



**ASSESSING ACCESS TO JUSTICE THROUGH THE INTEGRATION OF
TRADITIONAL JUSTICE SYSTEMS IN KENYA WITHIN THE FORMAL LEGAL
FRAMEWORK**

**Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School**

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DECLARATION

I, **CHAPELL ANTANGO SIFUNA**, do hereby declare that this research is my original work and that to the best of my knowledge 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.

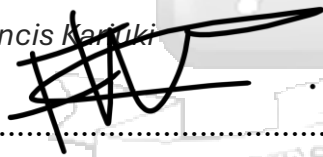
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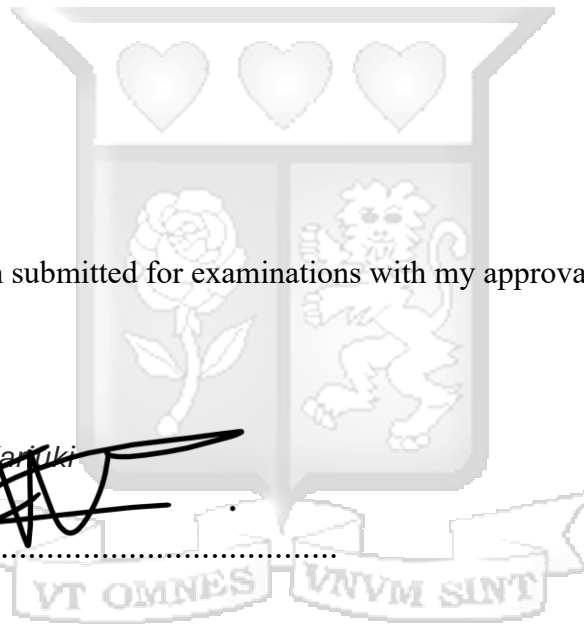


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LIST OF LEGAL INSTRUMENTS

International instruments.

International Covenant on Economic, Social and Cultural Rights
Universal Declaration of Human Rights
United Nations Declaration on the Rights of Indigenous Peoples

Judicature Act, cap 8, Laws of Kenya (2016 revised ed)

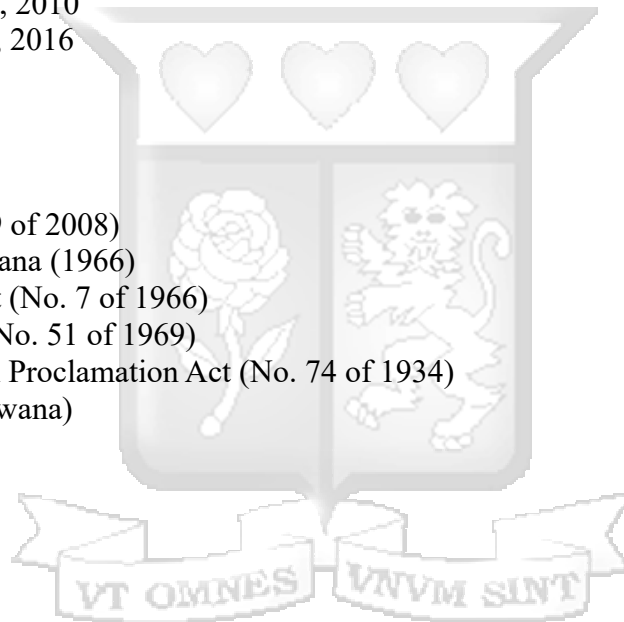
Domestic law

KENYA

Affiliation Act (Repealed)
Constitution of Kenya, 2010
Community Land Act, 2016
Marriage Act, 2014

BOTSWANA

Bogosi Act (Act No. 9 of 2008)
Constitution of Botswana (1966)
Customary Courts Act (No. 7 of 1966)
Customary Law Act (No. 51 of 1969)
Native Administration Proclamation Act (No. 74 of 1934)
Stock Theft Act (Botswana)



LIST OF CASES.

KENYA

George Mwangi vs Maria Wamugori (1965) eKLR

Kamilinchui & 5 others v Kimbui & another (Miscellaneous Application E007 of 2023)

Republic v Abdullahi Noor Mohammed (Alias Arab) (2016) eKLR

Republic v Mohamed Abdow Mohamed, High Court Criminal Case No. 86 of 2011 [2013] eKLR.

George Mwangi vs Maria Wamugori (1965) eKLR

Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR

BOTSWANA

Merapelo v The State (2001), Court of Appeal of Botswana

State v Pisto (1983), Court of Appeal of Botswana

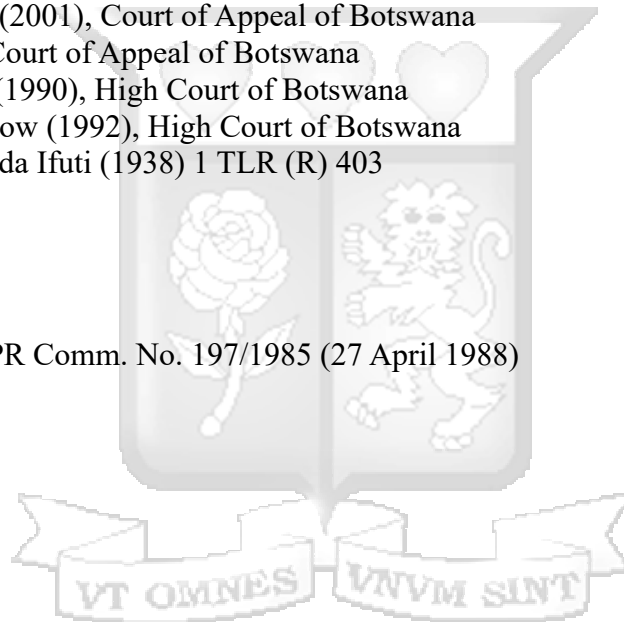
Molefi v Motswaledi (1990), High Court of Botswana

Attorney General v. Dow (1992), High Court of Botswana

Gwao Kilimo v Kisunda Ifuti (1938) 1 TLR (R) 403

SWEDEN

Kitok v. Sweden, CCPR Comm. No. 197/1985 (27 April 1988)



LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CoK	Constitution of Kenya
TJS	Traditional Justice Systems
TDRMs	Traditional Dispute Resolution Mechanisms



ABSTRACT

This research explores the existence of traditional justice systems in the Kenyan legal system, focusing on the impact of the repugnancy clause on traditional mechanisms. While the CoK,¹ recognizes culture as the foundation of the law and provides for the utilization of TDRMs under certain conditions, the repugnancy clause has historically marginalized traditional systems. The research aims to inform policy reforms aimed at fostering greater recognition, protection, and integration of traditional justice systems within the broader legal framework. Employing a doctrinal legal research methodology, the research analyzes legal rules from primary and secondary sources, drawing insights from cases, statutes, and existing literature. By emphasizing the necessity for institutional links between formal legal systems and traditional mechanisms, the research aims to facilitate a referral system, appeals, and reviews, ultimately targeting lawmakers and marginalized communities for positive change in the legal landscape.



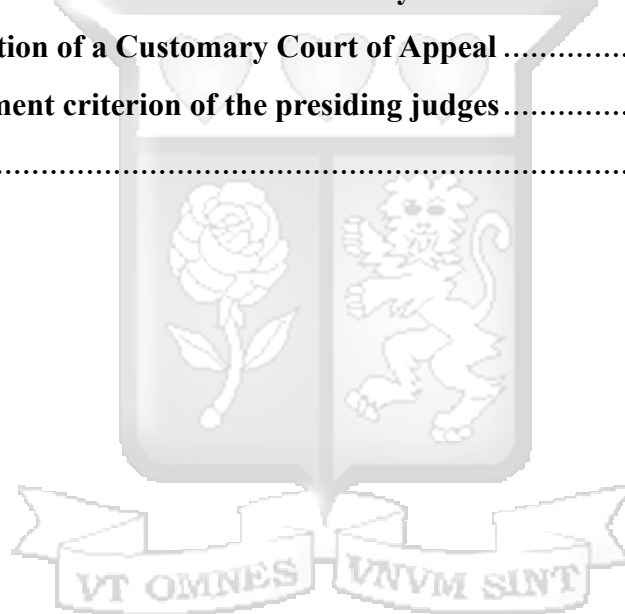
¹ Article 11, Constitution of Kenya, 2010.

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CHAPTER ONE

1.0 Introduction

1.1 Background

The existence of traditional justice systems in the Kenyan legal system presents a unique opportunity to explore the collaboration between indigenous practices and modern legal frameworks. Traditional Justice systems as referred to in this study are the informal, customary, or indigenous methods of conflict resolution and dispute settlement that have been practiced within specific communities or cultures for generations.² The historical overshadowing of traditional mechanisms by formal legal systems, through the repugnancy test entrenched in the Judicature Act,³ and the Constitutionality test has maintained the marginalization of TJS. This legal test stipulates that a court shall not uphold any rule of Customary law, if it contradicts public policy, equity, and good conscience.⁴ The Constitution of Kenya 2010, acknowledges African Customary law, through its recognition of culture as a foundation of the law,⁵ it also goes ahead to advocate for the utilization of TDRMs if they are not repugnant to justice and morality.⁶ The research advocates for a comprehensive examination of the impact of both the Repugnancy and Constitutionality tests on TJS, by shedding light on the barriers imposed by the two tests so as to inform policy reforms aimed at fostering greater recognition, protection and integration of traditional justice systems within the broader legal framework.

1.2 Statement of the Problem

In a rural Kenyan village, a land dispute arises between two families, rooted in conflicting interpretations of customary land practices versus modern legal ownership. Hindered by the repugnancy clause favoring modern legal principles, both parties struggle to access formal resolution. Turning to traditional mediation, led by local elders, they reach an agreement based on customary norms, highlighting persistent concerns over formal recognition.

1.3 Research Objectives

1. Analyze the legal and institutional framework governing TJS in light of the repugnancy and constitutionality test.
2. A comparative study between Kenya and other jurisdictions that have successfully integrated traditional justice systems into the formal legal framework.
3. Explore how Kenya can adapt the practices of these jurisdictions to effectively integrate traditional justice systems into its formal legal framework.
4. Propose policy recommendations aimed at enhancing the recognition, protection, and integration of traditional justice systems within Kenya's broader legal framework.

² Kariuki Francis, "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems," 8 (1) University of Nairobi Law Journal, 2015, 6.

³ Section 3(2), Judicature Act.

⁴ Section 3(2), Judicature Act.

⁵ Article 11, Constitution of Kenya, 2010.

⁶ Article 159(2), Constitution of Kenya, 2010.

1.4 Research Questions

1. How does the legal and institutional framework in Kenya governing TJS address conflict between Customary law and Statutory law, in applying the Repugnancy and Constitutionality tests?
2. How have other jurisdictions successfully integrated traditional justice systems into their formal legal frameworks, and what lessons can be drawn from these examples?
3. In what ways can Kenya adapt the practices of other jurisdictions to effectively integrate traditional justice systems into its formal legal framework?
4. What policy recommendations can be proposed to enhance the recognition, protection, and integration of traditional justice systems within Kenya's broader legal framework?

1.5 Hypothesis

It is hypothesized that the literal application of the Repugnancy clause by courts significantly hinders the application of (TJS), having a ripple effect that limits access to justice for marginalized communities. A more liberal interpretation of this clause will enhance the recognition of TJS, improving legal access for this communities.

1.6 Theoretical Framework

This research is founded upon the following theories:

1.6.1 The Postcolonial theory

Postcolonial theory examines the impact of imbalanced power relations, primarily focusing on an Eurocentric colonial history by studying how practices in the African states respond to Western supremacy.⁷ Postcolonial theory having been deeply influenced by the historical legacy of Marxist critique, which traditionally focuses on the material and economic conditions of exploitation, has transformed its framework by emphasizing the subjective, psychological, and ideological effects of colonialism.⁸ These effects can be traced to identity, culture, and language.

Edward Said, one of the main proponents of Postcolonial theory, in his work *Orientalism* critiques how the West constructed knowledge about the "Orient" in ways that justified colonial domination.⁹ The repugnancy Clause functions in a similar manner by categorizing indigenous legal systems as backward or incompatible with Western values, just as Said explains how Western discourses represented non-Western cultures as inferior. Said also focuses on hybridity and how colonized peoples subvert Western cultural products.¹⁰ The repugnancy Clause can be seen as an attempt to prevent this hybridization in the legal sphere by enforcing rigid

⁷ Revathi K, "The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory." 32 *Diacritics* 2, 2002, 106.

⁸ Revathi K, "The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory." 32 *Diacritics* 2, 2002, 108.

⁹ Revathi K, "The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory." 32 *Diacritics* 2, 2002, 109.

¹⁰ Krishnaswamy, Revathi. "The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory." 32 *Diacritics* 2, 2002, 109.

distinctions between what is "acceptable" (Western legal norms) and "repugnant" (indigenous customs).

Gayatri Spivak, also a proponent of the Postcolonial theory, discusses the elements of the dual engine of European imperialism that shows how sign systems (cultural and symbolic structures) and material realities (global capitalism, division of labor) work together to maintain imperial power.¹¹ The Repugnancy Clause serves as such a discursive tool by labelling indigenous laws as "repugnant" to Western legal norms, effectively shaping how indigenous societies were perceived and treated under colonial rule. Spivak's idea of how the symbolic order (in this case, the legal system) was used to control and reshape the identities and legal expressions of colonized subjects is evident in Kenya today.

