THE USE OF TRADITIONAL DISPUTE RESOLUTION MECHANISMS AS A VIABLE TOOL IN THE RESOLUTION OF LAND DISPUTES IN KENYA: A CRITICAL ANALYSIS OF ITS CHALLENGES AND PROSPECTS

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

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DECLARATION

I, NANCY TRACEY MWIHAKI, 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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Date: 14th March 2025

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

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ABSTRACT

Traditional Dispute Resolution Mechanisms (TDRMs) are deeply rooted in cultural beliefs and practices. They hence vary from one culture to another; however, the common characteristic is that they all aim to achieve justice. These systems are informal in nature, and this is what makes them attractive to the people who rely on them. Such dispute resolution mechanisms already exist and are acknowledged within a formal justice system, and this brings about the issue of dual legitimacy between the two systems: informal and formal. Even though the two systems are similar in the sense that they both aim to achieve justice, they are not structurally and substantively identical. This study examines the suitability of TDRMs in the resolution of land disputes. This study argues that even though the informal nature of TDRMs makes it more attractive and accessible to persons in the community, it does lack in some regards. It lacks a clear and uniform legal and policy framework that would enable its 'successful' application in the resolution of land disputes and enforcement of the decisions reached by the disputants.

LIST OF ABBREVIATIONS

ADR - Alternative Dispute Resolution

TDRMs -Traditional Dispute Resolution Mechanisms

LIST OF CASES

Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR.

Lubaru M'imanyara v Daniel Murugi , (2013) eKLR.

Nyali Limited vs the Attorney General, 1995 1 All ER 646.

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Ministry of Justice, *Abunzi Capacity Building Strategy (2020-2024)*, December 2020.

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Draft Alternative Dispute Resolution Bill, 2021, Senate Bills No. 97

Republic of Kenya, *Judiciary Transformation Framework*, 2012 - 2016.

Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration.*

Traditional Courts Bill (2017).

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CHAPTER ONE: INTRODUCTION

1.0 Introduction

Complex land issues over time have increased both in quality and quantity and this is due to the evolution of complex and overlapping land use while there is minimal availability of land.[1] The Constitution provides for the right to access to justice[2] and contemplates justice 'in many rooms' by promoting access to it through Traditional Dispute Resolution Mechanisms in addition to the formal court systems.[3] The traditional judicial process, especially land litigation, has proven to be time consuming, expensive, complex and more so not accessible to everyone.[4] Therefore, people often opt not to go to court to solve their land disputes due to unreasonable delay and expenses hence most of them turn to Alternative Dispute Resolution Mechanisms, specifically Traditional Dispute Resolution Mechanisms (herein referred to as TDRMs) to resolve their disputes, as they are informal, time consuming and cost less.[5] TDRMs, however lucrative they may be, do have their own legal and administrative challenges.[6] There are no guidelines or a notable policy framework on how these dispute

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[1] Iswantoro I, 'Strategy and Management of Dispute Resolution, Land Conflicts at the Land Office of Sleman Regency' *Journal of Human Rights, Culture and Legal System,* 2021, 1- <https://jhcls.org/index.php/JHCLS/article/view/3 > on 17th August 2024.

[2] Article 48, *Constitution of Kenya* (2010).

[3] Galanter, M., "Justice in many rooms: Courts, private ordering, and indigenous law," *The Journal of Legal Pluralism and Unofficial Law*, 13,1981, 1-47.

[4] Patoari M, Nor A, Awang M, Chowdhury A & Talukder J,'Legal and Administrative Challenges of Alternative Dispute Resolution(ADR) as a Peaceful Means of Resolving the Land Disputes in the Rural Areas of Bangladesh', 2020, 416- 417 - <https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/beijlar11&id=419&men_tab=srchresults > on 17th August 2024.

[5] Patoari M, Nor A, Awang M, Chowdhury A & Talukder J,'Legal and Administrative Challenges of Alternative Dispute Resolution(ADR) as a Peaceful Means of Resolving the Land Disputes in the Rural Areas of Bangladesh', 2020, 416- 417 - <https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/beijlar11&id=419&men_tab=srchresults > on 17th August 2024.

[6] Patoari M, Nor A, Awang M, Chowdhury A & Talukder J,'Legal and Administrative Challenges of Alternative Dispute Resolution(ADR) as a Peaceful Means of Resolving the Land Disputes in the Rural Areas of Bangladesh', 2020, 416- 417 - <https://heinonline.org.ezproxy.library.strathmore.edu/HOL/Page?collection=journals&handle=hein.journals/beijlar11&id=419&men_tab=srchresults > on 17th August 2024.

mechanisms should be utilised.[7] Therefore, this leaves a lot of uncertainty in the application of such mechanisms as the implementation of the various sectoral laws in the resolution of disputes is left to the concerned stakeholders. The main objective of this study is to identify these legal and administrative challenges of TDRMs as a way of resolving land disputes and also suggest recommendations that will create an avenue for TDRMs to be an effective means of dispute resolution in land disputes in Kenya. This study is 'qualitative' in nature therefore there is reliance on secondary data including but not limited to books, journals, articles, reports and case law.

1.1 Background to the Study

During pre-colonial Kenya and after the adaptation of foreign laws after independence, Africans had their own way of resolving conflicts.[8] Even before recognition by law, Traditional Dispute Resolution Mechanisms were heavily used by people living in the rural areas to settle disputes and such mechanisms were intergenerational; passed from one generation to another.[9] However, even with this social reality, the formal justice systems still dominated land dispute resolution due to weak legal pluralism; hesitance in recognition and embracement of customary laws and dispute resolution mechanisms into law.[10] However, even with their domination, formal justice systems were often characterised with inefficiency, inefficacy and inadequacy that usually result in delay and even denial of justice.[11] The Njonjo Land Commission, further stated that:

The public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions, because they are characterised by delays and unnecessary bureaucracy

[7] Muigua K, 'Current Status of Alternative Dispute Resolution Justice Systems in Kenya' *Accessing Justice through ADR*, Glenwood Publishers Limited, Nairobi, 2022, 264.

