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THE SUITABILITY OF TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN ADJUDICATING CRIMINAL MATTERS IN KENYA

BY

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REGISTRATION NUMBER 072592

A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE

BACHELOR OF LAWS DEGREE

AT THE

STRATHMORE UNIVERSITY LAW SCHOOL

MARCH 2016

Strathmore University
Law School

DECLARATION

I, **NJOROGE WAIRIMU JACQUELINE,** declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLB Bachelor of Laws Degree.

Signature: _____ Date: 23rd March 2016.

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

Signature: _____ Date: 22nd April 2016

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DEDICATION

I dedicate this work to my parents who have loved me unconditionally and who have taught me to work hard in order to achieve the things I aspire to achieve. I also dedicate this work to my brother Robert and to my grandmother Jacinta. I am truly thankful for having you in my life. Thank you for being a constant source of support and encouragement during this period.

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ACKNOWLEDGMENTS

First and foremost I would like to thank the Almighty God for giving me the strength to undertake this project. His continued grace and blessings enabled me to produce this work.

Secondly, among countless people to whose contributions in various ways the existence of this work is attributable, the following deserve special mention:

I owe a special gratitude to my supervisor for her patience in guiding me and providing me with constructive ideas.

I thank Strathmore University, in particular Strathmore Law School, for providing me with this unique opportunity to pen on a topic of my choice.

I also thank the staff of the Strathmore University Writing Centre for assisting me in establishing clarity in my work. May God bless you all.

ABSTRACT

The existence of ethnic groups in a society results in the employment of justice systems that are uniquely designed to fit the culture of such a people. These systems tend to be informal in nature as they apply only to the people in that ethnic grouping. In most cases, they exist within an already acknowledged formal justice system. One that is structurally, procedurally and substantively different. However, the two systems are similar but not identical. Similar because they purpose to achieve justice within a transparent system, but not identical because they employ different techniques in order to achieve that justice.

This paper examines the position of traditional dispute resolution mechanisms (TDRMs) in the context of criminal matters following the promulgation of the Constitution of Kenya, 2010. The paper argues that although the traditional systems are lacking in some regards, they act as a complementary tool to the formal justice system.

By interrogating the traditional justice systems in other states, the paper demonstrates that traditional dispute resolution mechanisms are ideal for adjudicating criminal matters in Kenya. This is against the background of the backlog of cases in the courts as well as the procedural technicalities that have rendered the formal criminal justice system to some extent ineffective.

The paper suggests that the role of the State is important in order to create a complementary cord between the formal and the traditional systems. The ways in which the State can effectuate this are explained in the paper. This is removed from the situation of traditional systems coupled with the success of other systems implemented in the world.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CJS	Community Justice System
CPC	Criminal Procedure Code
DPP	Director of Public Prosecution
FGM	Female Genital Mutilation
NWFP	North-West Frontier Province
TDRMs	Traditional Dispute Resolution Mechanisms
TJS	Traditional Justice Systems

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TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION AND GENERAL STATEMENT OF THE PROBLEM

1.1 Introduction

"Just because we cannot see clearly the end of the road that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims[1]." The journey of this paper; the examination of traditional dispute resolution mechanisms in the context of criminal matters, will lead us to the end of the road; the effective operation of these traditional mechanisms in Kenya's criminal justice system.

The concept of traditional dispute resolution mechanisms (TDRMs) has its beginning in the formation of groupings in a society that came to be known as communities. The formation of these communities is heavily reliant on the characteristics that are similar or common to these individuals who form a particular community. Historically, Kenya's communities have taken to an ethnic separation. Where the people of a community, for example the Kamba community, speak the same language; *kikamba.* That language acts as the similar or unifying characteristic.

In Kenya, there are forty two tribes[2]. Consequently, there are forty two ethnic communities. These communities each have their own way of operation. A system, if I may, that allows them to exist within themselves. One that preserves their culture while promoting peace and order. An example is that of the Meru community. The Meru have a council of elders known as the *Njuri Nceke*[3]. The main role of the council is to maintain harmony and facilitate justice[4]. They handle a wide array of matters such as conducting weddings to adjudicating criminal matters.

The *Njuri Nceke* was composed of men. They were elders who were elderly (of old age) and had undergone the initiation process of taking an oath; *lamala*[5], and completing three further stages.

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[1] Robert F Kennedy Victoria, Parliamentary Debates, *Legislative Assembly*, 16 November 2004, 1549.
[2] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 17 October 2015.
[3] The term *Njuri Nceke* means "a select council". Kang'ong'oi B, 'Visit to Holy House of the Meru Elders', *DAILY NATION,* June 20 (2005), 4.
[4] *Ibid.*
[5] *Ibid.*

This initiation process gave the elders a sense of belonging[6]. They worked with age groups to maintain order in the community.

The council adjudicated cases where there was harm occasioned against a victim who then sought justice against the offender[7]. The ultimate aim was to promote reconciliation. Parties could reach a settlement on their own, with recourse to the *Njuri Nceke* only where they disagreed. Other communities that had a similar system were the *Kokwo* of the Pokot[8] and the *Nabo* of the Samburu and Marakwet[9].

From this, it is clear that communities in Kenya have a system of governance that the people of that community understands and abides by. The systems have certain characteristics that make the people trust them. These systems are preferred because they incorruptible, the proceedings and language are familiar, they are accessible at all times, affordable and they utilizes local resources[10]. However, to the society at large, these system have various characteristics that do not conform to what society has put as standards of coexistence; the fact that they are patriarchal in nature[11] and that some of the practices are repugnant to justice and morality.

The patriarchal nature of these systems emanates from the fact that, like in the *Njuri Nceke,* only men were allowed to be part of the council of elders. Men were given a higher or better position than the woman. Some of the practices that were deemed as an affront to justice and morality included female genital mutilation. This was the position of the High Court in *Katet Nchoe and Nalangu Sekut v. R*[12], where the Court held that the Maasai custom of circumcising females was repugnant to justice and morality because the procedure is painful and produces no positive results. A repugnant custom is defined under the Constitution of Ghana[13] as those that which dehumanize or are injurious to the physical and mental well-being of a person. Another repugnant practice was

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[6] Tribal Law Journal Vol. 10 (2009-2010).
[7] Kinyanjui S. 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' from http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf on 11 August 2015.
[8] Martin K, Rabar B, Pkalya R, Adan M and Masinde I, 'Indigenous Democracy: Traditional Conflict Resolution Mechanism among the Pokot, Turkana, Samburu and Marakwet,' *ITDE-East Africa, Nairobi,* (2004), v-vi.
[9] *Ibid.*
[10] FIDA Kenya, 'Report on traditional justice systems in Kenya: A Study of Communities in Coast Province, Kenya, 10'.
[11] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 7 October 2015.
[12] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.
[13] Article 26(2) *Constitution of Ghana* (1992).

the fact that women in abusive marriages were expected to return to their husbands despite the abuse[14].

It is for these two reasons that Kenya has seen three different eras. The first beginning from colonialism through to 1967. In this era, traditional (customary) mechanisms were used by the council of elders, the African native tribunals and even African courts, and in very specific circumstances were the people tried in actual formal courts[15]. The second era commenced in 1967 running up to 2010. This was as a result of the promulgation of the first Constitution of Kenya in 1963. Following this promulgation, Parliament enacted two legislation in 1967 to clarify the position of customary law. Customary law was limited to matters of land, intestacy, family and marriage were left to customary law[16]. The Judicature Act went further to explain that customary law was limited to civil cases[17].

The third era established a new dispensation. The promulgation of the Constitution of Kenya provided redefined the position of customary law. Article 159 (2) states that "*In exercising judicial authority, the courts and tribunals shall be guided by the following principles— ...(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).* Clause 3 explains that the use of these TDRMs shall not contravene the Bill of Rights, be repugnant to justice and morality or be inconsistent with this Constitution or any written law[18].