1.6.2 Legal Realism

Legal Realism is attributed to Oliver Wendell Holmes Jr, who contended that shifts in law particularly precedent were influenced by policy personal experiences of judges not logic or established legal principles.¹² In his dissenting opinion, he also asserted that broad generalizations don't determine specific cases.¹³ Realists disputed the notion that judging is purely the logical application of legal rules and principles instead contend that even though legal rules play an important role, they operate alongside non-legal rules and factors to make the law more efficient and certain.¹⁴ Therefore, if the Realist argument is true, a judge is not bound by logic and precedent.¹⁵

From the above we get to see that the realist critique of the belief that judicial decisions are simply the logical application of legal rules resonates with the challenges faced in reconciling traditional justice systems (TJS) and formal legal structures in Kenya. Legal realists argue that while legal rules play a role in decision-making, they are influenced by non-legal factors such as cultural context, judicial discretion, and societal norms. This perspective is highly relevant to the Kenyan context, where the coexistence of TJS and formal legal systems is complicated by the repugnancy clause, which has historically marginalized customary practices. Just as realists sought to reform the legal system by acknowledging the complex factors influencing judicial decisions, this research advocates for policy reforms that integrate TJS more fully into the formal legal framework, recognizing that traditional systems reflect important cultural values and societal norms.

In conclusion the Postcolonial Theory and Legal Realism Theory address the influence of non-legal factors in shaping the legal landscape related to application of TJS. This is seen below:

Firstly, both theories reject the idea of law as purely objective and rooted in fixed logic. Postcolonial Theory highlights how cultural and political discourses shape colonial legal systems (like the repugnancy Clause), while Legal Realism emphasizes how judicial discretion

¹¹ Krishnaswamy, Revathi. "The criticism of culture and the culture of criticism: At the intersection of postcolonialism and globalization theory." 32 *Diacritics* 2 ,2002, 109.

¹² Tumonis, Vitalius. "Legal realism & judicial decision-making." 19 *Jurisprudencija* 4 ,2012, 1368.

¹³ *Lochner v. New York*, 198 U.S. 45, 76 (1905).

¹⁴ Tumonis, Vitalius. "Legal realism & judicial decision-making." 19 *Jurisprudencija* 4 ,2012, 1374.

¹⁵ Bloustein J "Logic and Legal Realism the Realist as a Frustrated Idealist." *Cornel LQ* 50 ,1964, 26

and non-legal factors (like culture and society) influence legal rulings. Both theories argue that law is shaped by subjective, contextual factors, be they cultural domination or judicial perspective.

Secondly, both Postcolonial Theory and Legal Realism advocate for the recognition of cultural context in the law. Postcolonial Theory critiques the erasure of indigenous legal practices through tools like the repugnancy Clause, while Legal Realism supports the idea that local customs and non-legal factors (like TJS) should influence judicial decisions, even in formal legal systems.

Thirdly, both theories advocate for legal reform that moves beyond rigid, colonial structures. Postcolonial Theory calls for the decolonization of legal systems by incorporating indigenous laws, while Legal Realism suggests that judicial discretion and non-legal factors (like TJS) should be considered in legal decision-making.

1.7 Literature Review

The following section will ascertain the necessity of reconciling TJS with the formal legal structure. The study intends to do this by looking into the work of different esteemed authors in the legal space.

Francis Kariuki,¹⁶ discusses the court's interpretation of Customary law since colonial times and how this interpretation may hinder the application of TJS and underscores the need for courts to develop legal principles that lead to its recognition.¹⁷ The methodology he uses is that of doctrinal legal research. He concludes his article by emphasizing the necessity for a shift in mindset and perception among judges, lawyers, and the broader community to foster the advancement of Traditional Justice Systems.

From the above the research agrees that there exists a legal gap in our Kenyan courts when it comes to jurisprudence that is supportive of TJS and the need to change our mindset as a society when dealing with issues of Customary law. In addition, he also speaks of the repugnancy clause in a nutshell. This goes to show that my research is important as traditional justice systems, and the repugnancy clauses are interdependently interlinked.

FIDA Kenya,¹⁸ focuses its study on traditional justice systems to recommend legal reforms for inclusion in Kenyan justice, especially for women's access. It emphasises the need to strengthen women's participation in TJS, as well as sensitizing TJS about gender issues.¹⁹ The methodology employed is that of empirical legal research. The study argues for the enhancement of non-formal justice systems alongside formal justice structures, enabling

¹⁶ Kariuki Francis, "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems," 8 (1) University of Nairobi Law Journal, 2015, 6.

¹⁷ Kariuki Francis, "Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems," 8 (1) University of Nairobi Law Journal, 2015, 6.

¹⁸ FIDA Kenya, "Traditional Justice Systems in Kenya: A study of communities in Coast Province" FIDA KENYA,6.

¹⁹ FIDA Kenya, "Traditional Justice Systems in Kenya: A study of communities in Coast Province" FIDA KENYA,6.

individuals to choose their preferred system.²⁰ It suggests establishing a system of appeals and referrals between formal and traditional justice systems, emphasizing the importance of clear institutional linkage to enforce decisions of traditional systems akin to court rulings, ensuring compatibility with international human rights principles.²¹

FIDA Kenya's study,²² is of importance to this research as they both share a common goal of need for such linkage, as traditional justice systems offer valuable contributions to dispute resolution, necessitating a coherent integration with formal systems. While this research focuses on the necessity of institutional links between the courts and traditional mechanisms, particularly for marginalized communities, FIDA Kenya's research emphasizes the importance of strengthening the involvement of women in TJS and advocate for legal reforms to enhance women's access to justice.

Both studies advocate for the coexistence and integration of traditional and formal justice systems through appeals, referrals, and clear institutional linkages, with the aim of ensuring compatibility with international human rights principles and empowering marginalized groups.

Francis Kariuki,²³ analyses a case,²⁴ where the accused was charged with murder and pleaded not guilty. On the date of the hearing the court was informed that the family of the deceased had requested to have the murder charge withdrawn on account of an out of court settlement between the families. The issue being whether a murder charge can be withdrawn on account of settlement between families in question and whether Alternative dispute resolution mechanisms can extend to criminal matters. The final verdict of the learned judge was based on the constitution that courts shall be guided by Alternative dispute resolution mechanisms.²⁵

Francis Kariuki views the Mohammed case as a significant precedent as the recognition of TJS was intended to broaden the scope of TJS improve justice accessibility given the barriers to courts and to acknowledge the ethnic, cultural, religious diversities among Kenyans.²⁶ He employs a doctrinal legal research methodology. He concludes his research by stating that TJS are anchored on African culture and values forming the social fabric hence, the Repugnancy test has played a major role in the destruction of TJS.²⁷

²⁰ FIDA Kenya, "Traditional Justice Systems in Kenya: A study of communities in Coast Province" FIDA KENYA, 2010,6.

²¹ FIDA Kenya, "Traditional Justice Systems in Kenya: A study of communities in Coast Province" FIDA KENYA, 2010,6

²² FIDA Kenya, "Traditional Justice Systems in Kenya: A study of communities in Coast Province" FIDA KENYA, 6.

²³ Kariuki Francis, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed (2013) eKLR" 8(1) University of Nairobi Law Journal, 2015, 6.

²⁴ Republic v Mohammed Abdow Mohammed (2013) eKLR, University of Nairobi Law Journal

²⁵ Article 159(2) (c), Constitution of Kenya, 2010.

²⁶ Kariuki Francis, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed (2013) eKLR" 8(1) University of Nairobi Law Journal, 2015, 6.

²⁷ Kariuki Francis, "Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed (2013) eKLR" 8(1) University of Nairobi Law, 2015, 6.

Kariuki's analysis is of importance to this study as it contributes valuable insights into the recognition and utilization of traditional justice systems within Kenya's legal landscape. By emphasizing the need for traditional systems to adjudicate criminal matters, Kariuki highlights the constitutional guidance that courts should be guided by Alternative Dispute Resolution mechanisms. This aligns with this research, as both aim to inform policy reforms aimed at fostering greater recognition, protection, and integration of traditional justice systems within the broader legal framework.

From the above we get to see that the existing literature on the integration of traditional justice systems (TJS) with formal legal structures highlights important challenges, but several gaps remain. While authors like Francis Kariuki emphasize the need for jurisprudence that supports customary law and FIDA Kenya focuses on enhancing women's access to justice through TJS, there is limited exploration of practical frameworks for institutional linkages between TJS and the courts. Moreover, although Kariuki briefly touches on the potential role of TJS in criminal matters, broader research on how these systems can handle serious criminal cases, such as murder, is lacking. Additionally, the literature often focuses on specific marginalized groups, particularly women, but there is insufficient attention to other vulnerable populations, such as ethnic minorities and economically disadvantaged communities.

The research seeks to address the gaps highlighted above by providing a comprehensive framework for integrating TJS with the formal legal system, proposing clear institutional linkages, referral systems, and mechanisms for appeals. It will also explore the role of TJS in criminal cases, expanding on Kariuki's analysis to examine how these systems can complement formal justice structures while maintaining legal safeguards. By broadening the scope to include other marginalized groups and conducting a comparative analysis of best practices from other jurisdictions, the study will offer a more inclusive and globally informed approach to integrating traditional and formal justice mechanisms. Additionally, by critically analyzing the repugnancy clause, the study will propose reforms that balance the need for cultural preservation with international human rights standards, ultimately contributing to policy recommendations that promote greater recognition and integration of TJS within Kenya's legal framework.

1.8 Research Methodology

The research relies on doctrinal legal research methodology. It is a methodology focused on the identification of the law, analyzing it, and formulating logical reasoning behind it, hence contributing to the continuity, consistency, and certainty of law. The research analyses the legal rules found in the primary and secondary sources of law. The primary sources include cases and statutes, while the secondary sources encompass the existing literature in books, journal articles, newspaper articles and online resources relevant to the research. Moreover, the research will analyze how the legal, policy and practice norms define the place of Traditional justice systems in Kenya. Hence, being able to draw useful recommendations that will aid in the campaigning of TJS.

1.9 CHAPTER BREAKDOWN

The study will be organized as outlined below:

Chapter one: Introduction to the study

This chapter lays the background of the study, statement of the problem of study, research objectives, research questions, justification for the research, hypothesis of the research, theoretical framework, literature review, and methodology employed in the research.

Chapter two: Examination of the current Legal and Institutional framework governing traditional justice systems

This chapter examines the current legal and institutional framework governing TJS while focusing on how Kenyan courts have historically and contemporarily addressed dispute between the law governing TJS and Statutory law.

Chapter three: A comparative study of jurisdictions that have successfully integrated traditional justice systems into the formal legal framework

This chapter examines other countries that have balanced the coexistence of customary and statutory law while drawing valuable insights and identifying a better approach that could inform the integration process of traditional justice systems in Kenya.

Chapter four: Implementing approaches used in other jurisdictions in the integration of traditional justice systems into Kenya's legal framework

This chapter examines how Kenya can implement the approaches used by other jurisdictions in integrating traditional justice systems into formal legal frameworks as it explores the practical steps, challenges, and considerations for adapting these models to Kenya's unique legal and institutional context.

Chapter five: Recommendations and Conclusion

This chapter concludes the research and makes recommendations based on the findings.

CHAPTER TWO

EXAMINATION OF THE CURRENT LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING TRADITIONAL JUSTICE SYSTEMS IN KENYA

2.1 Introduction

This chapter focuses on evaluating the legal and institutional frameworks that regulate Traditional Justice Systems. It critically examines key provisions of various applicable laws and the institutional framework supporting TJSs exploring how these institutions interact with statutory systems and the limitations they face in promoting and preserving customary justice practices.

The relationship between Customary law and Statutory law in Kenya is complex and marked by tension, particularly regarding the standards used to assess the relevance of Customary rules. While the Constitution acknowledges Customary law as a valid source of law, it is often subordinated to Common law. This form of "inclusive subordination" impacts the institutional framework supporting TJS, as these institutions struggle to assert their role in a pluralistic legal system, as the limitations imposed by this hierarchical relationship, such as insufficient resources, restricted mandates, and unclear legal support, constrain their capacity to operate effectively, diminishing their potential to deliver justice that resonates with Kenya's diverse cultural landscape.

2.2 International Instruments

2.2.1 Universal Declaration of Human Rights (1948)

Stipulates that every individual has the right to engage in the cultural life of the community and to partake in the arts and to benefit from scientific advancement.²⁸ This principle is particularly relevant to Traditional Justice Systems, as it underscores the importance of cultural practices and community involvement in resolving disputes to promote a more inclusive approach to justice that respects cultural identities and enhances community cohesion while ensuring that individual rights are upheld. In addition, its principles are widely interpreted by the Committee in recognising TJS and their role in respecting cultural diversity. This is evident where the committee held that the right partake in culture with other members of the community cannot be determined abstractly, hence the Committee should take into account legal restrictions impacting on an ethnic Sami to membership of a Semi community.²⁹

2.2.2 United Nations Declaration on the Rights of Indigenous Peoples

This instrument was adopted by the UN General Assembly in 2007, this declaration specifically addresses the rights of native people to maintain and develop their own legal systems, traditions, and customs,³⁰ and the right to access effective remedies for all violations of their

²⁸ Article 27, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

²⁹ Kitok v. Sweden, CCPR Comm. No. 197/1985 (27 April 1988).