[8] Coldham S, 'Criminal justice policies in Commonwealth Africa, trends and prospects, *44 Journal of African Law* 2, 2000, 220.

[9] Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed (2010) eKLR, 2 Alternative Dispute Resolution 1, (2014), 226.

[10] Republic of Kenya, *Judiciary Transformation Framework*, 2012 - 2016. 20.

[11] Republic of Kenya, *Judiciary Transformation Framework*, 2012 - 2016. 20.

especially when there is a loll' participation of the local people in land dispute resolution mechanisms.[12]

The promulgation of 2010 Constitution of Kenya encourages the use of TDRMs in the resolution of land disputes and this ushered in a new dawn for the recognition of TDRMs in law.[13] The Environment and Land Act also allows for the use of ADR mechanisms, which include TDRMs to resolve land disputes.[14] Other sectoral laws such as the Community Land Act 2016 and the Land Act 2012, among others, do recognize and encourage the use of TDRMs. Courts have also recognised the use of TDRMs in line with Article 159(2) of the Constitution. For instance, in the case of *Lubaru M'imanyara v Daniel Murugi*, the consent filed by the parties to refer the land dispute to the Njuri Ncheke Council of Elders, was adopted as an order of the court, hence showing the court's acknowledgement of the use of TDRMs to resolve land disputes.[15] The court adopted the consent as it was consistent with Article 60 (g) and Article 159 (2) of the Constitution. Therefore, courts do acknowledge the use of TDRMs in the resolution of land disputes.

While courts and tribunals do acknowledge the use of TDRMs, it is also important to understand that the foundational basis of these mechanisms is customary law. Considering the diversity of TDRMs based on the different communities as well as the informality that comes with them, enforcement of their outcomes is going to prove difficult.[16] This is also likely to be complicated due to the non-binding nature of the decisions reached unless both parties mutually agree to it. This is clearly seen in the case of *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR,* where the ELC Court at Garissa was called upon by the defendant/applicant to determine an application seeking orders that the proceedings be

[12] Republic of Kenya , *Report of the Commission of inquiry into the land law system of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration,* 2002. 78.

[13] Article 60 (g), 67(2) (f), *Constitution of Kenya* (2010).

[14] Section 20, *Environment and Land Act* (2011).

[15] *Lubaru M'imanyara v Daniel Murugi* , (2013) eKLR.

[16] Muigua K, 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects' Kairiuki Muigua & Company Advocates, 2019, 17.

stayed and that the dispute be referred to the local community elders for resolution.[17] The court noted that in as much as parties may decide to use TDRMs to resolve disputes, they have to consent and be willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders, but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court.[18] This case illustrates the recurring challenge that arises when applying mechanisms in land disputes; the unenforceability of the outcomes of the resolution mechanisms in land matters.

The lack of regulation beyond mere textual recognition in the Constitution and other written laws hinders the application and enforcement of decisions made using this specific dispute resolution mechanism. The lack of a clear legal or policy framework that seeks to tackle the same, leaves a huge gap of legal uncertainty in the application of TDRMs to resolve land disputes.

1.2 Statement of the Problem

The Constitution of Kenya makes several provisions that encourage the use of Traditional Dispute Resolution Mechanisms in the resolution of land disputes. However, there lacks clear and uniform legal provisions that define the jurisdiction, the applicable bare minimum standards and procedures and the enforcement of decisions made using the mechanisms. The lack of a clear legal provisions creates legal uncertainty when it comes to the promotion of use of TDRMs and enforcement of decisions made while resolving land disputes, leading disputants to turn to courts to seek remedy for this, which consequently defeats the purpose of ADR mechanisms being alternatives to litigation.

1.3 Research Objectives

(a) To explore the applicable laws in Kenya that govern the use of TDRMs in the resolution of land disputes.

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[17] *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others* [2018] eKLR.

[18] *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others* [2018] eKLR.

(b) To identify the constraints that exist within the legal and policy framework that cause the gaps that hinder the application of TDRMs in resolving land disputes.

(c) To analyse how Rwanda and South Africa, through their policy and legal frameworks, has effectively integrated TDRMs within their formal justice system.

1.4 Research Questions

(a) What laws in Kenya govern the application of TDRMs in the resolution of land disputes?

(b) What constraints exist within the legal and policy framework that cause the existing legal and policy gaps that hinder the application of TDRMs in the resolution of land disputes

(c) How have Rwanda and South Africa addressed the issue of effectively integrating TDRMs within the formal justice system, in their legal and policy framework?

1.5 Hypotheses

This study proceeds on the hypotheses that:

1. The current laws in Kenya that govern the application of TDRMs in the resolution of land disputes do not give clarity on the enforcement of the decisions made in the resolution of the said disputes.
2. Mere recognition of the application of TDRMs in the resolution of land disputes through provisions in the Constitution and other written laws that encourage their use is not enough and that there needs to be a policy and legal framework developed to ensure enforcement of the decisions made when such mechanisms are applied.
3. The Abunzi Committee legal framework in Rwanda and the Traditional Courts System in South Africa are better suited to address the issue of integration of TDRMs into Kenya's legal system.

1.6 Justification

This study seeks to show that TDRMs are applicable in the resolution of land disputes. This study is of relevance as the development of a legal and policy framework in the application of TDRMs is a largely unexplored area and the findings will thus add onto the academic discourse. The findings of this study will also be useful to lawmakers and policymakers as it will entail proposals on the development of a model framework that would govern the application of TDRMs in the resolution of land disputes.