This Article permits courts and tribunals to apply TDRMs without placing any constraints. There is no mention of whether they should be applied to only civil matters. This can easily be construed that TDRMs can also be used in the adjudication of criminal matters. This is the position that the courts have recently taken to. In *Republic v Mohamed Abdow Mohamed*[19], a murder case, the court

[14] FIDA Kenya, 'Report on traditional justice systems in Kenya, 10'.
[15] Kariuki, F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' from http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/TDRM%20and%20Jurisprudence.pdf on 12 July 2015.
[16] Section 2, *Magistrate Courts Act* (1967).
[17] Section 3(2), *Judicature Act* (No. 16 of 1967).
[18] Article 159(3), *Constitution of Kenya* (2010).
[19] [2013] eKLR.

accepted a settlement of the payment of camels, goats, and performed rituals to the family of the deceased. The rituals were a form of blood money to the deceased family.

Although courts have taken to TDRMs in criminal matters, there are a few challenges that come with it. The first being the aim of these two systems; the formal and the informal justice systems. The aim of many formal criminal justice systems is deterrence with the end being retributive justice. On the other hand, TDRMs seek to employ reconciliation mechanisms with an end to restorative justice[20]. The second challenge lies in the enforcement of punishment. Disputes adjudicated at the community level tend to lean on material compensation[21], but formal systems have a wider variety of punishments intended to fit the crime.

Based on the historical undertones of the people of Kenya, this paper contends that traditional dispute resolution mechanisms are a more effective means by which people at the grassroots level can access criminal justice. This means that both the formal and traditional systems must have an equal understanding of the severity of certain crimes, which will translate to punishments of similar degree, resulting in a similar if not identical form of justice.

1.2 Statement of the Problem

A legal system, whether formal or informal, exists to achieve justice among other things. The achievement of this justice is reliant on the establishment of such a right; the right to justice. This right is important especially for the victims of crimes committed. They know that if a crime is committed, they can and should get justice. This right is enshrined in the Constitution of Kenya as the right of access to justice where "*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*"[22]

[20] http://www.cscsb.org/restorative_justice/retribution_vs_restoration.html on 4 April 2015.
[21] https://www.griffith.edu.au/__data/assets/pdf_file/0020/220475/Reparation-and-restoration-as-of-1-Feb-2011.pdf on 18 November 2015.
[22] Article 48, *Constitution of Kenya*, (2010).

Access to justice is defined in the case of *Dry Associates Limited v Capital Markets Authority & anor*[23]. The court was of the view that, access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.[24]

Traditional justice systems are a means of promoting this right. They are an effective means of achieving justice at the grassroots level. Their dynamic nature indicates that they are capable of changing in order to conform to a set standard or rules[25]. The problem tackled by this paper is that legal pluralism can render one system ineffective where the existing systems are largely different instead of complementary. Thus, this paper investigates the suitability of TDRMs in Kenya in a bid to establish that different justice systems can exist in a manner that maximizes their ability to support and enrich each other, rather than to undermine and conflict with each other.

1.3 Justification of the Study

The new dispensation that was created by the promulgation of the Constitution of Kenya 2010 gave rights to two criminal justice systems. The already existing formal courts, and now, the traditional mechanisms[26]. This means that the two must find a way to coexist in complementarity and the courts are given the mandate to use them where necessary. This is seen in the case of *R v. Lenaas Lenchura*[27], where Emukule J resorted to sentencing a man convicted of murder within the context of Samburu customary law because of the specific facts of that case.

[23] Nairobi Petition No. 358 of 2011, (Unreported).
[24] *Ibid.*
[25] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 17 October 2015.
[26] Article 159(2) & (3), *Constitution of Kenya* (2010).
[27] Criminal Case No. 19 of 2011.

Consequently, this study evaluates the suitability of TDRMs by illuminating upon the aspects of the formal justice system that can be used to strengthen and make them complementary. It further acts as a reference piece for policy makers within the Judiciary and as a guide to the courts and the public, concerning the position of TDRMs in criminal matters. Finally, the study proposes how TDRMs can work to meet the aims of penal laws through legislative and non-legislative options in a way that which will translate to punishments of similar degree, resulting in a similar if not identical form of justice.

1.4 Statement of Objectives

Against this background, the main objective of this study is to assess the suitability of TDRMs in Kenya in the adjudication of criminal matters by -:

1. Evaluating the characteristics and operation of traditional justice systems;
2. Examining how dual legitimacy functions when formal and informal justice systems interact;
3. Interrogating the effect of legislation and excessive State interference on TDRMs; and
4. Exploring whether the of use non-legislative actions strengthens TDRMs.

1.5 Research Question

This paper seeks to evaluate the suitability of TDRMs in adjudicating criminal matters in Kenya. In an attempt to critique the re-emergence of this practice, the following questions shall be answered -:

1. Can traditional mechanisms can be effective without the involvement of the State?
2. How the courts have taken to this re-introduction of TDRMs?
3. How can the weaknesses of one system be complemented by the strengths of another? and
4. Are there legislative and non-legislative mechanisms that can be employed by the courts to strengthen traditional justice systems?

1.6 Scope and Limitations of the Study

The suitability of TDRMs can be interrogated from many viewpoints. This paper is limited to critiquing the strengths and weaknesses of TDRMs when pitted against the formal courts. The paper then examines the legal framework within which the criminal justice system of Kenya functions following the re-introduction and the recent use of TDRMs to achieve criminal justice in Kenya. A comparative analysis is made against the *Gacaca courts in Rwanda* and the traditional systems in Pakistan, with a deeper focus on the ways in which this informal system can complement the courts.

1.8 Chapter Summary

This paper is divided into five parts. Chapter 1 gives an introduction to the topic of study of the dissertation. Chapter 2 discusses the theories of legal pluralism and illuminates on the theoretical framework and methodology upon which the study is premised. Chapter 3 explores the legal framework within which TDRMs function. Chapter 4 lays out some fallacies, challenges and opportunities created by TDRMs in the realm of criminal justice. Chapter 5 engages in a comparative analysis with Rwanda and Ethiopia, fellow East African countries, on the application of TDRMs in a formal criminal justice system. Chapter 6 proposes ways of countering the deficiencies of TDRMs and makes recommendations on the reforms necessary so as to cause a complementary interaction between TDRMs and penal laws.

CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 Theoretical Framework

The suitability of traditional dispute resolution mechanisms can be analysed from the concepts of crime and criminal justice. Within these concepts, there are two theories that undergird a criminal justice system; the theory of legal pluralism[28] and the classical theory of crime[29].

The theory of legal pluralism seeks to explain one thing. That there can be more than one legal orders in a society, and these legal orders can coexist in different capacities[30]. In this paper, the two legal orders are the formal (courts) and the informal (TDRMs). Moore[31] defines plural (meaning multiple) legal systems as semi-autonomous social fields with rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance'[32].

This definition posits two things. Firstly, that informal systems exist as semi-autonomous social fields, and that they have a means to induce compliance; such as the council of elders in certain communities. Secondly, that they are set in a larger social matrix; the judiciary, which may interfere either on the request of a community or on its own volition. This is a form of pluralism known as weak legal pluralism. The proponents of weak legal pluralism identify a dominant legal order (formal courts) and subsidiaries (TDRMs). These subsidiaries are considered to have subsumed to the dominant one[33]. This is the case because the formal will dictate the informal in certain regards i.e. ensuring that TDRMs are not repugnant to justice and morality[34].

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[28] Moore S.F, *'Law and social change: the semi-autonomous social field as an appropriate subject of study'*, Law as Process: An anthropological approach, 1978.
[29] Beccaria, C. *'On Crimes and Punishment'*, New York: Bobbs-Merrill, 1963.
[30] Rouland N, 'Legal anthropology', Stanford University Press (1994), 51.
[31] Moore S.F, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', *Law as Process: An anthropological approach*, 1978, 56.
[32] *Ibid.*
[33] Bernstein H, Memorial Lecture, "Normative And Legal Pluralism: A Global Perspective William Twining Lecture In International And Comparative Law" Duke University School Of Law April 7, 2009.
[34] Article 159(3), *Constitution of Kenya* (2010).

In Kenya, the dominant criminal legal order is the courts system. They are considered formal because their structure is laid out within the Constitution[35]. The structure runs from the Supreme Court to the Court of Appeal to the High Court up to the subordinate courts. These courts operate within the limits of the Bill of Rights[36], the Penal Code[37] and the Criminal Procedure Code[38]. These three have acted as the rules of thumb when punishing crimes. They prescribe the laws, the rules and the standards to which the courts should adhere to when adjudicating crimes.