³⁰ Article 34, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61 UNTS 295.

individual and collective rights.³¹ The UN Permanent Forum on Indigenous Issues emphasizes that AJS can affirm indigenous communities' autonomy and cultural identity, by affirming that TJS are mainly the sources for resolving land disputes, and are effective, and inclusive³²

2.2.3 International Covenant on Economic, Social and Cultural Rights

This covenant highlights that the States Parties to the Covenant recognize the right to take part in culture.³³ The provision reinforces the significance of Traditional Justice Systems as vital expressions of cultural identity, enabling communities to engage in their customary practices for dispute resolution. The Committee on Economic, Social and Cultural Rights has interpreted the right to engage in cultural life as including the preservation and respect for traditional legal systems. In General Comment No. 21, the committee emphasizes on the ability of communities to uphold their customs and traditions in ways that foster identity and heritage, provided these practices respect gender equality and human rights.³⁴

2.3 The Constitution and Policies

2.3.1 The Constitution of Kenya, 2010

Interestingly, the Constitutional provision on the applicability of African Customary law doesn't embody a constitutionality test.³⁵ This becomes apparent in its implementation as it provides that "any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency...".³⁶ Ambani,³⁷ emphasizes that the Constitution includes additional provisions that have adversely impacted on the application of African customary law in three ways: It offers itself as the primary most important yardstick against which the relevance of all other laws, religions, customs, and practices are measured, it stipulates that no one shall be tried for a criminal offence unless it amounts to an offence under the laws of the state or under international law and it restricts customary law and religion through certain other subtle provisions whose overall effect is to sideline traditional practices.³⁸

Secondly, in defining the principles that govern the exercise of judicial authority, the Constitution stipulates that "traditional dispute mechanisms shall not be used in a way that: (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or (c) is inconsistent with the Constitution or any

³¹ Article 40, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61 UNTS 295.

³² United Nations Permanent Forum on Indigenous Issues, International expert group meeting on the theme "Peace, justice and strong institutions: the role of indigenous peoples in implementing Sustainable Development Goal 16", 30 January 2020, UN Doc E/C.19/2020/7, 28-31.

³³ Article 15 1(a), International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993.

³⁴ CESCR General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a) of the Covenant), 21 December 2009, 36.

³⁵ J Ambani and O Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1 Strathmore Law Journal 1, 2015, 49.

³⁶ Article 2(4), Constitution of Kenya, 2010.

³⁷ J Ambani and O Ahaya, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1 Strathmore Law Journal 1, 2015, 49.

³⁸ Mwangi C, 'Traditional Knowledge and the Inclusive subordination of African Customary Law in Kenya: Lessons from Personal Law' Journal of African Law, 2021, 8.

written law”.³⁹ In interpreting Article 159(2)(c), courts have consistently underscored that the Constitution’s endorsement of ADR should be at par with the established legal principles,⁴⁰ on the other hand in the interpretation of Article 159 (3) the Mohamed case is a good precedent demonstrating how the judiciary has a commitment to promoting reconciliation and traditional dispute resolution mechanisms.⁴¹

From the above, the constitutionality test poses several challenges to the application of Traditional Justice Systems. First, it subjects African customary law to a stringent evaluation against constitutional principles, which often prioritize modern legal frameworks over indigenous practices. This results in the dilution and marginalization of customary law, as it must conform to standards that may not fully embrace the cultural and community-specific nature of TJS. Hence, while TJS institutions are formally recognized, their practical application remains limited, leading to a legal environment where traditional mechanisms struggle to operate effectively within the broader legal system. Consequently, TJS face systemic barriers to full integration and recognition, weakening their role in providing accessible and culturally relevant justice.

2.3.2 The National Policy on Alternative Justice Systems

The National Policy on Alternative Justice Systems (AJS) in Kenya is a significant framework that guides the recognition and integration of ADR mechanisms within the legal system.⁴² The policy acknowledges the role of Alternative Justice Systems as legitimate avenues for resolving disputes ensuring that these systems are recognized and can operate alongside formal judicial processes.

The National Policy on AJS cannot be fully understood without considering the AJS Framework, as the framework serves to operationalize the policy's objectives. The AJS policy framework acknowledges Deference model which involves reviewing previous AJS proceedings and awards for procedural correctness and proportionality by the courts,⁴³ and the other is the Recognition and Enforcement model where the court recognizes an award or from an AJS Mechanism as it would its own decree and is subject to the right of one party to set aside the award.⁴⁴ These models are designed to ensure that AJS mechanisms can operate alongside formal judicial processes, promoting access to justice while upholding constitutional values.

The two models speak to the operationalization of Article 159 by the former Deference speaking to the principles of justice, equity, and fairness enshrined in Article 159(2)(a), by

³⁹ Article 159(3), Constitution of Kenya, 2010.

⁴⁰ *Kamlinchui & 5 others v Kimbui & another* (Miscellaneous Application E007 of 2023).

⁴¹ *Republic v Mohamed Abdow Mohamed* High Court Criminal Case No. 86 of 2011 [2013] eKLR.

⁴² National Policy on Alternative Justice Systems, 2014.

⁴³ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 75.

⁴⁴ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 75.

ensuring that AJS decisions are not arbitrary and adhere to the constitutional standards and the latter operationalizes Article 159(2)(c), which calls for the judicial system to facilitate the use of ADR by enforcing the outcomes of AJS mechanisms.⁴⁵ However, Kariuki and Enyinna contend that if customary law is regarded as an equal source of law alongside common law in Kenya, it is crucial for the outcomes of AJS to be enforceable without requiring judicial sanction.⁴⁶ Hence propose a Direct Enforcement Model, wherein the enforcement of AJS outcomes would occur independently, without the judicial oversight central to the ‘Deference’ and ‘Recognition and Enforcement’ models.⁴⁷

In a nutshell, the Direct Enforcement Model proposes a more robust application of Article 159 by recognizing TJS outcomes as automatically enforceable, further advocating for their legitimacy and independence within the Kenyan legal system. This approach promotes the constitutional vision of justice through pluralistic, inclusive mechanisms that reflects the diversity in Kenya's population.

2.4 Acts of Parliament

2.4.1 The Judicature Act

The Judicature Act brings about the repugnancy test usually entails weighing African customary practices against the “ideal” that is Western values.⁴⁸ Perhaps the most consequential formulations on the applicability of African customary law can be seen in the wording of the Judicature Act,⁴⁹ of which two sections will be considered. The first provision is that the jurisdiction of the courts shall be exercised:

“in conformity with the Constitution; subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited ... subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England ... Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

The second provision provides that the courts:

⁴⁵ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." RiA Recht in Afrika| Law in Africa| Droit en Afrique 26.1, 2023, 75.

⁴⁶ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." RiA Recht in Afrika| Law in Africa| Droit en Afrique 26.1, 2023, 75.

⁴⁷ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." RiA Recht in Afrika| Law in Africa| Droit en Afrique 26.1, 2023, 82.

⁴⁸ J Ambani and O Ahaya, ‘The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era’ 1 Strathmore Law Journal 1 ,2015,53.

⁴⁹ Sec 3(2), Judicature Act, cap 8, Laws of Kenya (2016 revised ed).

*“Shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay”.*⁵⁰

These two positions embody very different ways of viewing the desirability (or implicit preference) of a regime of law. Claude,⁵¹ contends that the idea of viewing customary law by the lens of the latter provision contributes to a systemic lack of commitment to the “inclusive subordination”⁵² of that regime of law. The mere choice of the word “repugnant” reveals the presupposition of an almost-expected appalling or reprehensible character inherent in the thing being so described that is characteristic of colonialism. “Inclusive subordination” is a legal technique the employment of which entails the formal recognition of the applicability of a law (or regime of law), coupled with little actual recognition or enforcement.⁵³ This is primarily due to the existence of a broader or more overarching, and implicitly preferred, law or regime of law.

A practical scenario is seen in the case *George Mwangi vs Maria Wamugori*⁵⁴ which was an appeal that arose from proceedings taken under section 3 of the then Affiliation Act,⁵⁵ that provided as follows: “If the evidence of the mother is corroborated in some material particular by other evidence to the satisfaction of the court, it may adjudge the defendant to be the putative father of the child and may also, if it sees fit in all circumstances of the case proceed to make against him an order for the payment ... of certain sums and expenses.” In giving force to this provision, Ainley P remarked as below:

“The African Court has assumed that these very clear provisions preclude any adjudication and therefore an order, in default of corroboration of the evidence of the mother. The African Court’s assumption was perfectly correct... We can think of no other material interpretation of the subsection, and we would also point out that the interpretation which we have adopted is the interpretation given by the English Courts for many years to almost precisely similar words in various English Affiliation Acts.”

Claude,⁵⁶ is of the view that the relevant court, while adjudicating over a customary law matter whose customary law rules were clear, elected to be persuaded by English law principles and

⁵⁰ Sec 3(2), Judicature Act, cap 8, Laws of Kenya, (2016 revised ed).

⁵¹ Mwangi. C, ‘Traditional Knowledge and the Inclusive subordination of African Customary Law in Kenya: Lessons from Personal Law’ *Journal of African Law*, 2021, 8.

⁵² S Kangara, “Beyond bed and bread: The making of the African state through marriage law reform – constitutive and transformative influences of Anglo-American legal thought”, *9 Hastings Law & Poverty Law Journal* 353, 2012, 362.

⁵³ Mwangi. C, ‘Traditional Knowledge and the Inclusive subordination of African Customary Law in Kenya: Lessons from Personal Law’ *Journal of African Law*, 2021, 8.

⁵⁴ *George Mwangi vs Maria Wamugori* (1965) eKLR

⁵⁵ Section 3, Chapter 142, Affiliation Act (Repealed).

⁵⁶ Mwangi. C, ‘Traditional Knowledge and the Inclusive subordination of African Customary Law in Kenya: Lessons from Personal Law’ *Journal of African Law*, 2021, 9.

English law techniques of legal interpretation and adjudication and even went ahead to rely on two English cases in supporting its rather flagrant disregard of a customary law rule.⁵⁷

From the above, it is evident that while Traditional Justice Systems are acknowledged, their recognition is superficial, as they are consistently subjected to scrutiny that diminishes their legitimacy. As illustrated above, restricted implementation on the rules of Customary law reflects a deep-rooted bias that undermines the authority of TJS. The requirement that customary law conforms to standards of justice and morality defined by external legal norms perpetuates the legacy of colonialism. This marginalization results in a legal system where TJS are often sidelined, limiting their effectiveness in providing justice that resonates with the cultural and social realities of local communities.

2.4.2 Community Land Act, 2016

In providing for the use of alternative dispute resolution methods, the Act states that “a registered community may use alternative methods of dispute resolution mechanisms, including traditional dispute and conflict resolution mechanisms, where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.”⁵⁸ The Act further emphasizes that “where a dispute or conflict relating to community land arises, the registered community shall give priority to alternative methods of dispute resolution.”⁵⁹

A potential gap in the Community Land Act, 2016 that could contribute to the marginalization of Traditional Justice Systems (TJS) lies in the phrase “where it is appropriate to do so” when referring to the use of ADR mechanisms. This wording introduces ambiguity, as the appropriateness of using TJS could be subject to the interpretation of external parties, including courts or legal authorities who may impose restrictive views influenced by the repugnancy clause. This is brought out in a practical scenario where the court's refusal to adopt the Njuri Ncheke's ruling in a land dispute stating that the case was *res judicata*,⁶⁰ highlighting the tension between traditional dispute resolution mechanisms and formal statutory law, particularly in the context of community land disputes.

Additionally, the Act mandates the use of TJS for community land disputes but still requires that these mechanisms be subordinated to the principles of justice and morality as outlined in formal statutory law. This opens the door for manipulation by the repugnancy clause, as disputes settled through TJS may be overturned or deemed invalid if they fail to meet the standards of justice and morality as defined by Western-centric, legal frameworks.

2.4.3 The Marriage Act, 2014

In providing for the dissolution of customary marriages, the Act stipulates that “the parties to a marriage celebrated under Part V may undergo a process of conciliation or customary dispute

⁵⁷ Mwangi. C, ‘Traditional Knowledge and the Inclusive subordination of African Customary Law in Kenya: Lessons from Personal Law’ *Journal of African Law*, 2021,12.

⁵⁸ Section 15 (3), Community Land Act, 2016.

⁵⁹ Section 39, Community Land Act, 2016.