1.7 Theoretical Framework

1.7.1 Legal Pluralism Theory

Legal pluralism is defined as the state of affairs (in any social order) in which more than one legal order occurs.[19] It reflects a society where two or more legal systems operate, some officially and others unofficially. This is the reality of many post-colonial states in Africa that exhibit the coexistence of a variety of justice models hinged upon the history, politics and religion of that specific state.[20] Some countries have recognised this concept of diverse legalities in their constitutions and other written laws albeit with limitations specifically with regards to the application of customary practices that tend to violate international standards of human rights, dignity, morality and justice.[21] Such limitations and repugnancy clauses are arguably said to undermine and devalue traditional values, among which includes the Traditional Dispute Resolution Mechanisms, that form part of the fulcrum of justice in many African societies. [22]

Griffith argues that a huge limitation of legal pluralism is the concept of legal centralism that denotes 'law' as that of the state and is considered to superior to any other laws in such a jurisdiction. [23] This means that a hierarchy of laws persists where other laws are inferior to the laws of the state.[24] This concept of legal centralism depicts the social and legal reality of

[19] Griffiths J, 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 1986, 1, -< https://commission-on-legal-pluralism.com/system/commission-on-legal-pluralism/volumes/24/griffiths-art.pdf > on 15th September 2024.
[20] Pimentel D, ' Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' *Yale Human Rights and Development Journal*, 2011, 59- < https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5755/04_14YaleHumRts_DevLJ59_2011_.pdf;jsessionid=14598BD3A6F9341BF3EC2F3F083C11ED?sequence=2 > on 15th September 2024.
[21] Article 2(4) & 159(3), *Constitution of Kenya* (2010).
[22] Sergon J, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, Nairobi, 2021, 6.
[23] Griffiths J, 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 1986, 1, -< https://commission-on-legal-pluralism.com/system/commission-on-legal-pluralism/volumes/24/griffiths-art.pdf > on 15th September 2024.
[24] Article 2(4) & 159(2), *Constitution of Kenya* (2010).

Kenya where all laws are subject to the Constitution as it is the supreme law of the land. [25] Griffith further splits legal pluralism into two: strong pluralism and weak pluralism. Strong pluralism, regarded as true pluralism by Griffith, depicts a legal system where both state and non- state laws are partly in harmony and partly contest one another.[26] In contrast, weak pluralism, which is the clear situation in Kenya, depicts a legal system where the sovereign recognizes and embraces parallel legal systems, such as customary law but subject to a supreme law.[27] Weak pluralism is also a clear depiction of legal centralism.[28]

This theory is relevant to this study as it shows the relationship between formal and informal legal and justice systems and how they interact with one another in society. To further support this, Kenya is a truly pluralistic society given the fact that we have at least forty-two ethnic groups in Kenya. This plurality is officially recognized in written law and furthers the embracing of the coexistence and diversity in different sources of law, including customary law.[29] Further, the constitutional recognition and protection of the right to culture encourages the promotion and practice of each community's culture and customs. [30] TDRMs are a subset of customary law that encourages people to seek justice using customary laws and dispute resolution mechanisms.[31] However, this right is limited as communities can only exercise their right to culture if it is not inconsistent the Constitution. [32] This clearly depicts Kenya as a weak pluralist state as it shows the supremacy of state law (the Constitution) through which the application of customary law is limited.

1.7.2 Rawls' Theory of Justice

John Rawls, in the Theory of Justice, defines justice as fairness.[33] He states that in a situation where equality persists and no one sees themselves as better or above the other, a contract or

[25] Article 2(1), *Constitution of Kenya* (2010).
[26] Griffiths J, 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 1986, 1, -< https://commission-on-legal-pluralism.com/system/commission-on-legal-pluralism/volumes/24/griffiths-art.pdf > on 15th September 2024.
[27] Section 3, *Judicature Act (Cap. 3 Laws of Kenya).*
[28] Griffiths J, 'What is Legal Pluralism?' *Journal of Legal Pluralism*, 1986, 1, -< https://commission-on-legal-pluralism.com/system/commission-on-legal-pluralism/volumes/24/griffiths-art.pdf > on 15th September 2024.
[29] Section 3, *Judicature Act (Cap. 3 Laws of Kenya).*
[30] Article 11, *Constitution of Kenya* (2010).
[31] Article 159(3), *Constitution of Kenya* (2010).
[32] Article 159(3), *Constitution of Kenya* (2010).
[33] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 52-55.

mutual agreement would be arrived at.[34] These principles of justice are hinged upon the rationality of man; that one if free and any rational person would not refuse an initial position of equality as defining the fundamental basis of their association.[35] These principles also specify the kind of social cooperation that could be entered and the forms of government that can be established.[36]

This theory justifies the protection of the various forms of Alternative Dispute Resolution Mechanisms, including TDRMs that we have. The use of ADR is hinged upon ensuring access to justice for all persons. This can be clearly seen through the various means in which TDRMs are applied, negotiation and mediation. These mechanisms bring the disputants at the negotiating table, and both assume an equal status by maintaining their status quo, where both parties present their interests and use them to negotiate with one another and reach a mutual agreement. Moreover, the application of TDRMs is not without limitations as prescribed in Article 159(3) of the Constitution of Kenya; justice, as described above is fairness, therefore such limitations in the application of TDRMs ensure that justice is served by protecting human rights.

1.7.3 Structural Functionalism Theory

Emile Durkheim and Herbert Spencer, who are the main propellants of the theory, undertook to investigate order and stability in society. The theory advocates for the maintenance of the status quo and works on the premise that people will cooperate to ensure social order is maintained.[37] Moreover, it states that the way a society is structured determines the way in which various societal functions are ordered, including what forms of dispute resolution mechanisms will be applied. As aforementioned, TDRMs were heavily applied even being formally recognised in the law. This is what led to the indoctrination of the encouragement of courts and tribunals to allow disputants to use TDRMs in resolving disputes. It is also

[34] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 52-55.

[35] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 52-55.

[36] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 52-55.

[37] Macionis J, Society: *The basics, 8 ed*, NJ: Pearson /Prentice Hall. Upper Saddle River, 2006, 12 - 13.

because of this theory that there is justification for the need to have a clear and uniform policy and legal framework that would govern the application of TDRMs in land disputes.

1.8 Literature Review

This study relies on writings and publications in the making of the argument that there exists a huge gap in the development of a uniformed legal and policy framework that would govern the application and enforcement of decisions made using ADR mechanisms, specifically Traditional Dispute Resolution Mechanisms. The lack of such a framework poses a strain when it comes to the determination of the jurisdiction of TDRMs and the enforcement of decisions made during the resolution of land disputes. This section will therefore explore literature on the subject through thematic analysis.