Traditional systems, on the other hand, do not prescribe to any documented rules[39]. The customs of the people dictate the rules, the laws and even the standards to which the "traditional adjudicators" adhere to. By acknowledging TDRMs as a means of resolving disputes, the Constitution of Kenya introduced the theory of legal pluralism, specifically weak legal pluralism. Where the courts shall be the determinants of when to use TDRMs subject to the boundaries of justice and morality, the Bill of Rights[40] and the supremacy of the Constitution[41].

TDRMs exist in a plethora of normative orders, whose hierarchy, although established by the *Grundnorm* (the Constitution), recognize that there are other regulatory and normative orders other than formal law that affect people's lives. As a result, village courts in Agarabi, Papua New Guinea have generated their own set of rules and procedures, as have other village courts[42]. Westermark[43] therefore insists we must not be blind to what Levi-Strauss describes as *bricolage*: 'people's capacity to select bits and pieces of the system's intellectuals to build and recombine them for their own purposes in their own way.'[44]

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[35] Article 162, *Ibid.*
[36] Chapter 4, *Constitution of Kenya* (2010).
[37] Chapter 63 of the Laws of Kenya.
[38] Chapter 75, *Ibid.*
[39] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 23 October 2015.
[40] Article 159 (3), *Constitution of Kenya* (2010).
[41] Article 2, *Ibid.*
[42] http://commission-on-legal-pluralism.com/volumes/19/huber-art.pdf on 30 October 2015.
[43] Westermark G. 1986, 'Court is an arrow: legal pluralism in Papua New Guinea', *Ethnology*, vol. 25, no. 2, p. 131.
[44] *Ibid.*

The acknowldegment of TDRMs in the Kenyan criminal system is an attempt by the law to better accommodate the cultural distinctiveness of indigenous people[45]. However, the challenge posed is that variants of an existing criminal justice system must be complementary to avoid rendering the system ineffective in itself. Therefore, the procedural may be different but the substantive must be similar if not exactly the same. Therefore, although the traditional systems and the courts are autonomous legal orders, since the two will be used at different instances, there must be an established system of compimentarity to avoid a spill into either the courts or the traditional mechanisms.

The second theory that undergirds this paper is the Classical theory of crime. This theory is based on the premise that crimes are committed through free will, and as a result, the punishment should be just and proportionate to the crime[46]. The position of the state in punishing crime is embedded in society's right to punish crime. This right is then transferred to the state.

The existence of variants in a criminal justice system demand the aspect of complementarity to achieve a common end. According to Cesare Beccaria[47], "*For a punishment to attain its end, the evil which it inflicts has only to exceed the advantages derivable from the crime.*"[48] This means that any punishment awarded should neither be excessive nor modest; *it should fit the crime.* To ensure this principle is observed, the persecution of criminal matters should be public. Thus, the position of the state is mandatory.

A criminal justice system must adhere to a threefold criteria:-

1. It must explain the causation of crime and criminal behaviour;
2. It must suggest punishment and preventive measures to suit its ideology; and
3. It must encompass the diversity of its people.

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[45] Svesson T, 'Interlegality, a process for strengthening indigenous peoples' autonomy: the case of the Sami in Norway', *Journal of Legal Pluralism*, vol. 51 (2005), 74.

[46] http://cjonline.uc.edu/resources/news/criminology-schools-of-thought/ on 12 November, 2015.
[47] Beccaria C, '*On Crimes and Punishment*', New York, Bobbs-Merrill, 1963.
[48] *Ibid.*

Thus, whether there are formal and informal variants, they must subscribe to this criteria to achieve the rationale behind the existence of the system; to prevent crime through deterrence. Deterrence seeks to make a potential criminal decide against committing a crime, as the punishment would be too costly. This means that both the formal and traditional systems must have an equal understanding of the severity of certain crimes, which will translate to punishments of similar degree.

The challenge is that traditional justice systems proffer restorative justice with the aim of promoting social cohesiveness, peace and social justice. Thus, their punishments inclined to material compensation. The courts have a wider array of punishments that range from imprisonment to payment of fines because their main aim is deterrence.

In the *Mohammed Abdow case*[49], although the shackles of formality are broken, the use of animals as a punishment for murder does not fit the severity of the effects of murder. The assumptions applicable, for the purpose of this paper, include[50]:-

a) that punishment is necessary to deter crime and the state has the prerogative to administer it;
b) that punishment should fit the crime;
c) that use of the law should be limited and due process rights should be observed; and
d) that each individual is responsible for his or her actions.

The classical school of thought illuminates that it is necessary to distinguish that there are various types of crime; misdemeanours versus felonies[51], and crimes against property versus against the person versus against the state[52]. Ideally, it is almost impossible to have "equal justice" in an unequal society, so the burden falls upon the state to ensure that the variants of the criminal justice system, although different, minimize the possible injustices; *both to the society and the aggrieved.*

[49] [2013] eKLR.
[50] Taylor I, Walton P, and Young J, *'The New Criminology'*, London, Routledge & Kegan Paul, 1973, p. 2.
[51] Cap 75.
[52] https://www.creighton.edu/fileadmin/user/law-school/docs/Crimes_Against_Persons__Property_-_2010.pdf on 16 September 2015.

The role of the state is to act as an autonomous unit and against the interests of the party with the upper hand, which in most cases has proven to be the upper class community. However, the constitution has introduced a new upper hand; that of the criminal. By allowing the *Mohammed Abdow*[53] case to be settled in such a manner, the state has given criminals another way out. One that they themselves can determine, should it be more lucrative to the aggrieved party, at the expense of justice to the society. In that case, the society was not protected from the possibilities of future murders as he was not detained.

From this, it is clear that there needs to be a deeper interaction between the formal and traditional criminal systems. The pitfalls TRDMs when examined through the lens of the classical school of thought include a lack of enquiry into the disabilities that can cause the commission of a crime i.e. insanity, drunkenness *inter alia*; as well as the lack of proper distinction between crimes, thus the application of less than fitting punishments.

2.2 Research Methodology

This paper evaluates suitability of traditional dispute resolution mechanisms to criminal matters in Kenya form a theoretical perspective. The paper subscribes to the Doctrinal Research Methodology[54]. This methodology interrogates legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning. It gives emphasis on analysis of legal rules, principles or doctrines[55]. This paper examines the relationship between TDRMs and the court system, with reference to criminal matters. It explores the limitations presented by TDRMs and examines the existing resource materials, including past related research reports.

This paper relies on both primary and secondary sources of information. The primary sources include the Constitution, statutes, case law and conventions; while the secondary sources would include journals, articles, books, newspapers, and other relevant materials from the internet.

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[53] [2013] eKLR.
[54] Vibhute K and Aynalem F, "Legal Research Methods", Justice and Legal System Research Institute (2009).
[55] *Ibid.*

The secondary information sources are critically perused to determine their usefulness and relevance. Thereafter, the study also examines and undertakes a content analysis of decided cases, and other publications on the interaction between the variants of the criminal system.

that is anchored on the law. This is because a crime cannot be termed as such if it is not deemed to be a crime in the law.

The chapter will conclude with a look at decided cases in Kenya, with the aim of establishing what the stance of the court is with regard to the use of TDRMs in criminal matters.

3.1 The Parties

There are three parties to a criminal matter. The victim of the crime, the perpetrator of the crime, and the adjudicator[63]. Being the protecor of the society, the State is conferred upon the right to prosecute crime by the society and takes the role of the aggrieved. The State retains this position in the formal justice through the office of the Director of Public Prosceution (DPP)[64]. The adjudicator is the magistrate or judge. The perpetrator is the accused.

Traditional justice systems oust the State and the aggrieved party retains their role[65]. The adjudicators are the "traditional judges" i.e. the the council of elders. The perpetrator remains the accused. The question then becomes, when the State is ousted as a party, does the case then become civil in nature? If so, does this not water down the criminal justice system? If not, how can the matter retain its criminality?

A criminal matter can retain its criminality even when the State is not a party. From the earlier explanation, an aggrieved indivudual has the right to prosecute a matter. This right is then transferred to the State. In traditional justice systems, the aggrieved keeps this right. The only difference comes in at the adjudication level. Judges and magistrates in the formal system are duly trained in the matters of the law. The traditional judges adjudicate based on customary practices. However, the criminal nature of the matter is retained according to the customs of the people.