⁶⁰ *Kamilinchi & 5 others v Kimbui & another* (Miscellaneous Application E007 of 2023).

resolution before the court may determine a petition for the dissolution of the marriage.”⁶¹ The Act further mandates that “the process of mediation or traditional dispute resolution shall conform to the principles of the Constitution,” ensuring that such mechanisms respect constitutional rights and do not contravene any written law.⁶² In addition, the person who takes parties through the process of conciliation or traditional dispute resolution must prepare a report of the process for the court.⁶³

Kariuki,⁶⁴ in his analysis of the said provisions brings out two gaps. The first gap is posed as a question: ‘on who is the dispute resolver in such an instance? Is it a traditional leader, a counsellor, family member, village elder or chief?’⁶⁵ Secondly, he speaks of the courts playing a supervisory role over customary dispute resolution processes to ensure compliance with the Constitution.⁶⁶ This requirement subjects traditional mechanisms to external scrutiny, particularly under the repugnancy clause, which evaluates the fairness and morality of these practices based on common law standards. As a result, traditional justice systems risk being overridden if their customs are deemed incompatible with these external benchmarks,

2.5 Institutional Framework

The National Policy on Alternative Justice Systems,⁶⁷ is a key milestone that formalizes the recognition and integration of traditional dispute resolution mechanisms into the legal system, paving the way for autonomous and court-annexed AJS institutions.

2.5.1 The Judiciary

In Kenya, Article 159(2)(c) of the Constitution reflects the judiciary's support for Alternative Justice Systems (AJS), including Traditional Justice Systems. Courts are to encourage the use of alternative forms of dispute resolution in conjunction with formal judicial processes. However, Article 159(3) sets limitations to ensure that these mechanisms do not violate human rights or conflict with the Constitution. Hence, the judiciary's support for AJS is balanced by a requirement to uphold the Constitutional values that seek to protect respective individual rights. The Judiciary has demonstrated its commitment to AJS through various initiatives. Firstly, this is evident through the collaboration of the Judiciary with the National Steering Committee on the Implementation of AJS which convenes annual AJS Conferences to educate Kenyans and stakeholders on TJS and their role in advocating justice accessibility. Secondly, through the establishment of AJS Centres. A good example is when the Chief Justice Martha Koome in June 2024 launched Africa's first autonomous Alternative Justice Systems Centre in Nakuru county. Thirdly, the judiciary’s integration of traditional justice systems within the formal legal

⁶¹ Section 68(1), Marriage Act, 2014.

⁶² Section 68(2), Marriage Act 2014.

⁶³ Section 68(3), Marriage Act 2014.

⁶⁴ Kariuki. F, ‘African traditional justice systems’ 1 Journal of cmsd 1,2017, 9.

⁶⁵ Kariuki. F, ‘African traditional justice systems’ 1 Journal of cmsd 1,2017,9.

⁶⁶ Kariuki. F, ‘African traditional justice systems’ 1 Journal of cmsd 1,2017, 9.

⁶⁷ National Policy on Alternative Justice Systems, 2014.

framework is evident in several cases provided below where an analysis of the integration between traditional justice systems and the judiciary is done.

2.5.1.1 Courts Interpretation, Approaches and Perspectives in the Application of Traditional Justice Systems

2.5.1.1.1 Liberal Interpretation Approach

This approach involves constructing of the law in way that broadens the scope of the legislation to include situations that align within the spirit of the statute, addresses the mischief the statute was meant to remedy, or assigns a meaning to the statute that enables the objective of the legislation to be achieved without being inconsistent to the words of the statute.⁶⁸

2.5.1.1.1.1 Mohamed Abdow case

In this case,⁶⁹ Mohamed was accused of the murder of Osman Ali Abdi. Upon being brought before the court on the day of the hearing, the prosecutor informed the court that counsel for the deceased's family had written to the DPP requesting the withdrawal of the charge subject to a settlement agreement reached between the families. Following the instructions of the DPP, the prosecutor made an oral application in court to have the matter marked as settled citing Article 159 of the Constitution, which the court agreed to discharging the accused citing Article 157 of the Constitution which authorizes the DPP to discontinue criminal proceedings at any stage. The court noted that allowing the application would better serve the interest of justice rather than disallowing it.

Apart from the Mohamed case being a good precedent it takes a liberal approach in the interpretation of Article 159 which encourages courts to promote reconciliation and traditional dispute resolution mechanisms, yet it also restricts their use in cases that would contravene justice, morality, or written law. Instead of applying this provision narrowly, it interpreted Article 159 to support broader application of traditional justice mechanisms even in severe offenses. Recognition of traditional justice systems was meant to open and liberalize the justice system in efforts to enhance access to justice due to the inaccessibility of formal justice systems.⁷⁰

2.5.1.1.2 Literal Interpretation Approach

A literal interpretation involves reading the statute and applying the plain meaning of a provision of the law. Nothing is presupposed or derived from the words apart from the exact meaning that it adheres to.⁷¹

⁶⁸ Sreya B, Literal interpretation versus liberal interpretation, National University of Juridical Sciences (NUJS), Kolkata ,2.

⁶⁹ Republic v Mohamed Abdow Mohamed High Court Criminal Case No. 86 of 2011 [2013] eKLR.

⁷⁰ F. Kariuki, Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, 24.

⁷¹ Sreya B, Literal interpretation versus liberal interpretation, National University of Juridical Sciences (NUJS), Kolkata ,2.

2.5.1.1.2.1 Republic v Abdullahi Noor Mohammed (Alias Arab) case

In this case,⁷² the accused Abdullahi Noor was accused of murder, his advocate filed a further affidavit sworn by the accused on 21st June 2016 where he deponed that the two families had a signed an agreement seeking an out-of-court settlement based on Somali culture. The prosecutor disagreed with this submitting that criminal cases are instituted by the state based on the right to life.⁷³

The court took a literal approach to Article 159 of the Constitution by strictly interpreting its language and applying its constraints precisely as written. Article 159(2)(c) encourages the promotion of ADR methods, including traditional justice systems, but only if they do not conflict with specific limitations. The court emphasized that criminal cases—especially those involving severe charges like murder—fall under state jurisdiction, not private or familial agreements, as stipulated by the literal wording of the law. Additionally, the court drew on Section 176 of the Criminal Procedure Code, which limits reconciliation to minor, private offenses, underscoring that murder does not fit this category. The court cited *Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR*, where it was held that permitting withdrawals in criminal cases would allow relatives of murdered persons to drop charges against accused persons whom they have pardoned, and this should not be allowed in the courts.

The court's stand was that the application of ADR mechanisms in criminal proceedings was intended to have a limited field of application and that the Judicature Act,⁷⁴ only envisages the use of the African customary law in civil cases that affect one or more of the parties that is subject to the rule of customary law. It also goes ahead to disagree with *Republic v Mohamed Abdow Mohamed High Court Criminal Case No. 86 of 2011 [2013] eKLR*, on the determination arrived at by the court by permitting out-of-court settlement. This literal approach underscores the non-negotiable role of the state as the primary complainant in such cases, ensuring that customary settlements cannot replace formal prosecution where the law is unambiguous.

2.5.1.1.2.2 Kamilinchui & 5 others v Kimbui & another

This case,⁷⁵ involves a land dispute involving 15 acres claimed by the applicants, who are nephews of the late Jason Kiamba Kimbui. The applicants previously pursued claims through various courts, including the Meru Environment and Land Court (ELC), but were unsuccessful. Unable to resolve the matter conclusively, they approached the Njuri Ncheke Council of Elders which ruled in their favor on 19th August 2023. The applicants requested that the court adopt the Njuri Ncheke's decision as a consent judgment under Article 159(2)(c) of the Kenyan Constitution, which supports alternative dispute resolution (ADR) mechanisms. The respondents, however, contended that the matter was *res judicata* and that the Njuri Ncheke panel could not invalidate the previous decision of the court.

⁷² Republic v Abdullahi Noor Mohammed (Alias Arab) (2016) eKLR.

⁷³ Article 26, Constitution of Kenya, 2010.

⁷⁴ Section 3(2), Judicature Act, cap 8, Laws of Kenya (2016 revised ed).

⁷⁵ Kamilinchui & 5 others v Kimbui & another (Miscellaneous Application E007 of 2023).

It is clear that the court adopted a literal interpretation to Article 159(2)(c) of the Constitution and the principle of res judicata, strictly adhering to the language of the law and prioritizing formal judicial finality over traditional justice mechanisms, this decision underscored that Article 159's promotion of ADR must align with established legal doctrines, such as res judicata, which prevents re-litigation of cases already decided by the courts.

From the above it is evident that the jurisprudence on the application of TJS in Kenya illustrates a careful balancing act between integrating customary practices and maintaining formal legal principles. Cases such as *Republic v Mohamed Abdow Mohamed (2013)* taking a more liberal approach in the application of TJS but in the case *Abdullahi Noor Mohammed* the threshold for the application of TJSMs is higher as based on the fact that serious offenses fall within state jurisdiction, underscoring that ADR in criminal cases is limited by virtue of the state being the primary complainant and in the civil dispute *Kamilinchi & 5 others*, where being a civil case the court denied a request to adopt a traditional ruling by the Njuri Ncheke Council of Elders due to the doctrine of res judicata, highlighting the supremacy of formal court decisions.

2.5.2 Autonomous Alternative Justice Systems Institutions

These are independent bodies that operate outside the formal court system and utilize traditional methods and practices to resolve disputes. They reflect local customs and community practices,

2.5.3 3rd Party Institution Annexed Alternative Justice Systems Institutions

These institutions work in conjunction with autonomous AJS bodies to offer additional support and basically involves 3rd parties who may not necessarily belong to the community and can include state authorized institutions or non-state institutions like religious leaders.

2.5.4 Court Annexed Alternative Justice Systems Institutions

Refer to AJS processes for resolving disputes with the guidance and limited involvement of the court.

2.5.6 Ministry of interior-steering committee on peace building and conflict management

Is an interagency established in 2001, whose main objective is to promote peaceful coexistence and social stability among Kenyan communities which aligns with Kenya's broader Vision 2030 goal of achieving national stability and cohesion through community-driven peace initiatives and the institutionalization of conflict management practices. In the achievement its main objective it collaborates with local leaders, including chiefs, village elders, and councils, to integrate AJS into local governance. This partnership reinforces traditional justice structures, helping to resolve disputes. The Steering Committee also promotes community-driven initiatives for peacebuilding, which often include traditional justice practices and other AJS methods. These initiatives help communities resolve disputes locally, reducing the need for

formal court interventions and empowering local leaders to handle conflicts in culturally relevant ways.

2.6 Conclusion

It is evident that Customary law is officially acknowledged as a legitimate source of law, the controversy lies in the selective application of Customary law as in principle it may be the prescribed law, yet it may be disregarded if it does not satisfy the Repugnancy and Constitutionality tests and as will be shown, any other arbitrary standard.⁷⁶

Wilson J in *Gwao Kilimo v Kisunda Ifuti*⁷⁷ articulated that different communities have different standards on morality and justice. The British have their own standard that was applied in British courts. Even in present-day Africa, there isn't any general standard of morality. Supporting this view Allott notes that the native judge is educationally and culturally divided from the ordinary farmers, hence, is detached from the affairs he adjudicates.⁷⁸

This chapter reveals TJS in Kenya reveals a persistent struggle for recognition and legitimacy amid prevailing colonial legacies. Despite the constitutional acknowledgment of customary law and the National Policy on Alternative Justice Systems advocating for its integration, the continued reliance on Western-centric standards for justice and morality compromises the effectiveness of TJS. Provisions in various legislative frameworks while offering pathways for the use of traditional dispute resolution mechanisms, are often laden with ambiguities and conditions that expose TJS to external scrutiny and manipulation.

The friction between Customary law and formal legal frameworks signifies not just a legal conflict but a broader societal challenge in valuing Traditional Justice Systems. For TJS to have a greater influence within Kenya's legal framework, there is a pressing need for comprehensive legal reforms that recognize and empower these traditional mechanisms, ensuring they are integrated on equitable terms that honour their cultural significance and societal relevance.

⁷⁶ Allott A, *New Essays in African Law*, Butterworths, London, 1970, 158.

⁷⁷ (1938) 1 TLR (R) 403.

⁷⁸. Allott A, *New Essays in African Law*, Butterworths, London, 1970, 164.

CHAPTER THREE

A COMPARATIVE STUDY OF JURISDICTIONS THAT HAVE SUCCESSFULLY INTEGRATED TRADITIONAL JUSTICE SYSTEMS INTO THEIR FORMAL LEGAL FRAMEWORK

3.1 Introduction

This chapter looks to the status of customary adjudication frameworks in Botswana, such as their structure and authority. The aim of this chapter is not to directly compare specific roles allocated to Customary courts in Botswana and those to TJS in Kenya but rather to determine what Kenya can draw lessons on.

The choice to delve into Botswana's legal framework stems from its status as a leading example of successfully integrating customary courts into its modern legal system. In Botswana, Customary Courts have not only passed the test of time but over the past two decades, their significance in settling disputes has surpassed that of courts applying Common law at a time when Customary courts in many African countries is on the diminishing.⁷⁹ Botswana's dual legal system provides a perspective on balancing respect for traditional norms with the demands of constitutional supremacy and human rights. For Kenya, these insights present an opportunity to reform its own TJS framework, addressing gaps in civil and criminal jurisdiction, and improving access to justice for all its citizens.

3.2 Traditional Justice Systems in Botswana

3.2.1 Historical Evolution of Customary Courts

During the colonial era, Botswana was referred to as Bechuanaland and was under a less stricter version of colonialism and after being independent in 1966, it restructured its Customary Courts.⁸⁰ Botswana's legal system that evolved in the colonial and post-colonial periods acknowledges traditional governance as Customary Courts being vital to the delivery of justice.⁸¹

3.2.1.1 Pre-colonial era

The traditions of the Tswana were embedded in codes of conduct which evolved over time and gradually gained public acceptance.⁸² Legal advancement took place when specific codes of conduct were enforced through the enforcements of the courts, that identified certain customs

⁷⁹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 167.