1.8.1 Nature and Status of Traditional Dispute Resolution Mechanisms in Kenya

Muigua Kariuki argues that historically, the use of TDRMs preceded the introduction of a formal legal system since conflict resolution among traditional African societies was anchored on people negotiating and the use of mediation.[38] However, during and after colonialism, the western notions of justice embedded in common law which was introduced in Kenya, led to the severe subjugation of TDRMs in the legal system.[39] Nonetheless, TDRMs still survived such limitations since most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[40]

Article 11 of the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation[41]. TDRMs encompass the

[38] Muigua K, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems' *Accessing Justice through ADR*, Glenwood Publishers Limited, Nairobi, 2022, 1025.

[39] Muigua K, 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems' *Accessing Justice through ADR*, Glenwood Publishers Limited, Nairobi, 2022, 1025.

[40] Murithi T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution*, 2006, 9-33 - <https://www.ajol.info/index.php/ajcr/article/view/39402 > on 17th August 2024.

[41] Article 11, *Constitution of Kenya* (2010).

traditional customs of a community as they are derived from African customary law, hence TDRMs vary from one community to another, and this poses a challenge in legislation as it would be really difficult to consolidate different dispute resolution mechanisms[42].

TDRMs have various features and they include: they are decided upon by chiefs or a group of council of elders and in the form of barazas; the authority of such leaders is derived from the status they hold in the community; there is no legal representation; the process is voluntary and the decision is based on agreement usually after negotiation by the involved parties; it embodies restorative justice; enforcement of decisions is based on fear of retribution by the community for instance being excommunicated for not respecting the decision held; and most importantly like cases, each scenario or dispute is treated differently and based on the circumstances of the case[43].

Contrary to the formal court system, which mainly focuses on allocation and protection of rights of the individuals, TDRMs are based on restoration the relationship between the disputing parties; as mentioned above, they are heavily based on ensuring restorative justice[44]. However, the major challenge facing TDRMs is that there is no clear legal framework or policy that governs their applicability; each use of TDRMs varies with each community due to different customs[45]

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

[43] United Nations Human Rights Office of the High Commissioner, Human Rights and Traditional Justice Systems in Africa < https://www.ohchr.org/sites/default/files/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf> on 17th August 2024.

[44] Kinama E, Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010, *Strathmore Law Review*,1 2015, 23.

[45] Kariuki F, African Traditional Justice Systems < http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf >on 17th August 2024.

1.8.2 Towards a Legal and Administration Framework of Traditional Dispute Resolution Mechanisms in Kenya

Yntiso argues that despite identifiable gaps within the customary law, TDRMs have been recognized as the best option in handling disputes and ensuring peaceful coexistence amongst the disputing parties and this is because such mechanisms are heavily anchors on dispute resolution that ensures the restoration of relationships than dispute settlement that focuses more on the enforcement of rights.[46] However, due to inadequacies in the study of customary laws, there has been slow development of theory and policy. The lack of efforts when it comes to identifying and analysing customary laws, has systemically limited our knowledge about which core values underlie customary law and this lack of knowledge has prevented the development of theoretical frameworks and concrete policy ideas; and this in turn has led to customary law being parallelly being applied against formal systems hence even ADR mechanisms are not as 'alternative' as they may be as there is still that need top turn to courts for guidance on how to apply them and the lengths to which they can be applied.[47]

Igbokwe V argues that informal justice processes in general should not exist as extensions of the formal process rather they should operate wholly as alternatives from the established court systems and be 'deprofessionalised'.[48] This is because even though court and informal systems both aim to resolve disputes, they both fundamentally differ in approach and methodology.[49] However, we could borrow some aspects of other ADR mechanisms. Since in the application of TDRMs mediation is also applied, to make TDRMs more effective would necessitate the accreditation of some council of elders as mediators to make the process and

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[46] Yntiso G, 'Understanding Customary Laws in the Context of Legal Pluralism' *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, Transcript Verlag, Bielefeld, 2020, 71.

[47] Yntiso G, 'Understanding Customary Laws in the Context of Legal Pluralism' *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, Transcript Verlag, Bielefeld, 2020, 71.

[48] Igbokwe V, 'Socio- Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking Peoples of Eastern Nigeria and their Implications for Community/ Neighboring Justice System in North America' *African Journal of International and Comparative Law,* 1998, 467-<https://heinonline.org/HOL/Page?handle=hein.journals/afjincol10&collection=journals&id=460&startid=&endid=485 > on 17th August 2024.

[49] Igbokwe V, 'Socio- Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking Peoples of Eastern Nigeria and their Implications for Community/ Neighboring Justice System in North America' *African Journal of International and Comparative Law*, 1998, 467-<https://heinonline.org/HOL/Page?handle=hein.journals/afjincol10&collection=journals&id=460&startid=&endid=485 > on 17th August 2024.

enforcement of the outcome way easier. This study agrees with Igbokwe V that there is a huge need to separate the formal and informal systems to avoid either being an extension of another as they both differ in their approach and methodology; this acknowledgement is what will help lawmakers and policymakers in developing a uniform and clear legal and policy framework that will govern the application of TDRMs and the enforcement of decisions that will be made, independent of courts.

1.9 Methodology

The findings of this study must be seen in light of some limitations. Time constraints have played a huge role in the conduct of this research. This research is not without its deadlines; therefore, it might negatively affect the quality and quantity of the research done. Moreover, the research methodology used is too limited to "desktop research." The methodology does not give the researcher a chance to go out in the field and collect raw data from people, to get first-hand information and experience on how suitable TDRMs are in the resolution of land disputes.

1.10 Chapter Breakdown

Chapter one (1) is the introduction of the research paper. It will contain the background, statement of problem, research objectives, research questions, hypotheses, justification of study, theoretical framework, literature review and methodology. This chapter will form the foundational basis of the study by providing the context and background of the legal problem in question.