[63] Ashworth A and Horder J, 'Principles of Criminal Law', 2013.
[64] Article 157(6) (a) *Constitution of Kenya* (2010).
[65] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 23 October 2015.

3.2 The Justice Systems

A justice system exists to realize a certain form of justice. This can be seen from the structures of dispute resolution as well as the types of punishments that are affordered by these systems. Most formal justice systems seek retributive justice, while community justice systems lean towards restorative justice[66]. Retributive justice focuses on the offender. It takes the "give me what I deserve" approach. Therefore, if I have killed someone, my life should also be taken away. That is why the death penalty exists as a punishment to murder[67]. Restorative justice focuses on the community as a whole. It encompasses the need for the victim to be compensated, couples with a reconciliation between them and the offendor upon confession. That is why compensation is mandatory regardless of the nature of the crime.

Where variants of a criminal justice system exist, there is bound to be an overlap. The differences in the systems will create a vaccum, which if not filled, will render the system inoperable. The challenge, however, is posited to the State. By acknowledging a variant of its system, it has the obligation to ensure this variant is complemenatry and not conflicting. The community justice system is inquisitorial and restorative in nature while the Common Law system is adversarial and punitive[68]. This difference gives an upper hand to the criminal. They can, in some circumstances, dictate which system to use. This may not be a problem when misdemeanours are propagated; it will be a challenge when felonies are committed. On the other hand, they facilitate access to justice for those at the grassroots level, and also the poor and disenfranchised.

In reality, a balance must be struck so that the strengths of the formal justice system complement the weaknesses of the TJS, and vice versa. The structure of the formal criminal justice system is such that there procedures to be followed in order for justice to be achieved. They begin from the reporting of the crime, to one's arraignment in court up until the stage where one is either dismissed or convicted and consequently punished[69]. This structure also caters for other matters; issues

[66] Wachira G, 'Vindicating Indigenous Peoples' Land Rights in Kenya' Unpublished LLD Thesis, University of Pretoria, 2008.
[67] Section 204, Cap 75.
[68] http://www.pambazuka.net/en/category.php/features/73087 *accessed on 7 April 2015.*
[69] Cap 75.

surrounding evidence[70], the use of qualified legal defenders, and also proffer alternative means of dealing with perpetrators who have any form of disability i.e. insanity.

In contrast, traditional justice systems have a trial format based on the guidelines provided by the "traditional judges"[71]. They lack a legal guide that can cater to issues surrounding evidence, the recording of the proceedings as well as offering different forms of punishment.

From this, it is clear that traditional justice systems need a touch of legal guidelines in order to make them more capable of handling certain components i.e. the legal components that come into play where evidence, specifically electronic evidence is concerned.

3.3 Punishment

A criminal justice system has the following reasons to punish offenders[72]: retribution, restitution, rehabilitation, and deterrence[73]. The punishments afforded by courts show that they have taken to retribution, rehabilitation and deterrence[74], while the reconciliatory nature of traditional systems shows a preference for restoration[75]. In the *Mohammed Abdow*[76] case, had the case proceeded in court, the penalty afforded would be have been death[77]. However, precedent has shown the predicament to be life imprisonment.

In the *Abdow*[78] case, the family of the deceased were compensated with camels, goats, and performed rituals. The rituals were a form of blood money to the deceased family. This form of monetary compensation is seen in many communities such as the Akamba, the Samburu and even the Kalenjin[79]. This poses a challenge to the courts. Can material compensation be used to deter

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[70] Cap 80.
[71] Wachira G, 'Vindicating Indigenous Peoples' Land Rights in Kenya', 2008.
[72] http://www.csun.edu/~dgw61315/aboutlaw.html#Footnotes on 1 April 2015.
[73] *Ibid.*
[74] Ashworth A and Horder J, '*Principles of Criminal Law*', 2013.
[75] Wachira G, 'Vindicating Indigenous Peoples' Land Rights in Kenya', 2008.
[76] [2013] eKLR.
[77] Sections 203 & 204 Cap 63.
[78] [2013] eKLR.
[79] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 23 October 2015.

crime? It is the duty of the State to protect society from crime and even more, obliterate any opportunities that may allow for repeat offenders.

Where crimes such as murder, rape, and even violence upon the person are committed, can material compensation deter these perpetrators from repeating the same crimes? Take the *Abdow*[80] case for instance. Is it safe to say that potential murderers have been deterred?

From this, it is clear that two things must happen. Firstly, that the State must categorize crime, and secondly, that punishments of equal weight must be awarded for these crimes. This means that both the formal and traditional systems must have an equal understanding of the severity of certain crimes, which will translate to punishments of similar degree, resulting in a similar if not identical goal i.e. deterrence.

3.4 Decided Cases

The promulgation of the Constitution of Kenya led to a departure in the courts against the strict implementation of the Penal Code in adjudicating criminal matters. In the case of *Githere v Kimungu* [81], Justice Hancox opined that: *"the relation of* ***rules of practice*** *to the administration of justice* ***is intended to be that of a handmaiden rather than a mistress*** *and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case".*

The court was of the same view in *Ndeto Kimomo v Kavoi Musumba*[82]. Law V.P stated as follows, *"In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court"s jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High*

[80] [2013] eKLR.
[81] (1976-1985) EA 101.
[82] [1977] KLR 170.

Court. The parties were of course entitled to have their case decided in any lawful way they wished, by consent."

The existence of traditional systems allow parties to seek recourse for a crime outside the courts if they so wish. These cases explain that the court should not be strict on the existing formal law. This forms the basis upon which the cases below are discussed.

In *R v. Lenaas Lenchura*[83], a dispute arose at a trading centre in Lerata between the accused, aged 89, and Lotiyan Lekapana, aged 55, over who would fetch water first. In the course of their dispute, the accused stabbed Lotiyan to death. This was a clear cut case of murder. The prosecution argued that the accused was a first offender and that the special circumstances of the case; the scarcity of water in Samburu, should be considered. The judge applied the customary laws of the accused due to his advanced age and the failure to provide water in that area by the government. The accused was convicted of manslaughter. He was sentenced to five years suspended sentence and was required to compensate the family of the deceased with one female camel according to their customs.[84]

The case of *Stephen Kipruto Cheboi & 2 others v R*[85] . The case involved five brothers convicted of assaulting three persons. The conviction of two of the appellants was quashed on the basis that traditional dispute resolution mechanisms were applicable to misdemeanours. The other 3 were convicted under a felony. They appealed arguing that they were part of an amicable resolution aimed at voluntarily enhancing family cohesion and reconciliation. This amicable resolution emanated from a reconciliation meeting which was attended by 89 persons from Nerkwo-Katee village. One of the complainants filed an affidavit and asked the court to quash convictions. The court did not accept this affidavit and upheld the conviction[86].

[83] Criminal Case No. 19 of 2011.
[84] *Ibid.*
[85] [2014] eKLR.
[86] *Ibid.*

The cases of *Lenaas Lenchura*[87] and *Stephen Keboi*[88] illuminate on the stance of using TDRMs to adjudicate criminal matters. In one case, the facts of the case were so special that the court permitted the use of TDRMs despite the severity of the crime. In the other, the court was keen on enforcing deterrence and retribution. The existence of both variants requires a more defined approach with regards to which categories of crimes can be tried by traditional systems.

In Zimbabwe[89], the Customary and Local Courts determine in which system a case will be decided. It is based on the mode of life of the parties, subject matter of the case, the understanding by the parties of the provisions of customary law of Zimbabwe and the relative closeness of the case and the parties to customary law or the general law of Zimbabwe[90].

In Swaziland customary courts have jurisdiction both in criminal and civil matters over Swazi nationals residing within their jurisdictional areas[91]. However, at a practical level whether a criminal case is to be tried by a traditional or formal court is made at a police station[92]. The burden is therefore placed on the State to ensure that traditional systems can adjudicate criminal matters of all kinds, with the exceptions i.e., crimes against the State, clearly stipulated.