⁸⁰ Makhari R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 8.

⁸¹ Makhari R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 8.

⁸² Schapera I, *A Handbook of Tswana Law and Custom*, Frank Cass and Company Limited, London, 1977,39.

as unenforceable.⁸³ Judicial precedents were upheld for consistency but in exceptional circumstance, relevant legal doctrines were established through deliberations among community elders and in certain instances traditional rulers sought guidance from their counterparts in other communities.⁸⁴

The headmen and senior traditional leaders presided over disputes with the latter having unlimited jurisdiction.⁸⁵ Though, civil and criminal jurisdiction was not distinguished, the only limitation was in the boundaries of tribes and communities as people mainly negotiated before their relatives and neighbours.⁸⁶

3.2.1.2 Colonial era

With respect to governance, the British did not establish complete colonial dominance in Botswana until 1890, when it implemented indigenous socio political structures.⁸⁷ The British allowed native courts to settle the disputes between community members.⁸⁸ Additionally, native councils were introduced requiring the traditional leaders to consult on administration of tribal affairs.⁸⁹ The subordination to traditional leaders under district commissioners also led to the reduction of their authority.

The Native Administration Proclamation No.74 of 1934 was enacted to regulate traditional leadership and to utilize native structures as entities for local government functions. The Proclamation created tribal councils,⁹⁰ requiring traditional leaders to designate members of the community to serve as councillors and to inform magistrates of these appointments.⁹¹ Consequently it imposed a duty on traditional leaders to exercise their power in collaboration with the councils.⁹²

On the Customary Law status, the repugnancy clause restricted the authority of Customary Courts as in the other former British colonies.⁹³ The 1934 Proclamation stipulated that Tswana traditions could only be enforced if they aligned with the 'white man's' laws and customs and subject to colonial jurisdiction.⁹⁴ In terms of court structure, the British rule over Botswana led

⁸³ Schapera I, *A Handbook of Tswana Law and Custom*, Frank Cass and Company Limited, London, 1977,39.

⁸⁴ Makhari R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 168.

⁸⁵ Makhari R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 172.

⁸⁶ Wylie D, 'A little god: The twilight of patriarchy in a southern chiefdom' 17 *Journal of Southern African Studies* 4, 1991, 101-102.

⁸⁷ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 *Stellenbosch Law Review* 1, 2004, 168.

⁸⁸ Goemeone E, J Mogomotsi, Justice and Fairness in Criminal Procedure: Assessment of the Criminal Jurisdiction of Customary Courts in Botswana, 19 *U. Botswana Law Journal* 18, 173.

⁸⁹ Molokomme "Customary Law in Botswana: Past, Present and Future" 353

⁹⁰ Section 5(1), Native Administration Proclamation Act (No. 74 of 1934).

⁹¹ Section 5(1), Native Administration Proclamation Act (No. 74 of 1934).

⁹² Section 5 of the Native Administration Proclamation Act (No. 74 of 1934).

⁹³ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 181.

⁹⁴ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 181.

to minimal alterations in the formalisation of the Customary Court system, however, there is limited on how traditional leaders reacted to this formalisation.⁹⁵

Regarding civil jurisdiction, the 1943 Proclamation further restricted the authority of the commissioners by excluding disputes that involved Africans and that the commissioners were to adhere to the laws of Africans, unless they were inconsistent with British law and natural justice. Customary courts were also prohibited from listening to cases where an administrative official chose to intervene for the sake of maintaining order. Customary courts were also allowed to apply native laws to enforce any proclamation and administer it.

During the colonial period, Botswana operated under a dual criminal law system but through the enactment of the Penal Code in 1964 Criminal Law was unified, but between 1964 and 1971, Customary Courts were not permitted to apply the Penal Code. Despite these limitations, traditional leaders continued to resolve disputes under Customary Law with minimal interference from the British administration. However, some sentences were harsh like the forceful removal of persons from land. In response, the colonial authorities implemented measures to protect the rights of convicted individuals mandating commissioner's approval in cases involving expulsion of a person from a tribal area.⁹⁶

3.2.1.3 Post Colonial era.

The inclusion of Customary courts into the court system holds significant importance to African countries. Upon gaining independence, Botswana like many other former British territories retained the dual legal system inherited from the colonial period unaltered.⁹⁷ Despite this, the government in alignment with all-Africa conferences regarding modernisation of Customary law, resolved to take steps in the direction of 'unification', 'integration' universalisation of Criminal Law and uniformity of procedural rules for Customary courts.⁹⁸ More than four decades after independence, Botswana, like other post-colonial transitional societies, continues to grapple with the task of reconciling plural legal systems inherited from the former colonial power.⁹⁹

The Constitution of Botswana does not have a provision that makes it automatically binding by virtue of it being the supreme law and the challenge for Seretse Khama's government was determining an appropriate role for traditional leaders in the restructured political system and to integrate them within the new framework.¹⁰⁰ This effort was reflected in the promulgation

⁹⁵ Roberts S, 'The survival of the traditional Tswana courts in the national legal system of Botswana' *Journal of African Law*, 1972, 103.

⁹⁶ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 187.

⁹⁷ Malila I. S., "Reconciling plural legal systems: Between justice and social disorder in Botswana," Botswana Notes and Records, 2010, 1.

⁹⁸ Malila I. S., "Reconciling plural legal systems: Between justice and social disorder in Botswana," Botswana Notes and Records, 2010, 1.

⁹⁹ Malila I. S., "Reconciling plural legal systems: Between justice and social disorder in Botswana," Botswana Notes and Records, 2010, 1.

¹⁰⁰ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 189.

of the Local Government (District Councils) Act 2 of 1965. The Chieftainship (Amendment) Act 18 of 1970 introduced stricter restrictions over chiefs granting the president the power to dismiss a chief at will but was repealed in 1987. The following Chieftainship Act 19 of 1987 transferred this power to the Minister of Local Government allowing him to recognise individuals as chiefs even those outside the royal families, but the minister lacked authority to dismiss a chief unless there were complaints or reasonable suspicion of abuse of power.

Chief Shikati Kamanakao disputed the legitimacy of the Chieftainship Act and Tribal Territories Act, resulting a court ruling that the provisions of section 2 exceeded Constitutional limits. This led to the amendment of sections 77 to 79 of the Constitution. The primary reform brought about by these legislative changes required that the process of recognising a chief had to be periodically defined, ensuring that no one could be acknowledged as Kgosi (chief),

*“ . . . unless the tribe had assembled in the Kgotla under the chairmanship of a senior member of the tribe to designate the rightful successor to the Bogosi (chieftainship) according to customary law or according to the established norms and practices of the concerned tribe. ”*¹⁰¹

In Botswana, much of Customary Law has been modernised as majority of the former customs and practices were repealed and the Customary Courts can apply customary rules only to the extent where Customary Law does not contradict any statute or moral standard.¹⁰² Hence, it is evident that Botswana preserved the traditional Tswana Law in conjunction with Common Law.

The Customary Courts in Botswana operate within a structured hierarchy presently and can be analytically placed within two broad and overlapping divisions, the formally recognised and informally recognised customary courts.¹⁰³ The main distinction between the two lies in the Customary Courts Act, which gives the Minister of Local Government the power to recognise or establish by warrant such customary courts as he thinks fit.¹⁰⁴ This research will focus on the formal Customary Courts that have been established by the Minister of Local government in accordance with the Customary Courts Act.

Although the Customary Courts Act defines "customary courts" solely as the lower and the higher customary courts, statutory provisions provide for urban customary courts and the Customary Court of Appeal. In practice, the lower customary courts comprise of the traditional headmen's courts,¹⁰⁵ the Chief's Representative's court, the senior chiefs representative court or their equivalents. Next is the Higher Customary courts comprised of the chiefs that operate at district level and are headed by a hereditary chief. Currently there are eight courts that correspond with the eight main Tswana speaking tribes that are headed by paramount chiefs.¹⁰⁶

¹⁰¹ Sections 5 and 6, Bogosi Act (Act No. 9 of 2008).

¹⁰² Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 192.

¹⁰³ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004,174.

¹⁰⁴ Section 6(2), Customary Courts Act, (No. 7 of 1966).

¹⁰⁵ Section 30, Customary Courts Act, (No. 7 of 1966).

¹⁰⁶ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 177.

There are seven urban Customary Courts, the Minister of local government appoints presidents who preside over the courts and these courts are of the same status as the chiefs' courts.¹⁰⁷ Unlike the chiefs' courts, they are pure statutory creatures "established" by the Minister and have no traces to any pre-existing traditional customary courts. The fourth category of formal courts comprise of the Customary Appellate court, introduced through the Customary Courts (Amendment) which takes appeals from decisions of lower courts. Appeals then go directly to the High Court or in some specified circumstances to the court of appeal.¹⁰⁸

While Customary Courts are classified as either formal or informal, additional complexities arise due to variations in the structure and jurisdiction from tribe to tribe within the eight Tswana speaking tribes.¹⁰⁹ Under the jurisdiction of Customary Courts (Amendment) Order, 1997, the hierarchy for criminal jurisdiction under the Stock Theft Act,¹¹⁰ in the South East district begins with the court of the Chief's Representative's as the lowest level, followed by the Senior Chief's representative's Court, and ultimately the Chief's court.

This is illustrated in *Merapelo v The State*,¹¹¹ where the defendant was found guilty of stock theft by a Customary Court and upon appealing to a higher Customary Court his appeal was rejected. He then took the matter to the Magistrates' Court and on further appeal to the High Court, it was held that the magistrate should have retried the matter because records of the Customary Courts are often not maintained as those of the Superior Courts and may fail to be accurate.

On Civil Jurisdiction, Customary Courts have jurisdiction over persons that have consented in writing and where the cause of action arose wholly within the area of jurisdiction of the court.¹¹² In criminal matters, the Penal Code oversees the application of jurisdiction where Common law offences, such as theft, assault with intent to do grievous bodily harm, public nuisance, damage to property, stock theft and housebreaking are generally fall within the purview of Customary Courts. However, these courts lack jurisdiction over offences specified in section 13 of the Customary Courts Act.

3.3 Overview of the Legal and Institutional Framework

Botswana just like any other country that was colonised is subject to the indirect rule of administration to reconcile laws with the traditional laws of the indigenous people. Hence, Botswana's legal system incorporates both customary and formal law. The Constitution of Botswana goes further to explicitly recognize authority bestowed on traditional leaders through the House of Chiefs that is a consultative entity that offers guidance on matters related to

¹⁰⁷ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 177.

¹⁰⁸ Section 41(3), Customary courts Act, (No. 7 of 1966).

¹⁰⁹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 173.

¹¹⁰ Section 5, Chapter 9, Stock Theft Act (Botswana).

¹¹¹ *Merapelo v The State* (2001), Court of Appeal of Botswana.

¹¹² Section 11, Customary Courts Act (No. 7 of 1966).

custom and tradition.¹¹³ The Constitution also provides a foundation for integrating TJS into the broader legal framework by recognizing the application of customary law provided it aligns with constitutional principles specifically, the protection of individuals from discrimination.¹¹⁴

The Customary Courts Act formalizes the role and operations of Customary courts as it delineates the jurisdiction of these courts to address civil disputes,¹¹⁵ and minor criminal matters,¹¹⁶ provided cases fall within their traditional or customary mandate and do not conflict with statutory laws, ensuring accessibility for a majority of the population. One notable landmark case highlighting the jurisdiction of customary courts is *State v Pitso*,¹¹⁷ where the Botswana judiciary examined the jurisdiction of customary courts to try minor criminal matters and reaffirmed that customary courts have the authority to handle disputes and offenses within the parameters set by the Customary Courts Act, as long as these courts align their practices with Botswana's constitutional principles regarding fair trial rights and gender equality.

It is critical to note that Customary courts in Botswana operate under statutory oversight, with clear jurisdictional boundaries and appeal mechanisms to formal courts. As individuals have the right to appeal decisions made by customary courts to higher customary courts or formal courts, such as the Magistrates' Court.¹¹⁸ This appeal mechanism ensures statutory oversight and alignment with constitutional protections, ensuring that customary courts do not exceed their jurisdiction or violate fundamental rights.

The structured integration illustrated above minimizes jurisdictional conflicts and ensures that Customary Law is consistent with the constitutional principles. This is seen in *Molefi v Motswaledi*,¹¹⁹ where the court reaffirmed that customary courts must operate within the boundaries set by the Customary Courts Act and in alignment with constitutional principles.

3.4 Comparative analysis of Botswana and Kenya

With Botswana as the reference point, this comparative analysis examines how Kenya has integrated Traditional Justice Systems (TJS) into its formal legal framework by drawing lessons from Botswana's long history of recognizing and institutionalizing customary courts. By comparing these two jurisdictions, this study seeks to answer a critical question of how can Kenya learn from Botswana's experience to enhance access to justice, promote social justice, through TJS?

3.4.1 Formal Recognition of Customary Law

Both Botswana and Kenya have not only recognized Customary Law as a valid source of law but have taken steps to integrate it into the legal system. Botswana has enacted a Customary

¹¹³ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 192.

