involve the accused and the complainant which includes the prosecution; and the resolution must be mutually agreeable to all these parties for it to be valid.

Pursuant to the provision of section 176, it is upon the parties to decide the terms of the agreement that has been negotiated through the TDRMs processes.¹⁸⁶ These terms may be the payment of monetary compensation or other terms. In the case of *R v Mohammed Abdow*, compensation was made in the form of camels, goats and other traditional ornaments which were paid to the aggrieved family. After that, a ritual was performed under their traditions and customs that meant to have paid for blood of the deceased to his family was performed.¹⁸⁷

4.2 The Timing of the Resolution

A pertinent question that arises is at what point of the proceedings can the parties decide to resolve their disputes through TDRMs; is it any time before judgment is entered or can it be done after judgement.

A judgement is the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its

¹⁸² Kiage P, *Essentials of Criminal Procedure in Kenya* at 3.

¹⁸³ Kiage P, *Essentials of Criminal Procedure in Kenya* at 3.

¹⁸⁴ William S.K. Ruto, Civil suit no. 1192 of 2005 eKLR.

¹⁸⁵ Kiage P, *Essentials of Criminal Procedure in Kenya* at 4.

¹⁸⁶ Section 176, Criminal Procedure Act (2015).

¹⁸⁷ *R v Mohamed Abdow Mohamed* (2013) eKLR para 3.

determination.¹⁸⁸ In criminal matters, a judgement is the final decision of the court as pertains the guilt or otherwise of the accused person, which is entered and rendered by the court once all evidence has been adduced by both sides.¹⁸⁹ A judgement is normally entered after both the prosecution and the defence have been given a chance to be heard and have presented their pieces of evidence to the court. It is final and binding on all parties save for where the same is being appealed against.

In the case of *Stephen Cheboi v R.*¹⁹⁰, the parties purported to present to the court an agreement resulting from resolving the dispute through TDRMs after the matter had been heard to conclusion and the judgement given. It was held that the parties could not purport to use TDRMs after judgment has been entered by the court as this will usurp the powers of the court. A similar finding had been made in the case of *Republic v Abdulahi Noor Mohamed*¹⁹¹ where the court had disallowed an out of court settlement due to the fact that the request for withdrawal was being made after the case has been heard to its logical conclusion.

The implication of these two cases is that the parties to a criminal proceeding may decide to resort to TDRMs any time after the plea has been entered in the course of proceedings and before judgement is entered. They cannot, however, purport to enter into an out of court settlement resulting from the TDRMs process after judgement has been entered as this will usurp the powers of the court.

¹⁸⁸ <http://thelawdictionary.org/judgment/> on 15th December, 2016.

¹⁸⁹ Kiage P, *Essentials of Criminal Procedure in Kenya* at 173.

¹⁹⁰ Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.

¹⁹¹ Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.

CHAPTER 5

5.0 Findings

Under the Constitution, judicial powers are vested in the people of Kenya. Pursuant to the theory of social contract, these powers have been donated through the Constitution to the courts and judicial tribunals which exercises them on behalf of the people. TDRMs are a way through which the citizens of Kenya, particularly the persons involved in the process, are able to exercise direct sovereignty of their judicial powers. The main reason for the use of this mechanism is that it promotes access to justice for the marginalized, particularly the poor,¹⁹² which is a right that every citizen is entitled to as provided in Article 48.¹⁹³

Article 159 states the principles that guide the judiciary in the course of discharging its mandate, one of which is to promote alternative dispute resolution mechanisms which include TDRMs.¹⁹⁴ It does not specifically exclude criminal matters from the scope of TDRMs, hence Article 159 is the constitutional provision upon which the application of TDRMs in criminal matters is premised.

Moreover, section 176 of the Criminal Procedure Code further provides for the use of conciliation to deal criminal matters involving common assault or other offences not amounting to felonies and not aggravated in degree.¹⁹⁵ Since TDRMs are conciliatory mechanisms, this section allows for the application of the same in criminal matters. However, under this provision, TDRMs can only be used to resolve misdemeanours and other offences that are not aggravated in degree. This was the interpretation of the court in the cases of *Juma Faraji Serenge v Republic*¹⁹⁶ and *Republic v Abdulahi Noor Mohamed*¹⁹⁷ where the court stated that TDRMs cannot be used for cases involving felonies.