There are two ways in which the State can classify crime -:

a) Misdemeanours and felonies[93]. Misdemeanours should in most cases be dealt with by the traditional mechanisms. Felonies must be determined on a case to case basis to prevent the law from aiding in the propagation of any form of injustice.
b) Crimes against the person (body), against the State and against property[94]. Crimes against the person such as rape and murder should be tried by the courts. Compensation in the form

[87] Criminal Case No. 19 of 2011.
[88] [2014] eKLR.
[89] Chirawu S, "Challenges to Outlawing Harmful Cultural Practices for Zimbabwean Women," in Women, Custom and Access to Justice, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary (2013), 15-17.
[90] *Ibid.*
[91] Masuku T, "Women and Justice in Swaziland: Has the Promise of the Constitution been Fulfilled?" in in Women, Custom and Access to Justice, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary (2013).
[92] *Ibid.*
[93] Cap 75.
[94] https://www.creighton.edu/fileadmin/user/law-school/docs/Crimes_Against_Persons__Property_-_2010.pdf on 16 September 2015.

of animals may not be the appropriate punishment. Using TDRMs will not deter such perpetrators. Crimes against property such as burglary and robbery can be handled by TDRMs, to the extent that they are not couples with crimes against the person i.e. robbery with violence. Crimes against the State i.e. treason cannot be tried at the grassroots level because they are a special class of crimes.

Kenya has a proper legal framework that can be melted into the traditional justice systems. Therefore, the threshold of these crimes should be that established in the Penal Code; where crimes that accrue a jail term up to 7 years can be dealt with TDRMs. The burden rests on the State to find the proper channels to implement this. Some of these channels are discussed in the remaining chapters.

CHAPTER 4: FALLACIES, CHALLENGES AND OPPORTUNITIES

Despite its use, customary law is an uncodified source of law entrenched in tradition[95]. As such, it has to be proved through expert witnesses, literature and past court decisions[96]. By examining the nature of traditional systems, we can derive its strengths and weaknesses in order to arrive at the challenges and opportunities they create against the fallacies that surround them.

As discussed in Chapter 1, Kenya encountered three eras where the position of customary law has always changed. This chapter will focus on the second era; between 1967 and 2010, where the first TDRMs and customary law were limited to matters of land, intestacy, family and marriage were left to customary law[97]. This period will highlight the positive and negative connotations of traditional justice systems.

4.1 Positive Attributes

Traditional justice systems have operated effectively within communities because of their dynamic and informal nature which has been informed by certain characteristics. These are[98] -:

a) *Accessibility, speed, and affordability.* Village elders and other traditional adjudicators are based in the village. They speak the same language and are known to the people of the community. In the formal system, the crime has to be reported to the police and then taken to the courts. A whole set of procedures must be adhered to before justice can be achieved. Once one gets to the courts, they incur legal fees at the filing stage and even in paying advocates' fees. Traditional systems are more prompt and the parties do not incur any costs. This falls squarely within the threads of accessing justice by ensuring "...*access to*

[95] Wachira G, 'Vindicating Indigenous Peoples' Land Rights in Kenya', 2008.
[96] P. Kameri-Mbote and Aketch M, "Justice Sector and the Rule of Law," (Open Society Foundations, 2011), 174.
[97] Section 2, *Magistrate Courts Act* (1967).
[98] https://www.academia.edu/4061034/_Informal_Traditional_Justice_System on 10 December 2015.

justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."[99]

b) *Flexibility.* Traditional systems change with time to accommodate changing circumstances. The traditional adjudicators can change the laws without procedural technicality to adapt to different contexts. The formal system is rigid in nature as it operates within a set of rules. To change these rules, or to operate outside the ambit of these rules requires either a judicial review or a legislative remedy.

c) *Legitimacy.* Traditional adjudicators possess an understanding of the daily on goings of their community. This enables them to become familiar with the historical, social and political background of disputes[100]. This provides a more holistic approach to disputes. The court system requires judges and magistrates to be independent actors in a matter. This means that matters are adjudicated upon in a vacuum.

d) *They aim at social cohesion and reconciliation*[101]. Traditional justice systems succeed because social harmony is valued in the community. They are effective because they can deal with minor cases on a daily basis to ensure that people can continue living in the same community. The courts, due to their emphasis on retributive justice, have no inkling toward social cohesion and reconciliation.

e) *They cater to conflict and post-conflict situations*[102]. Traditional justice systems can be operate even in times of conflict and are used to restore peace after the conflict. Formal systems are crippled during conflicts and can only operate after the fact. An example is the system in Kipkeleon Constituency which was one of the areas that was worst hit by the post-election violence in 2007/8. A justice system was activated in 2008 to respond to the community needs and frustrations of reconstruction, reconciliation and restitution[103].

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[99] Article 48, Constitution of Kenya, 2010.
[100] https://www.academia.edu/4061034/_Informal_Traditional_Justice_System on 4 January 2016.
[101] Tiemessen E, "After Arusha: Gacaca justice in post-genocide Rwanda. African Studies Quarterly (2004) from http://www.africa.ufl.edu/asq/v8/v8i1a4.pdf on 6 January 2016.
[102] Dinnen S, 'Traditional' Justice Systems in the Pacific, Indonesia and Timor-Leste' 2009.
[103] http://www.pambazuka.net/en/category.php/features/73087 on 6 April 2015.

There are other attributes of TDRMs that make them more prevalent in the community. They include: the processes are participatory[104], the trials are done in public for a[105], and they involve voluntary processes[106]. It is clear that people at the grassroots level would prefer traditional mechanisms as they are simple and they cater to their immediate needs, not just as individuals, but to the community as a whole. It is for this reason that TDRMs were limited to specific matters of land, intestacy and marriage.

4.2 Negative Attributes and the Challenges they present

Like any other system, traditional justice systems are not perfect. Their weaknesses include -:

a) *Unequal power relations with a disregard for international human rights standards*[107]. Traditional justice systems create power hierarchies at the expense of other groups. Most traditional systems in Kenya are patriarchal in nature[108]. This is because most councils of elders comprise of men; the *Njuri Nceke* of the Meru and the *Kokwo* of the Pokot. . Women and children are put in a lower position and they are forced to accept the status quo. In this regard, formal systems are better as they have to conform to the international standards of equality[109], usually along the lines of sex and age[110].

b) *Lack of enforcement machinery*[111]. Traditional systems have weak enforcement mechanisms. They rely on social pressure to implement compliance.

c) *Lack of competence of the traditional judges.* In most cases, there is a lack of adequate training and supervision of leaders/officials adjudication in the traditional systems[112]. This may lead to conflict with the formal system. However, this presents an opportunity for the

[104] https://www.academia.edu/4061034/_Informal_Traditional_Justice_System on 15 December 2015.
[105] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 17 October 2015.
[106] *Ibid.*
[107] Rwiza R, "*Ethics of Human Rights: The African Contribution*", 2010.
[108] *Ibid.*
[109] Article 27, *Constitution of Kenya* (2010).
[110] Article 27(4) of the Constitution of Kenya, 2010.
[111] https://www.academia.edu/4061034/_Informal_Traditional_Justice_System.
[112] Tobiko K CBS, SC DIRECTOR OF PUBLIC PROSECUTIONS, KENYA, "The Relationship between Formal Rule of Law and Local Traditional Justice Mechanisms" at the 18th IAP Annual Conference and General Meeting, Moscow, 8-12 September, 2013.

State to determine the boundaries within which the traditional judges can be trained to ensure conformity with the system.

d) *Unwritten law and lack of records*[113]. Customary law operates under the ambit of tradition. In Kenya, the elders in a community are considered to be the stakeholders of the traditions of a community. These are the traditions that are passed on from one generation to the next[114]. Although the lack of written records makes it difficult to understand and monitor the dynamics of the individual traditions, there is also a fortunate vacuum. The lack of precedent enables new laws to be adopted easily by the community.

These negative attributes threaten the integrity of a changing society. One where TDRMs are different from the formal systems which recognize the rights of women as being part of human rights. The lack of competence among the traditional adjudicators may result in similar legal changes going unaddressed at the grassroots level. The lack of written records of reference material make it impossible to monitor the way TDRMs operate. Traditional justice systems in Kenya can be perfectly suited to adjudicating criminal matters only if they are tweaked in a way that will acknowledge the legal responsibilities placed upon the State by its citizens and the international community.