¹¹⁴ Section 15, Customary Courts Act (No.7 of 1966).

¹¹⁵ Section 11, Customary Courts Act (No. 7 of 1966).

¹¹⁶ Section 12, Customary Courts Act (No. 7 of 1966).

¹¹⁷ *State v Pisto* (1983), Court of Appeal of Botswana.

¹¹⁸ Section 13, Customary Courts Act (No. 7 of 1966).

¹¹⁹ *Molefi v Motswaledi* (1990), High Court of Botswana.

Courts Act which formalizes the operations of customary courts within a dual legal system and Kenya through its Constitution,¹²⁰ though Kenya's approach is less formalized.

Similarly, both Botswana and Kenya include a repugnancy clause in their legal frameworks. In Botswana, this clause is found in the Constitution,¹²¹ which allows for the application of Customary Law only if it is compatible with written laws and does not conflict with morality, humanity, or natural justice. As previously stated, Kenya's Constitution provides for this test,¹²² but the Constitution does not have a provision that makes it automatically binding on Customary law by virtue of it being the supreme law in Botswana.¹²³

In *Attorney General v. Dow*,¹²⁴ the Botswana Court of Appeal judicially affirmed the supremacy of the Constitution over custom. Amissah P (as then was) held:

“...Custom and tradition have never been static. Even then, they have always yielded to express legislation. Custom and tradition must a fortiori, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read to conform to the Constitution. But where this is impossible, it is custom not the Constitution which must go...”

The court reaffirmed the Common Law position that, insofar as Customary Law and procedures are inconsistent with the Constitution or any other written law, the Constitution and statutes take precedence. The approach utilised in this case demonstrates its positive impact on the development of customary law. It illustrates how the adaptability of laws with Constitutional values ensures that discriminatory customary practices either evolve or are rendered void. Consequently, this alignment fosters societal norms consistent with modern standards of justice and equality. This interpretation highlights the practical application of the Constitutionality Test in balancing respect for tradition with adherence to fundamental human rights and its pivotal influence on the development of Customary Law.

3.4.2 Jurisdiction of Traditional Justice Systems (Customary Courts)

3.4.2.1 Civil Jurisdiction

Traditional Justice Systems in Botswana primarily operate through customary courts, whose jurisdiction is formalized under the Customary Courts Act. These courts operate within a dual legal system, handling civil and minor criminal matters while adhering to Constitutional values. Customary courts have jurisdiction to adjudicate disputes of civil nature arising under customary law. The Customary Courts Act,¹²⁵ defines the types of civil matters that customary courts may adjudicate, limiting jurisdiction to cases involving parties who voluntarily submit to the court's authority.

¹²⁰ Article 2(4), Constitution of Kenya (2010).

¹²¹ Section 15, Constitution of Botswana (1966).

¹²² Article 2(4), Constitution of Kenya (2010).

¹²³ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD Thesis, University of North-West, South Africa, 2021, 189.

¹²⁴ *Attorney General v. Dow* (1992), High Court of Botswana.

¹²⁵ Section 11, Customary Courts Act (No. 7 of 1966).

In contrast, Kenya's recognition of TJS is less formalized compared to Botswana, with no equivalent to the Customary Courts Act. Instead, Kenya's framework is guided by its Constitution and statutes such as the Magistrates' Courts Act. The Constitution emphasizes the promotion of TJS.¹²⁶ However, Kenya does not have specialized customary courts like Botswana. Instead, disputes involving customary law—such as land disputes, marriage, or inheritance—are handled by ordinary courts, aligned with statutory and constitutional provisions. Notably, the Magistrates' Courts Act,¹²⁷ grants magistrates' courts the authority to apply Customary law in civil cases, particularly in family relations, provided it Marpasses the constitutionality test.

The jurisdiction of TJSs in Kenya is also limited to the consent of the parties for the validity of the process.¹²⁸ This is seen in *Erastus Mutuma v Mutia Kamuno*,¹²⁹ where the High Court held that a party can refuse to submit to the jurisdiction of the Njuri Ncheke who are bound to refer that party to a court of law.

3.4.2.2 Criminal Jurisdiction

In Botswana, customary courts have authority over minor criminal cases involving breaches of customary norms, such as minor theft or assault.¹³⁰ The Customary Courts Act,¹³¹ limits the severity of penalties these courts can impose to ensure they remain proportionate and do not conflict with statutory provisions. Judicial oversight is a crucial feature, permitting appeals from customary courts to a Magistrates' Courts or a High Court to ensure consistency with the Constitution of Botswana.¹³² A critical observations on the Criminal jurisdiction of Customary Courts in Botswana is that they only have jurisdiction to try statutory offences,¹³³ hence, a person cannot be tried and convicted of customary law offence(s).¹³⁴ Additionally, prosecution in Customary Courts is not any different from general law courts, where the DPP has discretion to initiate or terminate criminal proceedings, therefore those acting on behalf of the state are experienced in the area of criminal law and criminal procedure.¹³⁵

Kenya by contrast has a more restrictive approach. On the question of consent discussed on earlier courts have set out limited rules of validity in their evaluation of outcomes of AAJS

¹²⁶ Article 159(2)(c), Constitution of Kenya (2010).

¹²⁷ Section 9, Magistrates' Courts Act (No. 26 of 2015).

¹²⁸ Kariuki. F and Enyinna S. N, "Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks." RiA Recht in Afrika| Law in Africa| Droit en Afrique 26.1, 2023, 77.

¹²⁹ (2012) eKLR

¹³⁰ Section 13, Customary Courts Act (No. 7 of 1966).

¹³¹ Section 18, Customary Courts Act (No. 7 of 1966).

¹³² Section 39, Customary Courts Act (No. 7 of 1966).

¹³³ Section 12(6), Customary Courts Act (No. 7 of 1996).

¹³⁴ Goemeone E, J Mogomotsi, Justice and Fairness in Criminal Procedure: Assessment of the Criminal Jurisdiction of Customary Courts in Botswana, 19 U. Botswana LJ 18, 175.

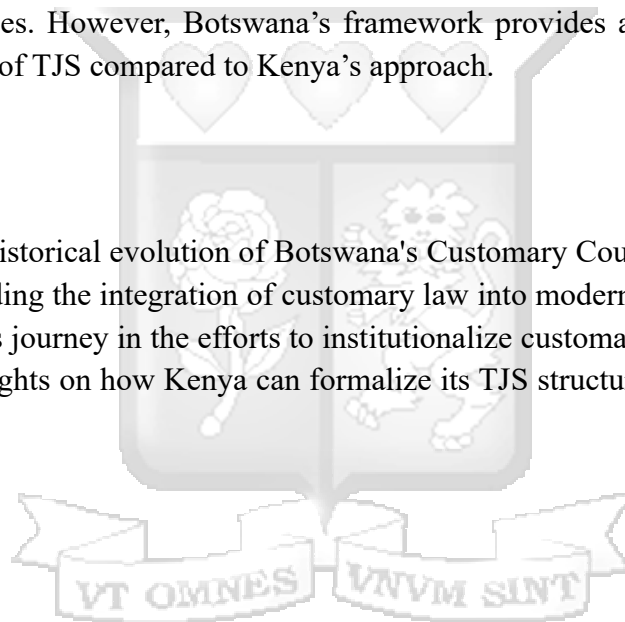
¹³⁵ Section 12(4), Customary Courts Act (No.7 of 1996)

with regard to consent to commence a TDRM process.¹³⁶ This is seen in *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another*,¹³⁷ where the High Court noted that in determining whether TDRMs are applicable in a criminal case, the parameters under Article 157 (11) of the Constitution for the exercise by the Director of Public Prosecutions of the prosecutorial mandate to wit: “the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process” vital considerations. As far as jurisprudence is concerned as explained in the previous chapter TJSs don’t have criminal jurisdiction.¹³⁸

In a nutshell, Botswana’s dual legal system, with formal recognition and regulation of TJS under the Customary Courts Act, allows for both civil and minor criminal jurisdiction in customary courts. In Kenya, TJS is confined primarily to civil matters, with no specialized customary courts, and the enforcement of customary law in criminal cases is explicitly excluded. Despite these differences, both systems ensure that customary practices adhere to constitutional principles. However, Botswana’s framework provides a more formalized and structured integration of TJS compared to Kenya’s approach.

3.5 Conclusion

As stated above, the historical evolution of Botswana's Customary Courts provides a valuable context for understanding the integration of customary law into modern legal frameworks. By examining Botswana's journey in the efforts to institutionalize customary courts, this research provides valuable insights on how Kenya can formalize its TJS structure under Article 159 of the Constitution.



¹³⁶ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 77.

¹³⁷ (2016) eKLR

¹³⁸ *Republic v Abdullahi Noor Mohammed (Alias Arab)* (2016) eKLR.

CHAPTER FOUR

INTERGRATING TRADITIONAL JUSTICE SYSTEMS INTO KENYA'S FORMAL LEGAL SYSTEM; LESSONS FROM THE INTERGRATION OF CUSTOMARY COURTS IN BOTSWANA

4.1 Introduction

This chapter is devoted to appraising the practical approaches employed in Botswana in the integration of Customary courts into its court system to identify strategies that can be adapted to Kenya's unique legal, cultural, and institutional context for the effective incorporation of TJS into Kenya's formal legal framework. Since colonial era, African countries have sought to regulate the role of chiefs either leading to inclusion or exclusion of chiefs in administering justice.¹³⁹ However, not all TJS revolve around chiefs; some are based on councils of elders like the Njuri Ncheke in Kenya, or other customary dispute resolution mechanisms.

Building on this historical backdrop, this chapter aims to provide actionable insights on fostering a cohesive coexistence between TJS and formal courts, addressing potential advantages and challenges of coexistence, to enhance the access to justice. The chapter proceeds by first evaluating the benefits and challenges of integrating TJS, drawing lessons from Botswana's integration of customary courts into its formal legal system. Following this, the chapter identifies how integration of TJS should be done drawing lessons from Botswana, to answer the question is integrating TJS into the formal legal system the goal?

Studies over the years have demonstrated that Customary courts in Botswana resolves more civil disputes than magistrates' courts.¹⁴⁰ This goes to show the assumption that Customary law dispute-settlement institutions are only for rural areas is inaccurate as even in surveys conducted in major town prisons, have showed that almost 75 % of those in prison today are serving sentences presided over by Customary courts.¹⁴¹

4.2 Pros and cons of integrating customary courts into the formal legal system

Botswana is a good example of a nation where Customary law courts have been in intergrated into the formal court system.¹⁴² This is seen in the creation of a Customary Court of Appeal that unlike the customary courts is established by statute not custom.

¹³⁹ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 10.

¹⁴⁰ Roberts 1979 African Law Studies, 46-47.

¹⁴¹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004,181.

¹⁴² Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008,11.

4.2.1 Pros of integration

Firstly, the introduction of a customary court of appeal in 1968 and its establishment in 1986 was major reform that saw for the first time the official creation of a customary court that had no roots in the traditional system of justice and it came at a time when a very critical report had intimated that the low standards in the customary courts were such that they had reached "the point of no return".¹⁴³ Which drew attention to the corruption and inefficiency in the system. Hence, the customary court of appeal was meant to provide a more credible, faster and cheaper method of dealing with appeals and limit the appeals that go before the non-customary courts.¹⁴⁴

Secondly, courts make their awards based on the facts accepted and the law as it is applicable thereto and there has to be a winner and a loser.¹⁴⁵ Conversely, Customary courts generally perceives the end of justice differently, where the aim is the restoration of social equilibrium which had been disturbed by the offensive conduct (Retributive justice).¹⁴⁶

Thirdly, procedures in the chiefs' court are simple and as a result, most disputes are settled in a day and the verdict is announced, as opposed to courts who face backlog of cases as a major challenge.¹⁴⁷

Fourthly, cases of matters arising from matters of customary nature arising from witchcraft, magic, hexing, taboo will be painfully difficult if not literally impossible to resolve in the formal portals of justice administration. Hence, the use of modern courts of law have not resulted in the disappearance of traditional courts.¹⁴⁸

Fifthly, the chief's courts are founded on the principle of restoration unlike the modern legal systems allowing both parties to actively participate in defining the dispute, the resolution of the conflict and the guiding principle of the traditional court is the vindication of the victim, while holding the offender is held accountable while attempting to reconcile the victim with the offender.¹⁴⁹

Sixthly, the criminal and civil jurisdiction of Customary Courts is well defined in Botswana. In Botswana, the jurisdiction of traditional leaders is restricted to less severe cases,¹⁵⁰ excluding serious criminal matters such as murder or complex civil cases like insolvency.¹⁵¹ More generally, the civil jurisdiction is limited to matters and causes which, according to the

¹⁴³ Baillie Report of a Territorial Survey made of the Customary court ,1969, 13.

¹⁴⁴ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004,186.

¹⁴⁵ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 26.

¹⁴⁶ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 26.

¹⁴⁷ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 26.

¹⁴⁸ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 27.

¹⁴⁹ Dzivenu S, 'The Politics of Inclusion and Exclusion of Traditional Authorities in Africa: Chiefs and Justice Administration in Botswana and Ghana' 2 Political Perspectives 1, 2008, 10.