Chapter two (2) will answer the first research question. It will explore the existing applicable laws in Kenya in relation to the use of TDRMs in the resolution of land disputes. Such an analysis would be helpful in determining whether the laws in Kenya are sufficient in ensuring the 'successful' application of TDRMs in resolving land disputes.

Chapter three (3) will answer the second research question. It will analyse the constraints that cause the existing gaps in policy and law in relation to the use of TDRMs in resolving land disputes.

Chapter four (4) will answer the third research question. It will analyse the legal and policy framework implanted in Rwanda and South Africa with regards to the integration of TDRMs within their formal justice system. Gaining such an understanding will help determine whether the model applied in Rwanda and South Africa would be better suited in filling the existing legal and policy gaps in Kenya in so far as the applicability and maximization of the use of TDRMs in Kenya is concerned.

Chapter five (5) is the final chapter of the study. It will provide the findings of the study, drawn from the previous chapters, to draw a plausible conclusion. The study will also give recommendations that it proposes should be adapted and thereafter, present a conclusion to the study.

CHAPTER TWO: LEGAL AND POLICY FRAMEWORK GOVERNING TDRMS IN THE RESOLUTION OF LAND DISPUTES IN KENYA

2.1 Introduction

This Chapter will answer the first research question (what current laws and policies govern the application of TDRMs in the resolution of land disputes?). It will start by giving a brief overview of the legal landscape governing TDRMs in the resolution of land disputes in Kenya. It will then explore the legal and policy positions in Kenya with regards to the use of TDRMs in resolving land disputes.

2.2 A Brief Overview of the Legal Landscape: The Use of TDRMs in Resolving Land Disputes in Kenya

The Constitution of Kenya guarantees the right of every person to access justice and imposes a duty on the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems.[50] To guarantee access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilization of formal and informal justice systems.[51] In this regard, Article 159 recognizes the use of Traditional Dispute Resolution Mechanisms (TDRMs) in addition to the court process.[52] Despite the formal textual recognition coupled with a constitutional mandate for their promotion in appropriate conflict management strategies, TDRMs are yet to be institutionalized by way putting in place adequate supporting legal and policy measures that would ensure effective utilization of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3). Mere textual recognition is not enough as it leaves so many questions regarding the application of TDRMs unclear. It is against this background that this section of the study examines the current legal and policy framework on access to justice, especially with regards to the resolution of land disputes, with a view to make recommendations in the subsequent chapters on the appropriate policy, statutory and administrative measures that will ensure that TDRMs are meaningfully and effectively utilized to ensure access to justice especially when it comes to resolving land disputes.

[50] Article 21 & 48, *Constitution of Kenya* (2010).
[51] Article 159(2)(d), *Constitution of Kenya* (2010).
[52] Article 159(2)(d), *Constitution of Kenya* (2010).

2.3 Legal Framework Governing use of TDRMs in Resolution of Land Disputes in Kenya

The Constitution of Kenya, 2010

Due to the resilience of customary laws in the social and way of life of Kenyans, there was a huge need to incorporate them into the legal framework.[53] Consequently, the promulgation of the Constitution of Kenya, 2010, ushered in a new dawn for TDRMs in Kenya. The recognition, therefore, by the supreme law seems to assert the place of customary law in the legal system and, consequently, that of TDRMs in dispute resolution. However, it is quite noteworthy, that while TDRMs have been recognized in the Constitution, they are still subject to a constitutionality test[54] and subsequently a repugnancy test[55], which means that their recognition is not at the same pedestal as formal laws in Kenya.[56] The following Articles of the Constitution have implications for TDRMs, in general and specifically to the resolution of land disputes:

Supremacy of the Constitution

Article 2(4) provides for the Constitution being the supreme law of the state.[57] The Constitution, is the most important part of the basic law of a state.[58] Furthermore, the Article goes ahead to recognize customary law as a source of law: "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."[59] This recognition,

[53] Muigua K, "Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya, 2010" Kairiuki Muigua & Company Advocates, 2018, 3.
[54] Article 159 (2), *Constitution of Kenya* (2010), acknowledges that courts and tribunals in exercising their judicial authority, shall the guided by the principle of alternative forms of dispute resolution including the use of TDRMs. This, therefore, forms the basis of the formal recognition of TDRMs in the resolution of disputes. However, constitutional safeguards are established through a constitutionality test provided for in clause (3), where it is clearly stated that TDRMs 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 written law.
[55] Article 159(3)(b), *Constitution of Kenya*(2010) and Section 3(2), *Judicature Act* (1967) give provisions for the repugnancy clause and test, where in the former, TDRMs wouldn't be applicable if they are repugnant to justice and morality and in the latter, among the sources pf law outlined, African Customary Law is included and is applicable in so far as it is not repugnant to justice and morality. Such repugnancy is further elaborated upon in judicial decisions and interpretation varies based on a case by case basis.
[56] Muigua K, "Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya, 2010" Kairiuki Muigua & Company Advocates, 2018, 3.
[57] Article 2(4), *Constitution of Kenya* (2010).
[58] Lurnumba P and Franceschi L, 'The Constitution of Kenya. 2010: An Introductory Commentary', *Strathmore University Press*, Nairobi. 2014 . 66.
[59] Article 2(4), *Constitution of Kenya* (2010).

however, is in the negative; it still signifies the inferiority of customary laws as compare to other sources of law.[60]

Culture

As aforementioned in the previous Chapter, Kenya is an ethnically diverse state with at least 42 tribes, therefore, there has been an attempt by the constitution to acknowledge and protect this diversity and the right of communities to manifest their cultural practices and beliefs.[61] **T**his was done through the Article 11 on culture. This constitutional provision recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.[62] This Article aims at encouraging cultural diversity and protecting and promoting culture. It, therefore, imposes obligations on the State to promote and protect all forms of cultural expressions TDRMs are embedded in the customs, norms and values of traditional African cultures, therefore by constitutionally recognizing traditional cultural practices, this legitimizes the use of TDRMs in resolving disputes.[63]

Principles of land policy

Article 60 outlines the principles on land policy that guide the way land administration and management are conducted in the country. [64] These principles must be adhered to by the policy and legal formulations on land. Among those principles includes the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. [65]

The National Land Commission

Article 67 of the Constitution establishes the NLC to prevent abuses of land management and administration processes.[66] One of the functions assigned by the Constitution to the NLC is to encourage the application of traditional dispute resolution mechanisms in land conflicts. NLC is, therefore, one of the bodies charged by the Constitution with ensuring that TDRMs are applied in the land dispute resolution process.