In the process of resolving criminal matters through TDRMs, the accused, complainant as well as the prosecution must be adequately involved in the process in order for the agreement resulting therein to be considered valid and legally enforceable. Pursuant to the case of *R v Faith Wangoi*¹⁹⁸ and *William Ruto v Attorney General*,¹⁹⁹ the failure to involve the

¹⁹² Muigua K & Kariuki F, *ADR, Access to Justice and Development in Kenya*, Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School at 1.

¹⁹³ Article 48, Constitution of Kenya (2010).

¹⁹⁴ Article 159, Constitution of Kenya (2010).

¹⁹⁵ Section 176, Criminal Procedure Act CAP 75 (2015).

¹⁹⁶ *Juma Faraji Serenge alias Juma Hamisi v Republic* [2007] eKLR.

¹⁹⁷ *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR.

¹⁹⁸ *Republic v Faith Wangoi*, Criminal Misc. No. 1 of 2015, High Court at Kajiado.

¹⁹⁹ *William S.K. Ruto*, Civil suit no. 1192 of 2005 eKLR.

prosecution or any other party in the dispute resolution process will invalidate the agreement arrived at therein.

The TDRMs processes must be carried out and completed before the court enters a judgment on the case. The court will not allow any out-of-court settlement to be enforced after judgment has already been entered since a judgment is the final decision that is binding on all persons as was held in *Stephen Kipruto v R*²⁰⁰ & *Republic v Abdulahi Noor Mohamed*.²⁰¹

5.1 Conclusion and Recommendations

TDRMs is applicable in criminal cases, but its scope is limited only to misdemeanours and other offences that are not aggravated in degree. This process may be invoked anytime in the course of proceedings provided judgment has not been entered.

This study makes the following recommendations:

- The judicial officers hearing criminal matters should encourage the parties appearing before them to resolve the matter by way of conciliation through TDRMs where the case involves misdemeanours. This will go a long way in ensuring that the backlog of criminal cases is managed.
- TDRMs should be used in a manner that is consistent with the Constitution and other written law, which includes the respect for human rights and fundamental freedoms. Any inconsistency thereof will render the process and the outcomes thereof null and void.
- In the course of the TDRMs processes, the parties should be allowed to negotiate the terms of their agreement pursuant to Section 176 under which they may agree on the compensation to be paid or other terms of the agreement. This will result into a settlement that is mutually agreeable to both parties and therefore both parties will more likely be willing to enforce it.
- Where a criminal case involves a felony or any other offence that is aggravated in degree, the judicial officer should not allow for the resolution of this matter through TDRMs.
- In the course of the TDRMs processes, the complainant, accused as well as the prosecution all parties to the dispute in question should be adequately involved. This parties include the accused person, the complainant as well as the prosecution. This

²⁰⁰ Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.

²⁰¹ Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.

will ensure that the agreement resulting therein is valid and legally enforceable as well as mutually agreeable to all parties.

- Parties to a criminal case seeking to resolve it through TDRMs should be allowed to get into negotiations at any point in the course of the proceedings provided the judgment has not been entered by the judge. Where judgement has been entered, allowing the parties to resort to TDRMs will usurp the authority and the role played by the courts.

Bibliography

Texts

1. Kiage P, *Essentials of Criminal Procedure in Kenya*, LawAfrica Publishing ltd, Nairobi (2010).
2. Kiwanda Y, *The Exodus of Law and Legal Methods*, LawAfrica Publishing ltd, Nairobi (2014).
3. Lumumba P.L.O, Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.
4. Mbondenyei M.K, Ambani J.O, *The New Constitutional law of Kenya*, Claripress ltd, Nairobi, 2012.
5. Onyango P, *African Customary Law System: An Introduction*, LawAfrica Publishing Ltd, Nairobi, 2013.
6. Zehr H & Gohar A, *The little book of restorative justice: revised and updated*, Skyhorse Publishing Inc., 2015.