¹⁵⁰ Section 12, Customary Courts Act (No. 7 of 1966).

¹⁵¹ Section 11, Customary Courts Act (No. 7 of 1966).

Customary Courts Act, the claim or value of the matter in dispute does not exceed the maximum amount set out in the warrant creating that particular customary court.¹⁵² This distinction ensures that customary courts focus on minor disputes while more significant cases are reserved for the formal judiciary.

4.2.2 Cons of integration

Firstly, customary courts in Botswana are patriarchal in nature limiting access of women hence, compromising the efficient administration of justice.¹⁵³

Secondly, the 1969 report on customary courts pointed out that in some of these courts the rights of the accused to defend himself fully were sometimes curtailed on the ground of "contempt" or regarded as attempts "to waste the court's time," and that acquittals were rare.¹⁵⁴

Thirdly, the Customary Courts Act,¹⁵⁵ gives the minister power in establishing these courts by warrant to define their jurisdiction and although the courts have been in existence for more than a decade, no warrants establishing them have ever been issued hence, questions about the legal basis of their existence are raised.¹⁵⁶ The second being that section 41(1) and (2) of the Customary Court Act offers the Customary Court of Appeal the power to hear appeals from both lower courts but it has to re-hear the matter and does not solely rely on the records of the lower courts.¹⁵⁷ The third being, the anomalies in the manner in which judges are appointed to this court provided under Section 40(2) and (3) of the Customary Courts Act which gives the minister power to appoint the judges as well as their "alternates" while not specifying what qualifications are required for appointment nor does it oblige the minister to consult anyone or anybody before making his appointments.¹⁵⁸

Fourthly, there is too much uncertainty over the nature and operation of the Customary Court of Appeal when it comes to the qualification for the appointment of its judges and lack of a consultation mechanism. Possible satisfactory solutions will be to define clearly the status of these statutorily created customary court judges, the qualification for their appointment and a consultation mechanism, probably involving the House of Chiefs.¹⁵⁹ The worrying question that this poses is whether these courts, manned as they are by persons with no formal legal training, can adequately dispense criminal justice.¹⁶⁰

¹⁵² Section 10 (1) (c), Customary Courts Act (No. 7 of 1966).

¹⁵³ Makhari M. R., "Legal history of the reform of traditional courts in South Africa: insights from Botswana and the Kingdom of eSwatini," Unpublished PhD thesis, University of North-West, South Africa, 2021, 207.

¹⁵⁴ Bennett Sourcebook of African Customary Law for Southern Africa, 1991, 5-6.

¹⁵⁵ Section 40, Customary Courts Act (No.7 of 1966).

¹⁵⁶ Republic of Botswana Report of the Presidential Commission on the judiciary, 1997, 71.

¹⁵⁷ Merapelo v the state, 1985.

¹⁵⁸ Republic of Botswana Report of the Presidential Commission on the judiciary, 1997, 71-73.

¹⁵⁹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 188.

¹⁶⁰ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 181.

Fifthly, the Customary Courts Act prohibits legal representation.¹⁶¹ The same goes for courts taking appeals directly from Customary courts, except with the permission of the courts to which the appeals have been taken. There is a need to consider such a possibility with respect to the Customary Court of Appeal as well as the Urban courts which, as we have seen, are essentially creatures of statutory law.¹⁶²

Sixthly, on the application of Customary law, which is the foundation of Customary courts, there has been a problem of ascertaining whether a particular rule has changed, and if so, what it has changed to.¹⁶³ This is due to the introduction of money, cash cropping and industrial activities which has led to the changing evolution of our needs.¹⁶⁴ The problems that may arise when there is uncertainty over the applicable rule of customary law arose in *Kweneng Land Board v. Kabelo Matlho and Pheto Motlhaban*,¹⁶⁵ where the Court of Appeal had to ascertain whether or not Customary Law prohibits the sale or transfer of traditional land by private individuals could have changed, and if so, how to determine what it could have changed to. By a majority of two to one, and on the premise that Customary Law was not static but has continued developing to meet societal needs, it was held that the contested rule had changed.

The decision provoked a lot of adverse criticism on the various philosophical perspectives on the nature of Customary Law.¹⁶⁶ The difference lay in interpretation of Customary Law Act where the majority saw the law as a developing living law that should be adjusted to reflect the changing circumstances, the dissenting judge on the other hand was of the opinion, “for a change in a rule of Customary Law to be established credible evidence must be provided by individuals of integrity who don’t have a stake in the final decision to be given.”¹⁶⁷

Still on the evolving nature of Customary Law, Innes CJ pointed out in *O’Callaghan NO vs Chaplin*:

*“It is the duty of a court ... so to administer a living system of law as to ensure without the sacrifice of fundamental principles that it shall adapt itself to the changing conditions of the time. And it may be necessary sometimes to modify, or even to discard, doctrines which have become outworn.”*¹⁶⁸

Section 7 also has a weakness as it makes minimal provision for the parties' participation in processes of ascertaining a contested rule of customary law.¹⁶⁹ For example, section 7(2) gives the courts the power to determine the law based on their own knowledge and without requiring

¹⁶¹ Section 31, Customary Courts Act (No. 7 of 1966).

¹⁶² Manga CF, ‘Customary courts and traditional justice in Botswana: present challenges and future perspectives’ 15 Stellenbosch Law Review 1, 2004, 168,189.

¹⁶³ Manga CF, ‘Customary courts and traditional justice in Botswana: present challenges and future perspectives’ 15 Stellenbosch Law Review 1, 2004, 182.

¹⁶⁴ Manga CF, ‘Customary courts and traditional justice in Botswana: present challenges and future perspectives’ 15 Stellenbosch Law Review 1, 2004, 182.

¹⁶⁵ 1992 BLR 292

¹⁶⁶ Clement N, ‘Land Problems in some Periurban villages in Botswana and Problems of Conception Description and Transformation of ‘Tribal’ Land Tenure’ Journal of African Law, 1992, 167.

¹⁶⁷ Section 7, Customary Law Act (No. 51 of 1969).

¹⁶⁸ 1927 AD 310 327.

¹⁶⁹ Manga CF, ‘Customary courts and traditional justice in Botswana: present challenges and future perspectives’ 15 Stellenbosch Law Review 1, 2004, 184.

proof of the law through evidence.¹⁷⁰ The court is only expected to resort to other means prescribed in the Act in cases of doubt. Additionally, the Act also permits the court to consider all the submissions made by the parties, but it has discretion to decide whose opinions it wants to consult hence, it could refuse to hear a witness offered by an opposing party. The Act instead should have required the court to evaluate evidence tendered by the parties and limit the court's discretion to determining whose opinions are to be heard.¹⁷¹

4.3 Kenya's approach to the recognition of TJS and its pros and cons

In Kenya just like in Botswana people in rural areas as a first recourse look to Customary law to settle their disputes.¹⁷² Unlike Botswana where the customary courts have literally been coopted within the formal court system Kenya follows a different path just like most African states.¹⁷³ Where the formal justice systems operate alongside the informal ones unlike in most places the two systems coexist without acknowledging each other.¹⁷⁴ This lack of formal coordination highlights the challenge of blending traditional practices with formal legal system in a way that enhances access to justice for all as would be expounded on below.

4.3.1 Pros

Firstly, there is growing dependence on TDRMs partly due too lack of trust in the judiciary and the high cost of court procedures and the general inability to afford advocates' fees.¹⁷⁵

Secondly, litigation is inherently uncertain as parties to a dispute have little control over the proceeding and the final ruling. In contrast, facilitated non adversarial dispute resolution empowers the parties to be in control of the process hence offering greater confidence that a mutually agreed solution will be reached.¹⁷⁶

Thirdly, TJS are often more accessible to the marginalized communities, and it often offers culturally relevant remedies as a result they serve as the cornerstone for resolving dispute for most populations, with TJS resolving between 80 and 90 percent of the disputes.¹⁷⁷

¹⁷⁰ Section 7(2), Customary Law Act, (No.51 of 1969).

¹⁷¹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004,185.

¹⁷² Wanende E.O, 'Assessing the role of Traditional Justice Systems in resolution of environmental conflicts in Kenya' Unpublished, Kenya, 2013, 40.

¹⁷³ Reform International and Bluhm Legal Clinic, Access to Justice in Africa and Beyond: Making the Rule of Law a Reality, Google Books Edition, Penal Reform International, Northwestern University School of Law, 2013, 22.

¹⁷⁴ Wanende E.O, 'Assessing the role of Traditional Justice Systems in resolution of environmental conflicts in Kenya' Unpublished, University of Nairobi, Kenya, 2013, 40.

¹⁷⁵ Ruto P, 'Conflict Management in Kenya: Towards Policy and Strategy Formulation' Practical Action, 2006, 9.

¹⁷⁶ Boege V, 'Traditional Approaches to Conflict Transformation — Potentials and Limits' Berghof Research Centre for Constructive Conflict Management, 2013, accessed at <http://www.berghof-handbook.net> on 22nd January 2013.

¹⁷⁷ FIDA Kenya, The Peoples Version, Informal Justice System simplified guide ,2011.

Fourthly, Customary Law is rooted on community values and taboos making the rulings of informal court a direct manifestation of the cultural norms reinforced by a strong belief in curses.¹⁷⁸

Fifthly, the lack of effective enforcement mechanisms diminishes the relevance of TJS as there isn't any prescribed system of enforcing rulings other than curses.¹⁷⁹ Hence, due to this inadequacy the rulings rely primarily on social pressure.¹⁸⁰ Additionally, the absence of community law enforcement to implement this ruling has weakened the effectiveness of TJS.¹⁸¹

However, to address issues of non-compliance, Kenyan courts have adopted a Recognition and Enforcement model, which is the current practice of Kenyan Courts, where the Court recognizes an award or decision from an AJS Mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reasons.¹⁸²

4.3.2 Cons

Firstly, a major challenge with Kenya's approach is the potential for inconsistent outcomes, which can undermine the legitimacy and authority of Traditional Justice Systems (TJS). This is evident in the *Kamilinchui* case,¹⁸³ that was referred to in Chapter 2 where the court failed to adopt the Njuri Ncheke's decision as a consent judgment under Article 159(2)(c) of the Constitution of Kenya, asserting the matter was *res judicata* and that the Njuri Ncheke panel could not overrule the court's previous decision. This highlights a practical situation where there is a potential for conflicting rulings between the courts and TJS, undermining the consistency and reliability of legal outcomes. In this case, the TJS ruling was subordinated, rendering it inferior to decisions of formal court's.

Secondly, Customary Law has no documented reference, this has attributed to obstructing the operations of Customary courts as it poses a challenge to the reference of previous cases for guidance while handing down a sentence and it is also challenging to transmit on customary knowledge and practices to the upcoming generations.¹⁸⁴

Thirdly, is on the effectiveness of traditional conflict resolution mechanism that has been significantly eroded and marginalized through civilization and development initiatives hence, regarded as an outdated mode of dispute resolution. Additionally, the establishment of modern

¹⁷⁸ Wanende E.O, 'Assessing the role of Traditional Justice Systems in resolution of environmental conflicts in Kenya' Unpublished, University of Nairobi, Kenya, 2013, 47.

¹⁷⁹ Ruto P, *Indigenous Democracy: Traditional Conflict Resolution Mechanisms*, Pokot, Turkana, Samburu, and Marakwet, ITDG-EA, January 2004, 4.

¹⁸⁰ FIDA Kenya, *The People's Version: Informal Justice System Simplified Guide*, 2011.

¹⁸¹ Ruto P, *Indigenous Democracy: Traditional Conflict Resolution Mechanisms*, Pokot, Turkana, Samburu, and Marakwet, ITDG-EA, January 2004, 4.

¹⁸² *Alternative Justice System Framework Policy*, 9.

¹⁸³ *Kamilinchui & 5 others v Kimbui & another (Miscellaneous Application E007 of 2023)*.

¹⁸⁴ Wanende E.O, 'Assessing the role of Traditional Justice Systems in resolution of environmental conflicts in Kenya' Unpublished, University of Nairobi, Kenya, 2013, 48.

courts system has significantly contributed to the marginalization of traditional conflict management systems.¹⁸⁵

Fourthly, the Recognition and Enforcement model as expounded on above does not promote the growth of customary law as the judges in reviewing TJS decision often lack expertise customary law. This is why Kariuki and Enyinna, advocate for the Direct Enforcement model where for customary law to be regarded as equal to common law in Kenya, it is important that outcomes of AAJS are enforceable without the judicial sanction that is at the heart of the ‘Deference’ and the ‘Recognition and Enforcement’ models recognised by the AJS Framework Policy.¹⁸⁶ Though this supervision by courts seems to suggest TJS are inferior or to an extent repugnant to justice.

Fifthly, the lack of clarity on the jurisdiction of TJS in Kenya is a great hinderance to the effective working of TJS. Although the repugnancy clause,¹⁸⁷ touches on the issue of jurisdiction, it falls short of explicitly defining the jurisdiction of TJS and without a structured framework, there is ambiguity about which cases can be handled by TJS. Kenya just like Botswana also limits the jurisdiction of TJS to civil cases only that it doesn’t specify the intensity of the civil crime. However, as discussed in Chapter Two, this approach has proven ineffective because even in civil matters, customary law is heavily subordinated to statutory law.¹⁸⁸ Hence, Kenya’s approach towards the jurisdiction of TJS tends to marginalize them even in this limited jurisdiction accorded to it by the repugnancy clause as statutory law dominates even in areas traditionally governed by custom, overall limiting the relevance of traditional justice systems.