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[60] Lurnumba P and Franceschi L, 'The Constitution of Kenya. 2010: An Introductory Commentary', *Strathmore University Press*, Nairobi. 2014 . 66.
[61] Article 11, *Constitution of Kenya* (2010).
[62] Article 11, *Constitution of Kenya* (2010).
[63] Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abelow Mohamed [2013] eKLR' 2 *Alternative Dispute Resolution Journal*, 1 (2014),203.
[64] Article 60, *Constitution of Kenya* (2010).
[65] Article 60(g), *Constitution of Kenya* (2010).
[66] Article 67*, Constitution of Kenya* (2010).

The Exercise of Judicial Authority

Article 159 outlines that in their exercise of judicial authority courts and tribunals should encourage the use of traditional dispute resolution mechanisms as one of the principles of exercising such authority. Article 159 also places restraints on the use of traditional dispute resolution mechanisms.[67] They are not to be applied in a manner that contravenes the Bill of Rights, repugnant to justice and morality or inconsistent with the Constitution or any written law. The restriction as to repugnancy to justice and immorality is vague. This is because neither the Constitution nor statutes define what constitutes repugnant to justice and morality. This is left for the courts to determine and provides room for undue restriction of traditional dispute resolution mechanisms.[68]

The National Land Commission Act, 2012

Section 3 lays out the objective of the Act as to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya.[69] The Commission is also obligated to encourage the application of traditional dispute resolution mechanisms in land conflicts.[70] Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. In the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.[71] There is

[67] Article 159(3), *Constitution of Kenya* (2010).
[68] The Court in *Republic v Abdulahi Noor Mohamed* (alias Arab) [2016] eKLR, in the adjudication of whether or not TDRMs are applicable in the resolution of criminal cases, notes in para.22 that "*The constitutional recognition of alternative justice systems as one of the principles to guide courts in the exercise of judicial authority does not exclude criminal cases. This recognition restated the place of alternative justice systems in the administration of justice. Article 11 recognizes culture as 'the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'. There are however, no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters. As noted above, statutory provisions only limit to certain category of offences, and this does not extend to capital offences. There is also no formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation. Policy engagement is paramount to provide guiding principles on such as aspects as the types of cases that can be determined through the alternative justice systems, interrelation of such application (if any) with the court process, how and when the alternative process is to be invoked in the course of proceedings among others.*'" While this observation of the court specifically dealt with the applicability of TDRMs in the resolution of criminal matters, it cuts across through all disputes where TDRMs can be applied, including civil matters such as land disputes. This case, therefore, provides a clear demonstration of the need for a comprehensive legal and policy framework that goes beyond textual recognition, on the use of TDRMs. Lack thereof, means that the interpretation of the constitutional safeguards in place and repugnancy clauses in written laws, are subject to judicial discretion and decisions may vary on a case by case basis.
[69] Section 3, *National Land Commission Act* (2012).
[70] Section 5(f), *National Land Commission Act* (2012).
[71] Section 6(3), *National Land Commission Act* (2012).

a need to amend Section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land.[72]

Having a legal framework on the use of TDRMs is arguably the only way that community elders can have a say in deliberations on the use, access and management of natural resources affecting their livelihoods, especially land, without being sidelined by the Commission.[73] Currently, there have been no signs of actual and meaningful engagement of communities in land matters especially in the ongoing supremacy battle between the National Land Commission and the Ministry of Land, Housing & Urban Development on who should spearhead the control of use, access and management of land in the country.[74] The indulgence of community elders by the Commission on matters pertaining land, on a discretionary basis, further impedes ,the legitimacy and utilization of TDRMs in resolving land disputes.[75] This poses an indefinite gap in the application of customary law because elders are way more equipped on customary laws, yet are barely accorded the opportunity to advise on matters pertaining customary law, as they barely form part of the members of the County Management Boards as per Section 18. [76]

The Environment and Land Court Act, 2011

Under Section 3, the objective of the Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives.[77]

Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDRMs in accordance with Article 159(2) (c)

[72] Section 17, *National Land Commission Act* (2012).
[73] Yance S & Yance S, 'Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System : A Study on the ADR Processes in Rwanda and Nicaragua' *Pepperdine Dispute Resolution Law Journal*, Vol. 14 No. 3, 2014,14- < https://digitalcommons.pepperdine.edu/drlj/vol14/iss3/1/ > on 27 September 2024.
[74] Ayieko F, 'Ngilu- National Land Commission wars hit lenders' The Standard, 23 October 2014- < https://www.standardmedia.co.ke/lifestyle/article/2000139137/ngilu-national-land-commission-wars-hit-lenders > on 27 September 2024.
[75] Muigua K, 'Legal and Policy Framework of ADR in Kenya' *Accessing Justice through ADR*, Glenwood Publishers Limited, Nairobi, 2022, 83.
[76] Muigua K, 'Legal and Policy Framework of ADR in Kenya' *Accessing Justice through ADR*, Glenwood Publishers Limited, Nairobi, 2022, 83.
[77] Section 3, *Environment and Land Court Act* (2011).

of the Constitution.[78] Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court must stay proceedings until such condition is fulfilled.

It is, however, unclear and ambiguous on what or who determines a matter where the use of TDRMs is a condition precedent to any proceeding before the court. The court's discretion and lack of clarity on these provisions may defeat the spirit of Article 159 hence the same should be clarified.

Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with the aim to harmonize land regimes which were scattered in different pieces of legislation. It lays down the guiding values and principles of land management and administration which include inter alia: elimination of gender discrimination in law, customs and practices related to land and property in land; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; and alternative dispute resolution mechanisms in land dispute handling and management.[79]

This Act promotes the application of ADR mechanisms which in this case include Traditional Dispute Resolution Mechanisms.[80] Thus, TDRMs can effectively be utilized within the framework of providing access to justice. Moreover, the use of ADR and TDR mechanisms can also facilitate the implementation of the constitutional principles of public participation, inclusiveness, protection of the marginalized, non-discrimination, equity and social justice amongst others.

Lack of a policy and legal framework that sets out the parameters on the operation of TDR mechanisms, however, gives a wide discretion to the National Land Commission[81] on how to go about ensuring the use of TDRMs in land matters and may even create confusion as how and when the same should be used.

[78] Section 20, *Environment and Land Court Act* (2011).
[79] Section 4, *Land Act* (2012).
[80] Section 4(2)(m), *Land Act* (2012).
[81] Article 67, *Constitution of Kenya* (2010).

Judicature Act, 1967

The objective of the Act, as can be derived from its title, is to make provisions on the jurisdiction of the High Court, Court of Appeal and other subordinate courts. In line with the objective outlined, the Act lays out the sources of law in which the courts need to conform to as they exercise their jurisdiction.[82]

Among the sources of law outlined, includes African Customary Law, and that such law shall apply in civil matters so far as it is applicable and is not repugnant to justice and morality.[83]

The Act does not define what constitutes repugnancy to justice and morality; definition of these terms is determined through jurisprudence and hence varies on a case-by-case basis. Arguably, such vagueness in expounding on the repugnancy clause, would have been intended to weaken the position of customary law, and consequently TDRMs, in the legal system due to their perception as backward and retrogressive, apperception imported from colonial times. [84]

Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers on it with the mandate under Section 8 to perform various functions.[85] Section 8 (f), mandates the Commission to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration, which including matters regarding land. In this regard, the utilization of TDRMs enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.[86] The Commission has been instrumental in promoting the use of ADR mechanisms especially in handling disputes between various State and Constitutional organs.[87]

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[82] Section 3(1), *Judicature Act* (1967).
[83] Section 3(2), *Judicature Act* (1967).
[84] Sergon J, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, 2021, 18.
[85] Section 3 & 8, *Commission on Administrative Justice Act* (2011).
[86] Amollo O, 'Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya' *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014, 96-111- < https://www.studocu.com/row/document/jomo-kenyatta-university-of-agriculture-and-technology/bachelor-of-law/legitimising-alternative-dispute-resolution-mechanisms-in-kenya/31008431 > on 27 September 2024.
[87] Amollo O, 'Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya' *Chartered Institute of Arbitrators (Kenya) Alternative Dispute Resolution Journal*, Vol. 2, No. 1, 2014, 96-111- < https://www.studocu.com/row/document/jomo-kenyatta-university-of-agriculture-and-technology/bachelor-of-law/legitimising-alternative-dispute-resolution-mechanisms-in-kenya/31008431 > on 27 September 2024.

2.4 Policy Framework Governing the Use of TDRMs in Resolution of Land Disputes in Kenya

National Land Policy, 2009

It recognizes the need to ensure that there is access to timely, efficient, affordable dispute resolution mechanisms to facilitate efficient land markets, tenure security and investment stability in land. [88] On community land, the Policy states that one of the effects of individualization of tenure was to undermine traditional resource management institutions.[89] The Policy recognizes that TDRMs have a role to play in guaranteeing access to justice in the land sector.

Alternative Justice Systems Framework Policy, 2020

The AJS Framework Policy represents efforts by the Judiciary to align AJS mechanisms (including TDRMs) with the Constitution and the Judiciary's Framework for Sustaining Judicial Transformation. The Taskforce acknowledges that despite the textual recognition under Article 159 of the Constitution for the use of AJS mechanisms, AJS are yet to be institutionalized and that there are no adequate legal and policy guidelines that govern AJS.[90]

2.5 Is mere textual recognition in laws and policies enough to safeguard the application of TDRMs in the resolution of land disputes?

TDRMs are part of a well-structured social system that is geared towards reconciliation and maintenance of social relationships given that they are deeply rooted in African customs.[91] It is because of this that TDRMs have been recognized as the best option in handling disputes and ensuring peaceful coexistence amongst the disputing parties and this is because such mechanisms are heavily anchored on dispute resolution that ensures the restoration of relationships than dispute settlement that focuses more on the enforcement of rights.[92] Despite the overwhelmingly lucrative nature of TDRMs, there are identifiable gaps as

[88] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, Section 169.
[89] Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, Section 64.
[90] The Judiciary of Kenya, *Alternative Justice Systems Framework Policy* (2020), 3.
[91] K. Osei-Hwedie and J.R. Morena, Chapter 3: *Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, University of Botswana*, 2012.
[92] Yntiso G, 'Understanding Customary Laws in the Context of Legal Pluralism' *Legal Pluralism in Ethiopia: Actors, Challenges and Solutions*, Transcript Verlag, Bielefeld, 2020, 71.

observed in the analysis of the legal and policy framework above that hinder their application.

While there has been formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies TDRMs are yet to be institutionalized by way putting in place supporting adequate legal and policy measures that would ensure their effective utilization in access to justice.[93] The repugnancy test is arguably what hinders the application of African Customary Law in general and because of this, no stable and comprehensive legal and policy framework has been established to overcome such limitation, further leading to the ineffective utilization of TDRMs.[94] Repugnancy is such a subjective and Western borrowed notion that it can barely provide a stable yardstick in cases involving African Customary Law. [95] Moreover, the constitutionality test hinged upon the constitutional safeguards established under Article 159, is subject to application and interpretation on a case by case basis thus making the application of TDRMs very fluid and unpredictable.[96] The fact that there is no clear precedent in judicial decisions regarding their application, for instance by setting cross cutting bare minimum standards(applicable to all customs) in their application more than just subjecting them to the constitutionality test and repugnancy test further illegitimizes the effective use of TDRMs despite their formal recognition in laws and policies.