[113] Cotran, E, *Casebook on Kenya Customary Law*, Nairobi University Press, 1995.
[114] *Ibid.*

CHAPTER 5: A COMPARATIVE ANALYSIS OF OTHER TRADITIONAL SYSTEMS AGAINST THOSE USED IN KENYA

Kenya is a state comprised of forty two tribes[115]. This means that, there are forty two different cultures, each with a unique justice system that is observed. The common factor being, that the tribes use councils of elders in order to establish order and to punish perpetrators. These elders are deemed to be the stakeholders of the tribe.

Ethnic diversity has been a challenge in many countries and governments have addressed this challenge in different ways. In Rwanda, there erupted the *Gacaca* system following the genocide that resulted in the killing of many *Hutus* and the *Tutsis*[116]. Theirs was an attempt to restore peace and unity among their people. In Pakistan, the traditional system has existed for decades. In this chapter, the suitability of TDRMs in adjudicating criminal matters in Kenya will be illustrated against the situation in other countries.

5.1 The Ethnic Situation in Kenya

In order to create a comparative analysis, it is necessary to get a glimpse of the ethnic situation in Kenya. The justice systems that will be examined are those of the *Kamba* and the *Kikuyu*. These two communities illustrate the existence of traditional justice systems as well as the similarities afforded by these systems.

a) The *Kamba* Justice System

The *Kamba* justice system grounded on the social ties one has with the community. Thus, social practices inform individual behaviour as relationships had to be maintained as they formed the foundation of the community[117].

[115] http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf on 7 October 2015.
[116] http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/ on 3 November 2015.
[117] Tribal Law Journal Vol. 10

The dispute resolution process among the *Akamba* is hierarchical. Offences committed within the family are heard and determined by the family head. However, the family head could seek assistance from the clan elders[118]. Similarly, if the offender and the victim belonged to the same clan, the council of elders in that clan would adjudicate the matter. The perpetrator and the victim would have a representative to lay the facts before the elders. If the matter was between different clans, elders from the different clans would come together after which, spokespersons to represent each clan would then be selected to facilitate the hearing of evidence from both sides[119]. There would be different types of punishments awarded. Compensation was mandatory in almost all cases, for example the Kamba in Kitui on assault leading to damage to; one finger: one cow; one hand: one cow and one bull; one ear: one cow and one bull; one eye: one cow and one bull one leg: one cow and one bull[120]

b) The *Kikuyu* Justice System

There is an established council of elders referred to as *kiama kia mbari*[121]. The council acts as an overseer and a judicial body. It is comprised of the male heads of the extended families. The principle of *nemo udex in causa sua* is applied as an elder is required to recuse himself from sitting for a case in which he has an interest[122].

The system is more restorative than retributive as seen in practice. The fine for the murder of a male was one hundred goats and sheep payable to the deceased's family. For female, the fine was 30 goats and sheep payable to the deceased's family. The fine for breaking another person's leg was 50 goats[123]. From this, it can be argued that the system is very patriarchal. Once a case is

[118] The clan elders' court was comprised of family heads from the families making up the clan.
[119] Kinyanjui S. 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' from http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf on 11 August 2015.
[120] Penwill D.J, "Kamba Customary Law; Notes taken in the Machakos District of Kenya Colony 85" (1951).
[121] The term kiama is translated to mean "council."*Kiama wa mbari* then means clan council (author's own translation.
[122] Kinyanjui S. 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya' from http://lawschool.unm.edu/tlj/volumes/vol10/Kinyanjui.pdf on 11 August 2015.
[123] Leakey L.S.B, "The Southern Kikuyu before 1903", Jean Ensminger & G.S.B. Beecher eds., 1977 (1998).

presented, the elders would listen to the facts and give a decision. Once the decision is given, the offender is required to compensate the victim. Compensation is symbolic for taking responsibility for the crime[124].

5.2. The Case of Rwanda

In 1994, there Genocide erupted in Rwanda. Between April and July of the same year between 800,000 and 1,000,000 Tutsis and moderate Hutus were killed in Rwanda[125]. The killings were organized by the Government and executed by combatants; the military, armed militia groups and ordinary men and women who often killed their own relatives, friends and neighbours[126]. At least 250,000 women were victims of sexual violence. Many of the women were subsequently killed and 70% of the survivors were infected with HIV[127]. In an effort to restore justice in the country, the *Gacaca* courts were established. For the purpose of this paper, the structure and the effectiveness of these courts will be evaluated.

After the Genocide, the International Criminal Tribunal for Rwanda (ICTR) was established to fill the justice deficit created by absent of the Rwandan justice system[128]. However, due to its shortcomings, the Rwandan government proposed the ancient traditional method of dispute resolution known as *Gacaca.* The main objective of the system was reconciliation through restoration of harmony and social order by punishing, shaming and requiring reparations from the offenders[129].

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[124] Tribal Law Journal Vol. 10

[125] http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/ on 16 November 2015.

[126] Clark P and Kaufman Z, "After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond", London, Hurst eds. (2008).

[127] Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission of Human Rights from http://www.wfrt.org/humanrts/commission/country51/7.htm 127 -147 on 10 December 2015.

[128] Tiemessen E, After Arusha: Gacaca justice in post-genocide Rwanda. African Studies Quarterly (2004) from http://www.africa.ufl.edu/asq/v8/v8i1a4.pdf on 13 December 2015.

[129] *Ibid.*

The *Gacaca* courts were established to achieve a restorative and retributive justice approach in order to needs of the victims and the perpetrators. Established in 2001, the courts are headed by the *Inyangamugaya* –"people of integrity"- who were are suggested and elected by the local community[130]. Initially, the courts were able to try cases of homicide, theft and the destruction of goods and properties. They could award punishments i.e. community work to 30 years imprisonment[131]. Although they sought to promote justice, the lack of impartiality in the courts was critiqued[132].

a) The courts

The *Gacaca* System structurally is divided into administrative cell courts [local courts], sector courts and appellate courts[133]. Each Gacaca court is composed of seven judges appointed by the community[134]. The judges undergo a training lasting between one to two weeks on the types of crimes and how to conduct trial proceedings.

b) The parties

The accused, dressed in pink prison attire, sit in the middle of community which they offended or victimized. There are no legal advisors; the community acts as plaintiff, legal advisors, juries and witnesses[135]. The community is tasked with giving testimonies; questioning and/ or cross examining the defendants. The community is also responsible for declaring the form of punishment for the accused. Order is observed in the courts by the presence of armed guards[136].

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[130] Clark P, "The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda. Justice without Lawyers", Cambridge University Press (2010), 167.
[131] Kirkby C, "Rwanda's Gacaca Courts: A Preliminary Critique", *Journal of African Law* (2006), 101.
[132] Burnet J, "The Injustice of Local Justice: Truth, Reconciliation, and Revenge in Rwanda", *Genocide Studies and Prevention,* 2008, 176.
[133] http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRzWL_yUclc on 25 July 2015.
[134] Carter E, "Justice and reconciliation on trial: Gacaca proceedings in Rwanda", New *England Journal of International and Comparative Law* (2008) *from* http://www.nesl.edu/userfiles/file/nejicl/vol14/Carter_Final_1.pdf on 28 July 2015.
[135] *Ibid.*
[136] *Ibid.*

c) The hearing

The proceedings take three forms[137]; information gathering, categorization, and judgment and sentencing. Information gathering begins at the cell level courts [local]. Categorization requires the judges to review the information and classify the crimes. This determines whether the crime will be tried by the *Gacaca* or the national courts. The judges preside over at this level to oversee community participation and witnesses, confession and regrets bargaining pleas, guide community to determine appropriate sentencing and encourage the community to have a say on how to initiate the reconciliation and reintegration process[138].

d) Expectations from the community

The Gacaca courts are expected to create a trusting environment to prompt the perpetrators to confess truthfully[139]. This will initiate the forgiveness and reconciliation process. The courts are also tasked with ensuring the protection of witnesses from the community members[140].

e) Success

The *Gacaca* system empowered women to engage in trials and reconciliation processes. Another aspect of success is the ability to try tens of thousands of cases in a shorter time than the ICTR would have been able to judicially prosecute[141].

f) Critiques

There have been a number of critiques against the system. They include[142]:-

- That the system lacks qualified judge and mechanisms to measure justice dispensation. Following the Gacaca process, the suspects "are taken to the villages where they allegedly

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[137] http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRzWL_yUclc on 23 June 2015.
[138] Penal Reform International, "Eight years on: A record of Gacaca monitoring in Rwanda", (2010) on 15 June, 2015 from http://www.penalreform.org/files/WEB%20english%20gacaca%20rwanda-5.pdf.
[139] http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=... on 28 June 2015.
[140] *Ibid.*
[141] Tiemessen E, "After Arusha: Gacaca justice in post-genocide Rwanda", African Studies Quarterly (2004) from http://www.africa.ufl.edu/asq/v8/v8i1a4.pdf on 3 July 2015.
[142] *Ibid.*

committed their crimes and confronted directly by their accusers. The trials are not overseen by legally qualified judges but local people respected for their integrity"[143];

- That the *Gacaca* courts lack resources to deal with psychological and traumatic consequences;

g) International assistance

The international community; Human Rights Watch, Avocets Sans Frontiers (Lawyers without Borders), Reseaus de Citoyens (Citizens' Network, or RCN), and Penal Reform International, have assisted the system by providing legal material supplies[144] and innovative ways for investigating and prosecuting cases. For example, Reseaus de Citoyens on the other hand provided legal infrastructure specifically in training courts clerks, magistrates and prosecutors in the *Gacaca* system[145].