4.4 Is integrating TJS into the formal legal system the goal?

From the above it is evident that traditional methods of conflict resolution differ from one society to another, influenced by history, culture, and customs. Hence, there isn’t a universally applicable concept of traditional conflict transformation traditional approaches are tailored to specific contexts.¹⁸⁹ One important aspect of the integration of customary courts which the research focuses on is the introduction of a Customary Court of Appeal in Botswana. The Customary Courts Law of 1986 in Botswana allowed litigants to appeal decisions from customary courts to a newly created Customary Court of Appeals and magistrate courts. It is important to note that the ‘Recognition and Enforcement’ model seems closest to the current practice in Botswana courts. The Recognition and Enforcement model is where the Court

¹⁸⁵ Ruto P, Indigenous Democracy: Traditional Conflict Resolution Mechanisms, Pokot, Turkana, Samburu, and Marakwet, ITDG-EA, January 2004, 4.

¹⁸⁶ Kariuki. F and Enyinna S. N, "Reflections on the “Autonomous Alternative Justice System Institutions” in Kenya’s Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 75.

¹⁸⁷ Sec 3(2), Judicature Act, cap 8, Laws of Kenya, (2016 revised ed).

¹⁸⁸ *Kamilinchui & 5 others v Kimbui & another* (Miscellaneous Application E007 of 2023).

¹⁸⁹ Boege V, ‘Traditional Approaches to Conflict Transformation — Potentials and Limits’ Berghof Research Centre for Constructive Conflict Management, 2013, accessed at <http://www.berghof-handbook.net> on 22nd January 2013.

recognizes an award from an AJS Mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reason.¹⁹⁰

Kenya on the other hand lacks a separate appeal chain for customary matters, which would strengthen the legitimacy of traditional courts and ensure fair oversight without overwhelming the formal judicial system. The big question that comes up is who should listen to the appeals? In Botswana the minister has appointed as judges people who, at one time or another, have been members of a lower or higher customary court.¹⁹¹ Whilst those who preside over the lower and higher customary courts are traditional rulers who in most cases are knowledgeable in the customs of their area, although as we pointed out earlier this cannot always be guaranteed, there is no legal obligation on the minister to appoint such.¹⁹² The appointments by the minister as elaborated above shows that local traditional leaders are formally recognized and involved in decision-making, especially regarding customary law and dispute resolution. Another good example is in the establishment of the House of Chiefs in Botswana, following independence, which provided a formal platform for traditional leaders (Kigosi) to participate in legislative processes. Hence, a possible solution could be having an appointment criterion for Customary Appeals Judges which is overseen by a hybrid appeals panel comprised of customary experts and legal practitioners. This will somehow resemble the Judicial Service Commission. But when it comes down to who presides over the appeals a similar approach to Botswana is what the research proposes, which is traditional rulers who in most cases are knowledgeable in the customs should be given priority.

Customary Courts just as the name suggests are founded on Customary Law. Tying this to the discussion on jurisdiction, currently several statutes have restricted the application of Customary law in numerous areas previously governed by its rules and this is evident in Section 10(8) that was referred to above on statutory offences. Although this aligns with the principle of legality that ensures there is certainty in the administration of criminal law, exempts customary criminal law from application, as it belongs to the oral tradition.¹⁹³ Consequently in Kenya, Customary Law is subjected to inclusive subordination as expounded on in Chapter Two and this has a negative impact on traditional justice systems as they similarly continue diminishing in their effectiveness and autonomy

Hence, introducing a Customary Court of Appeal will lead to development of Customary Law jurisprudence through appointment of Customary Law experts to preside over disputes and the model that can facilitate this is the Direct Enforcement model, which basically recognises

¹⁹⁰ Kariuki. F and Enyinna S. N, "Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 75.

¹⁹¹ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 *Stellenbosch Law Review* 1, 2004, 168, 187.

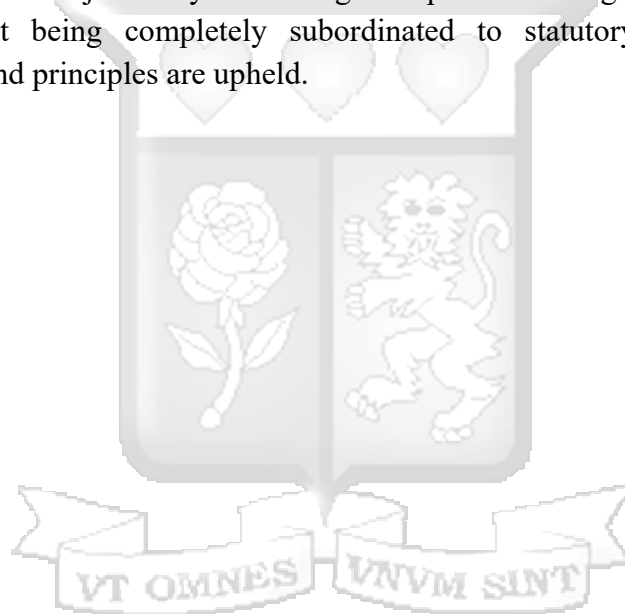
¹⁹² Republic of Botswana Report of the Presidential Commission on the judiciary ,1997, 71.

¹⁹³ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 *Stellenbosch Law Review* 1, 2004, 168, 172.

customary law as an equal source of law like common law in Kenya, hence the outcomes of AJS become enforceable without the judicial sanction.¹⁹⁴

4.5 Conclusion

In summary, Botswana's Customary Court of Appeal and its recognition of Customary Law as an equal authority alongside Common Law offer valuable lessons for Kenya. Through the introduction of an Appeals process Kenya can enhance access to justice and strengthen legal efficiency. However, these reforms must be done in a way that upholds constitutional principles of fairness, inclusivity especially on safeguarding women's equal rights considering the patriarchal nature of Customary Law. Clear and transparent criteria for appointing customary appeals judges is also essential to ensure accountability and the effective administration of justice. On the jurisdiction of TJS, a possible solution could be adopting similar framework to Botswana, where traditional justice systems are given specific and legally recognized roles in civil matters without being completely subordinated to statutory law, provided that constitutional rights and principles are upheld.



¹⁹⁴ Kariuki. F and Enyinna S. N, "Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks." *RiA Recht in Afrika| Law in Africa| Droit en Afrique* 26.1, 2023, 75.

CHAPTER FIVE

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter constitutes the summary of findings, recommendations and the conclusion.

5.2 Summary of Findings

This research set out to investigate the following objectives:

1. Examine the current legal and institutional framework governing TJS with a particular focus on how Kenyan courts have historically and contemporarily addressed the interplay between customary law and statutory law.
2. A comparative study between Kenya and other jurisdictions that have successfully integrated traditional justice systems into the formal legal framework.
3. To explore how Kenya can adapt the practices of these jurisdictions to effectively integrate traditional justice systems into its formal legal framework.

The findings are aligned with the objectives listed above:

5.2.1 The double impact of the inclusive subordination of Customary law on TJS

Examination of Kenya's legal and institutional frameworks governing TJS reveals a persistent struggle for legitimacy amid prevailing colonial legacies, this is despite the constitutional acknowledgment of customary law and the National Policy on Alternative Justice Systems advocating for its integration, the continued reliance on Western-centric standards for justice and morality which in turn compromises their effectiveness.

The Constitution of Kenya 2010,¹⁹⁵ formally recognises TJS; however, in practice TJS are subordinated to the formal courts. This is brought about by the application of the constitutionality test and the repugnancy test that leads to the inclusive subordination of African Customary Law limiting its scope and legitimacy. Consequently, this inclusive subordination tends to have a negative impact on the institutional framework supporting TJS as this hierarchical relationship constrains its capacity to operate effectively in administering justice. Additionally, the courts have added in this subordination by dominantly adopting a literal approach in the interpretation of Article 159, further undermining the effectiveness of TJS.

5.2.2 Botswana formal integration of customary courts into its formal legal system

Similar to Kenya, Botswana operates under a system that formally incorporates traditional courts into its judicial framework. Unlike Kenya, Botswana has gone a step further in its recognition of customary courts through the enactment of the Customary Courts Act and the introduction of the Customary Court of Appeal to strengthen the role of Customary Law by introducing a Customary Court of Appeal that is purely a statutory body. Although Botswana's success in maintaining the role of its customary courts is attributed to its colonial history, where

¹⁹⁵ Article 159(2) (c), Constitution of Kenya, 2010.

the colonial powers at the time preserved these courts rather than discarding them as was the case in many African countries, like Kenya.

5.2.3 Bridging justice through the introduction of a Customary Appellate court

Kenya could borrow from Botswana's approach through the introduction of a Customary Court of Appeal that acts as a bridge between the formal court systems and TJS. This approach offers significant advantages as compared to Kenya's current approach as it generally incorporates the Direct Enforcement model that will in turn lead to the growth of customary law as an equal source of law like common law ultimately leading to the formal recognition and institutionalization of TJS. Additionally, borrowing from Botswana's framework would provide a clear delineation of jurisdiction ensuring that TJS operate within a well-defined legal framework.

5.3 Recommendations

Considering the findings, the study makes the following recommendations:

5.3.1 Recommendations to the Courts

5.3.1.2 Adopting a liberal interpretation of Article 159 in applying the repugnancy and constitutionality tests.

By incorporating a more liberal approach in the interpretation of Article 159 just as was done in the Mohamed Abdow case. This approach will allow the application of the repugnancy test by the courts with sensitivity to cultural diversity making sure that it is not used as a tool that advocates for the inclusive subordination of Customary Law but a tool that harmonizes customary law with constitutional values, hence meeting the Constitutionality test.

5.3.2 Recommendations to parliament

5.3.2.1 Introduction of a Traditional Justice Systems Act

This Traditional Justice System Act resembles the Customary Courts Act of Botswana and specifically deals with the scope and jurisdiction of TJS. This act will define the jurisdiction of Traditional Justice Systems limiting the scope to minor civil and criminal offences in the Traditional Justice Systems Act.

5.3.2.2 Introduction of a Customary Court of Appeal

Secondly, introduce a Customary Court of Appeal established by the Traditional Justice Systems Act. In terms of the hierarchy just like Botswana, at the lowest level will be the community customary courts which will be presided over by 'wazee wa kijiji' as they are commonly known, followed by regional customary courts, presided over by chiefs, then the customary court of appeal at the national level presided over by traditional leaders who have

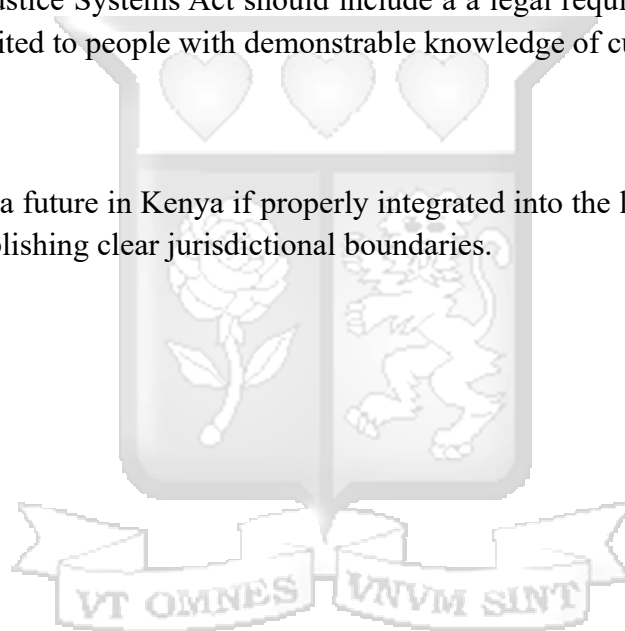
at one point served at the lower levels of the hierarchy. Given Kenya's ethnic diversity regional customary courts and the customary court of appeal should have multi-ethnic panels to avoid bias or mis-informed decisions.

5.3.2.3 Appointment criterion of the presiding judges

Thirdly, on the appointment criterion of the presiding judges, it will resemble Botswana's criterion where the appointed judges are people who, at one time or another, have been members of a lower or higher customary court.¹⁹⁶ Whilst those who preside over the lower and higher customary courts are traditional rulers who in most cases are knowledgeable in the customs of their area, although as we pointed out earlier this cannot always be guaranteed, there is no legal obligation on the minister to appoint such.¹⁹⁷ However, as stated above this expertise is not always guaranteed and sometimes it may be influenced by politics. To address this, the Traditional Justice Systems Act should include a legal requirement compelling the appointment to be limited to people with demonstrable knowledge of customary law.

5.4 Conclusion

In a nutshell, TJS has a future in Kenya if properly integrated into the legal system enhancing its legitimacy by establishing clear jurisdictional boundaries.



¹⁹⁶ Manga CF, 'Customary courts and traditional justice in Botswana: present challenges and future perspectives' 15 Stellenbosch Law Review 1, 2004, 168, 187.

¹⁹⁷ Republic of Botswana Report of the Presidential Commission on the judiciary, 1997, 71.

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