Journal Articles

1. AJGM Sanders, *How Customary is African customary law?* The Comparative and International Law Journal of Southern Africa, Vol. 20, No. 3 (November 1987).
2. Allott A.N, *The Judicial Ascertainment of Customary Law in British Africa*, The Modern Law Review, Vol. 20, No. 3 (May, 1957).
3. Allott A.N, *What Is to Be Done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950* Journal of African Law, Vol. 28, No. 1/2.
4. Bennett T.W, *Re-Introducing African Customary Law to the South African Legal System* Source: The American Journal of Comparative Law, Vol. 57, No. 1.
5. Browne Orde, *British Justice and the African*, Journal of the Royal African Society Vol. 32, No. 127 (April 1933).
6. Coldham S, *Criminal Justice Policies in Commonwealth Africa, Trends and Prospects*, Journal of African Law.
7. Cotran E, *The Development and Reform of the Law in Kenya* Journal of African Law, Vol. 27, No. 1 (1983).
8. Friedman B, *Causes of Popular Dissatisfaction with Administration of Justice: A Retrospect (and a Look Ahead)*, Indiana Law Review, 82, (2007).

9. Griffiths J, *What is Legal Pluralism?* Journal of Legal Pluralism and Unofficial Law, Vol 32 no. 24 (1986).
10. Hurter E, *Access to justice: to dream the impossible dream?* The Comparative and International Law Journal of Southern Africa, Vol. 44, No. 3 (NOVEMBER 2011).
11. Jackson S.A, *Legal Pluralism and the Nation State: Romantic medievalism or pragmatic modernity?* University of Michigan.
12. Kariuki F, *Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: A case Study of Republic v Mohamed Abdow Mohamed (2013)* eKLR, Alternative Dispute Resolution Vol. 2 No. 1 (2014).
13. Kariuki F, *Customary Law Jurisprudence from Kenyan Courts, Implications for Traditional Justice Systems.*
14. Kinama E, *Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010*, Strathmore Law Journal, June 2015.
15. Kinanga Z.M, *The Place of Customary Criminal Law; the Need for Reform*, Unpublished LLB Thesis, University of Nairobi, July 1982.
16. Lijalem E. E, *A Move towards Restorative Justice in Ethiopia: Accommodating Customary Dispute Resolution Mechanisms with The Criminal Justice System*, Master's Thesis in Peace and Conflict Transformation, University of Tromsø, 2013.
17. Muigua K, *Alternative Dispute Resolution and Article 159 of the Constitution.*
18. Muigua K, *Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework*, Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi. [July, 2015].
19. Muigua K & Kariuki F, *ADR, Access to Justice and Development in Kenya*, Strathmore Annual Law Conference, held on 3rd & 4th July 2014 at Strathmore University Law School.
20. Nabuweze B.O, *Presidentialism in Commonwealth Africa* (1974).
21. Ogendo H.W.O, *The Tragic African Commons; A Century of Appropriation, Suppression and Subversion*, University of Nairobi Law Journal, Vol 1 (2003).
22. Pimentel D, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, Yale Human Rights and Development Journal Vol 14 (2011).

23. Read J.S, *When Is Customary Law Relevant?* Journal of African Law, Vol. 7, No. 1 (spring, 1963), School of Oriental and African Studies.

Statutes

1. Constitution of Kenya (2010).
2. Criminal Procedure Code CAP 75 (2015).
3. East Africa Order in Council (1897).
4. Judicature Act (1967).
5. Repealed Constitution of Kenya (1963).

Case law

1. Dry Associates Limited V Capital Markets Authority & Another, Interested Party Crown Berger (K) Ltd [2012] eKLR
2. Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR.
3. Moses Munyendo & 908 others v Attorney General & Minister for Agriculture (2013) eKLR.
4. Ndeto Kimomo v Kavoi Musumba (1977) eKLR.
5. Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.
6. Republic v Amkeyo (1917) EALR 17.
7. Republic v Faith Wangoi, Criminal Misc. No. 1 of 2015, High Court of Kenya at Kajiado.
8. Republic v Mohamed Abdow Mohamed (2013) eKLR.
9. Ruhi vs. Republic (1985) KLR 373.
10. Stephen Kipruto Cheboi & 2 others v R (2014) eKLR.
11. Timothy Njoya and 6 others v Attorney General and 3 others (2004) 2 KLR.
12. William S.K. Ruto, Civil suit no. 1192 of 2005 eKLR.

Internet Sources

1. <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/kenya.html> on 15th February 2016.
2. <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/> on 6th July 2016.
3. <http://thelawdictionary.org/justice-n/> on 6th July, 2016.
4. <http://thelawdictionary.org/judgment/> on 15th December, 2016.
5. <http://thelawdictionary.org/felony/> on 17th December, 2016.