The *Gacaca* system have brought justice to the Rwandan community. They have also bridged the ethnic divides among Rwandans through community participation in the trial proceedings. In comparison to Kenya, the *Gacaca* system has a more formal structure that envisages that of actual courts. Also, there is actual exposure of the judges to legal materials and processes.

[143] http://news.bbc.co.uk./1/hi/world/africa/3246291.stm

[144] Chakaravarty A, "Gacaca courts in Rwanda: Explaining divisions within the human rights community", *Yale Journal of International Affairs* (2011) from http://yalejournal.org/wp-content/uploads/2011/01/061211chakravarty... on 7 July 2015.

[145] http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRzWL_yUclc on 23 June 2015.

5.3 The Practice in Pakistan

In Pakistan, there are two forms of ADR that are practiced; traditional ADR comprising of *Jirga, Faislo* and *Panchayats,* and public bodies such as Msalehat Committee or Small Claims and Minor Offences Courts Ordinance, 2002 (SCMOCO)[146].

a) Traditional ADR

The *Jirga* system is used in the North-West Frontier Province (NWFP) and Baluchistan, the *Panchayats* in Punjab and, the *Fasilo* in Sindh[147]. Under the Faislo, there are categories of crimes[148]:

Table 1. Different Categories of Disputes in Pakistan

Nature of dispute	**Penalties & Punishments**
Dispute on demarcation of Agriculture Land	Resolved in accordance with the revenue record and testimony of the witnesses on site.
Dispute regarding distribution of water	Resolved as per due appropriation of water share in irrigation record and severity of the matter.
Neighbourhood disputes	Amicably resolved with the consent and representation of both parties.

[146] Evaluation report on the Study of Informal Justice Systems in Pakistan from http://www.sja.gos.pk/Publicaiton/Misc/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf on 3 November 2015.

[147] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEUQFjAG&url=http%3A%2F%2Fwww.sja.gos.pk%2FPublicaiton%2FMisc%2FReport%2520Informal%2520Justice%2520System%2520in%2520Pakistan.pdf&ei=XXYjVefsGMjraMPRgcgI&usg=AFQjCNEb5t2wbjqV5pJbBKKUqcYj0OZ6zA&bvm=bv.89947451,d.d2s on 3 November 2015.

[148] Evaluation report on the Study of Informal Justice Systems in Pakistan.

Matrimonial disputes	Resolved amicably – parties usually re-join each other, in case of dissolution of marriage, maintenance is fixed and husband is liable to pay to the wife and children.
Theft of goat, buffalo, standing/stored crops	Resolved amicably – the accused or his family members resolve or pay compensation in case the property has been disposed of.
Injuries, attempt to Murder & murder	Compensation is paid to the injured and the legal heirs of the deceased. In case of murder of a woman compensation amount is double to that of the murder of a man. In cases of murder usually an amount Rs.400, 000/- is paid for the murder of a man whereas in case of a woman compensation would be Rs. 800,000/-. This practice vary from tribe to tribe, however female is treated differently from a man.
Kidnapping	Normally women are victim of this offence. During Faislo it is ensured that the woman is taken back and handed over to the family members of the victim.

There is another category of crimes known as Karo-kari[149]. These are honour killings such as teenage girls who were buried alive after refusing arranged marriages. These killings are enjoy high level of support from the Pakistani rural society[150].

[149] Evaluation report on the Study of Informal Justice Systems in Pakistan from http://www.sja.gos.pk/Publicaiton/Misc/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf on 3 November 2015.

[150] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEUQFjAG&url=http%3A%2F%2Fwww.sja.gos.pk%2FPublicaiton%2FMisc%2FReport%2520Informal%2520Justice%2520System%2520in%2520Pakistan.pdf&ei=XXYjVefsGMjraMPRgcgI&usg=AFQjCNEb5t2wbjqV5pJbBKKUqcYj0OZ6zA&bvm=bv.89947451,d.d2s on 3 November 2015.

b) Who/how to bring complaints

In Pakistan, both parties approach the *Sardar*/Notable to resolve their dispute[151]. Sometimes, in Sindh, the courts also refer the parties to the Notables for amicable settlement of the dispute. For example, dispute between two tribes are also referred by a police officer to *Sardars* of third tribe[152]. A District Police Officer, Khairpur[153] informed that a dispute between two tribes involving murder of 17 persons was referred to a *Sardar* which was resolved in one day. The *Sardars* took about 8 hours to bring the parties to agree[154].

c) Hearings

Parties are given a fair hearing. They are allowed to bring two *Musheers*; advisors who participates in the hearing and represent one of the parties to the dispute[155]. They also facilitate decision makers in resolving the dispute. The *Musheers* act as the clerks as they record the incident from the parties. The perpetrators and victims participate fully as there is no monetary involvement as is the contrary in the courts[156].

d) Role of witness(es)

The *Sardar* calls and asks people to state the facts on oath[157]. Sometimes witnesses or the parties are asked to take special oath on the Holy Quran. In Sindh, it is known as *Sakh* and in NWFP

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[151] Evaluation report on the Study of Informal Justice Systems in Pakistan from http://www.sja.gos.pk/Publicaiton/Misc/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf on 3 November 2015.

[152] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&cad=rja&uact=8&ved=0CEUQFjAG&url=http%3A%2F%2Fwww.sja.gos.pk%2FPublicaiton%2FMisc%2FReport%2520Informal%2520Justice%2520System%2520in%2520Pakistan.pdf&ei=XXYjVefsGMjraMPRgcgI&usg=AFQjCNEb5t2wbjqV5pJbBKKUqcYj0OZ6zA&bvm=bv.89947451,d.d2s on 3 November 2015.

[153] Muhammad Peer Shah, District Police Officer, Khairpur from the 'Evaluation report on the Study of Informal Justice Systems in Pakistan'.

[154] *Ibid.*

[155] Evaluation report on the Study of Informal Justice Systems in Pakistan.

[156] *Ibid.*

[157] *Ibid.*

known as *Qassam*[158]. The process is formalized as decisions are based on the evidence and facts disclosed.

e) Decision-making, both in terms of process and identity of decision-makers

The system is similar to an arbitration. The parties to the dispute choose decision-makers contrary to the courts. Unlike the courts, there is no appellate authority and the process is not[159].

f) Enforcement of decisions; monitoring; recourse

The parties must consent to the settlement of the dispute. Once the decision is given, the parties must put their signature in acknowledgement. This is what the parties will act on[160].

g) Interaction and Relationship between Formal and Informal Justice Systems and Impact.

There have been efforts by the Government of Pakistan to integrate and develop relationship between the formal and informal justice systems[161]. The Local Government Ordinance of 2001 provides a basic framework for resolution of disputes. This is done through Musalihat *Anjuman* (MA). The MA consists of selected persons from the community through Insaf Committees (ICs) at union council level[162]. The criteria being persons who have integrity, good judgment and command respect. The courts can refer cases to MA where proceedings are pending[163]. Earlier committees redressed petty issues but the police and courts have departed and referred cases of criminal nature as witnesses and perpetrators are more responsive to MA[164].

Compared to Kenya, the traditional systems of Pakistan is similar in that there are more than two existing traditional justice systems. However, there has been more effort by the Pakistani government in developing a relationship between the formal and traditional systems. These two systems clearly show that TDRMs can be effectively used in adjudicating criminal matters.

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[158] Evaluation report on the Study of Informal Justice Systems in Pakistan.
[159] *Ibid.*
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] Section 104, Local Government Ordinance of 2001.
[164] Evaluation report on the Study of Informal Justice Systems in Pakistan.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS FOR THE USE OF TDRMs IN KENYA

6.1 Conclusion

It is clear that customary law has formed a big part of the history of Kenya. This resulted in traditional justice systems tailored to meet the needs of the different communities that exist. However, the introduction of the formal legal system threatened these traditional systems, but with the passage of time, it is clear that these traditional systems are here to stay.

Most of these traditional systems operate as though the formal legal system does not exist because this is what has been the practice. The move to using courts can only be realized if the courts are located in all parts of Kenya. However, this may not always guarantee that people will use them. The man in the village will always opt for the system that is closer to home, the system that he understands and one that understands him in return[165]. For this reason, the State equip these traditional systems with the necessary tools to effectuate criminal justice.

6.2 Recommendations

The current criminal justice system in Kenya has embraced the two variants of the system; formal and informal. Against the background of access to justice, a victim of a crime can choose the system in which they can best receive recourse. The courts have accepted the use of traditional systems in certain cases. The State can equip these traditional systems in two ways; legislative and non-legislative action.

[165] Cotran E, *'Casebook on Kenya Customary Law'*, Nairobi University Press, 1995.

a) Legislative action

The criminal justice system of Kenya operates within a legal framework entrenched in the Constitution[166], as well as statute; the Criminal Procedure Code[167], the Penal Code[168] and the Evidence Act. These laws act as complementary tools of justice, not only in the substantive, but also in the procedural. The question then becomes whether the State should legislate on traditional justice systems.

In reality, traditional systems operate in a vacuum of unwritten laws and unrecorded proceedings. Introducing legislation may pave way for legally recognized rules and a system of monitoring that emanates from written records. On the other hand, legislating on these systems may take away from their informal nature and their flexibility to easily adapt to change in circumstance[169]. Legislation may also interfere with the language of the people as they would be expected to use the State's national and formal languages.

Although written laws allow for better implementation and monitoring[170], they may not be prudent where the system has a close proximity to the ways of the people. This paper proposes that the State should not legislate on the procedure within which TDRMs operate. If they must legislate, they can do so on the substantive; limited to the construction of the adjudicators to include the concept of equality, as well as prescribing different forms of punishment for different crimes.

b) Non-legislative action

Legal tools do not always have a legislative characteristic. Legal tools and mechanisms can borrow from the legislative and be tailored to the nature of a system. From the evaluation of the *Gacaca*

[166] *Constitution of Kenya* (2010).
[167] Cap 75
[168] Cap 63.
[169] Bello E and Ajibola B, *'Essays in Honour of Judge Taslim Olawale Elias'*, Vol. II, Martinus Nijhoff Publishers and Kluwer Academic Publishers, The Netherlands, 1992.
[170] *Ibid.*

system and traditional mechanisms used in Pakistan, there are a number of non-legislative tools that can be adopted by the State. They Include -:

1. **The development and design of training modules and material for traditional "judges" involved in resolving disputes under informal justice system[171].**

There is a pressing need to develop and design a comprehensive training module and readily avail legal materials on substantive and procedural matters in the layman's language. This will help to eliminate repugnancy; bias, prejudice and violation of basic human rights. This was the case under the *Gacaca* system as explained earlier[172]. The State engaged the judges in a two week training program to familiarize them with the laws they had to subscribe to. The international community even assisted the judges with legal materials and new adjudicative processes[173].

The State should engage all traditional adjudicators in basic and continuous training that will familiarize them with the law, and enable them to introduce new aspects of adjudication into their respective communities. This will assist both the State and the community.

2. **Formation of a coordination, evaluation and implementation committee at all levels[174].**

There ought to be coordination, evaluation and implementation committees within both the formal and traditional criminal justice system. The National Cohesion and Integration Commission of Kenya is established to, *inter alia*, promote, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya[175].

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[171] http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRzWL_yUclc on 23 June 2015.
[172] *Ibid.*
[173] Chakaravarty A, "Gacaca courts in Rwanda: Explaining divisions within the human rights community", *Yale Journal of International Affairs* (2011) from http://yalejournal.org/wp content/uploads/2011/01/061211chakravarty... on 7 July 2015.
[174] Evaluation report on the Study of Informal Justice Systems in Pakistan from http://www.sja.gos.pk/Publicaiton/Misc/Report%20Informal%20Justice%20System%20in%20Pakistan.pdf on 3 November 2015.
[175] Section 25(1) National Cohesion and Integration Act (Act No. 12 of 2008).

In Rwanda, the *Abunzi* has[176] jurisdiction over criminal cases involving the removal or displacement of land terminals and plots; any form of devastation of crops by animals and destruction of crops when the value of crops ravaged or destroyed do not exceed three million Rwandan francs; theft of crops when the value of crops does not exceed three million Rwandan francs and larceny (theft) when the value of the stolen object does not exceed three million Rwandan francs[177].

The interaction between the courts and traditional systems must be guided to allow for coordination. Once coordination is established, a system of monitoring can be implemented.

3. **Providing the traditional systems with a legal framework within which TDRMs can operate.**

The Government should create guidelines to which traditional systems must subscribe should they wish to be recognized by the state. This will slowly but eventually snuff out any practices that are repugnant to justice and morality. An example is adhering to principles of international standards. Existing legislation should be reviewed i.e. the Evidence Act[178] should review the rules of evidence or create a new chapter within which the rules of evidence can be appreciated at the community level.

This will also enable all traditional adjudicators to be recognized by the State. An example of a guideline is requiring every traditional adjudicating body in a county to be recorded by the courts in that county. This will enable the State to know which areas rely more on traditional adjudicators so that they can be trained effectively.

[176] http://www.rwandapedia.rw/explore/abunzi on 14 December 2015.
[177] *Ibid.*
[178] Cap 80.

4. **Agreeing which system can adjudicate certain matters[179].**

In the states in which this had been effective; Rwanda and Zimbabwe, legislation has been passed. The Rwandan government created the *Organic Law No. 31/2006.* This law recognizes the role of *Abunzi* or local mediators in conflict resolution of disputes and crimes[180].

In Swaziland customary courts have jurisdiction both in criminal and civil matters over Swazi nationals residing within their jurisdictional areas[181]. However, at a practical level whether a criminal case is to be tried by a traditional or formal court is made at a police station[182].

From this, it is clear that the State has to take the first step in ensuring a proper complementary interaction between the two systems. First, it has to classify crimes in order for the systems to know which crimes they can adjudicate. Second, the State needs to understand the different kinds of traditional justice systems that exist in Kenya. Lastly, the State must find a way to engage the two systems. This will give rise to proper application of traditional systems to criminal matters.

The implementation of these recommendations will undoubtedly involve a measure of compromise. However, such compromise would be beneficial to all if a balance is to be struck between the use of traditional justice systems and the use of the courts in adjudicating criminal matters.

5. **Aligning the practice of TDRMs with Constitutional provisions**

With the provision of equality in Article 27 of the Constitution, it is important for the traditional adjudicators, which comprise mostly of council of elders, to include women and the youth in

[179] Masuku T, "Women and Justice in Swaziland: Has the Promise of the Constitution been Fulfilled?" in in Women, Custom and Access to Justice, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary (2013).

[180] Mutisi M, "Local conflict resolution in Rwanda: The case of abunzi mediators", in M. Mutisi and K. Sansculotte-Greenidge (Eds), Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa, 41.

[181] Masuku T, "Women and Justice in Swaziland: Has the Promise of the Constitution been Fulfilled?" in in Women, Custom and Access to Justice, Heinrich Boll Stiftung, Perspectives-Political Analyses and Commentary (2013).

[182] *Ibid.*

leadership. This will cure the repugnant nature of patriarchy that is identified with traditional justice systems. It will also give more confidence to the people in the community as they can be sure that all their interests will be represented and the range of stakeholders will be expanded.

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