While it is noteworthy that such tests and constitutional safeguards exist to ensure that those customary laws that do not align well with human rights standards are sieved out, this has led to the continued subjection of customary laws to the repugnancy clause by courts hence affecting the efficacy of TDRMs.[97] Besides, it is arguable that the repugnancy clause, since its introduction during the colonial times, has not been redefined to match the conceptions of morality and justice of African societies; its interpretation still suffers from a grievous misconception of 'justice and morality' as it imposes the Western moral codes on African

[93] Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution, Volume 5, No 1, (2017), pp. 74-104
[94] Section 3(1), *Judicature Act* (1967).
[95] *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR.
[96] Article 159(3), *Constitution of Kenya* (2010).
[97] Section 3(1), *Judicature Act* (1967).

societies.[98] While it is true that the adoption and application of Africa's traditional dispute resolution mechanisms, including indigenous principles and methods on conflict management do not apply to all situations, there are relevant aspects of these principles and practices that can be integrated and harmonized with the formal legal and institutional framework to offer an all-round approach on access to justice which caters for all persons despite any social differences.[99] They can be weighed against the constitutional safeguards such as ensuring that they do not contravene the Bill of Rights, so as to get rid of the negative aspects therein. TDRMs, because of their informal nature, can go a long way in facilitating access to justice at the community level, especially with regard to the resolution of land disputes, for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures.

2.6 Conclusion

In conclusion, the current legal framework does not provide for a comprehensive legal, policy and judicial framework that goes beyond mere textual recognition. It also fails to provide for guidelines on linkage of TDRMs with the formal court process; it also does not clearly outline the enforcement mechanisms for decisions made through their use, which has further frustrated the utilization of TDRMs in Kenya.

[98] IDLO, Kenya Judiciary & NCIA, Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes, 2018.

[99] Yance S & Yance S, 'Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System : A Study on the ADR Processes in Rwanda and Nicaragua' *Pepperdine Dispute Resolution Law Journal*, Vol. 14 No. 3, 2014,14- < https://digitalcommons.pepperdine.edu/drlj/vol14/iss3/1/ > on 27 September 2024.

CHAPTER THREE: CONSTRAINTS TO THE INTEGRATION OF TDRMS WITH THE FORMAL JUSTICE SYSTEM

3.1 Introduction

Following the discussion in Chapter Two, this Chapter will answer the second research question (what constraints exist within the legal and policy framework that cause the existing legal and policy gaps that hinder the application of TDRMs in the resolution of land disputes). The Chapter will begin by describing the nature of TDRMs and whether they align with the rules of natural justice. It will then analyze the general limitations that inhibit the integration of TDRMs with the formal justice system by relying on data such as reports, policy framework and judicial attitudes regarding the same.

3.2 A Brief Overview of the Nature of TDRMs

Among the unique features that set apart traditional justice systems from the formal justice system include community leaders as the decision makers and implementers of such decisions[100], public participation by community members and proceedings that aim at reconciliation and restorative justice in comparison to retributive justice that is mainly featured in the formal justice systems.[101] These mechanisms give greater voice to the communities.[102] In a typical land dispute, it is the elders who adjudicate over these matters as they have the respect of the community and are presumed to have the best memory of the boundaries of the land and the history of ownership and possession of the land.[103] Such dispute proceedings would entail the calling of a baraza by the community elders, in which the community members would have a space to voice out their opinions and present necessary evidence that would help the elders to arrive at a decision.[104] Land matters have real and lasting impact on the lives of Kenyans and it is, therefore, necessary that the State in collaboration with community leaders, come up with ways to redefine the interaction between the formal and informal justice systems (a gap that was clearly posited in Chapter Two is the

[100] Joireman S, 'On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya', *University of Richmond*, 2009, 1.
[101] OHCHR *Human Rights and Traditional Systems in Africa*, 2016, 23.
[102] Article 174 (c), *Constitution of Kenya* (2010), that clearly notes one object of the new governmental system is to give powers of self-governance to the people and enhance the participation of people in the exercise of the powers of the State and in making decisions affecting them.
[103] Fish B, 'The Kalenjin Heritage: Traditional Religious and Social Practices' *Africa Gospel Church*, Kericho, 1995, 262–63.
[104] Juma L, 'Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes', 14, Thomas L. Rev. 2001, 459 & 505-< https://heinonline.org/HOL/LandingPage?handle=hein.journals/stlr14&div=31&id=&page= >on 20th December 2024.

fact that there is a huge disconnect between the interaction of the two systems) to ensure the legitimization of TDRMs and their fluid integration with the formal justice system.[105]

However, even in an attempt to achieve the aforementioned objective, it is necessary to analyze whether or not TDRMs at their very core and nature meet the principles of natural justice and the rule of law, particularly in ensuring the right to a fair hearing is met as per Article 50 of the Constitution.[106] This analysis will be done by relying on Rawl's theory of justice.

3.3 Interplay between TDRMs and the Rules of Natural Justice

Natural justice is a fundamental principle in the justice system and its application is presumed especially where a person's rights (in this case land rights) are at stake. The principle entails a concept of justice that denotes fairness.[107] Aristotle defines justice as lawfulness or fairness.[108] Fairness, according to Rawls, entails the concepts of equal opportunities and liberties.[109] The rule of law doctrine, on the other hand, displays the basic principles of constitutionalism: values of independence, due process, access to justice and respect for human dignity.[110] Another fundamental principle underpinning rule of law, is equality before the law, meaning that all classes of person, regardless of status or gender, is subject to the same law and that all parties to a dispute are subject to fair treatment under the law and be accorded due process.[111] While customary law has legitimacy in itself, some norms are arguably not in line with the principles of natural justice (as will be discussed further within this Chapter); such as fairness which is clearly neglected when it comes to norms that are discriminatory against women. Therefore, all proceedings, including the ones in TDRMs, should be subject to procedures prescribed in the law and where such procedure does not

[105] Witchger K, 'Equality in Process: Community Land Dispute Resolution Mechanisms in Kenyan Law', *Columbia Journal of Gender and Law*, 2018, 69- < https://journals.library.columbia.edu/index.php/cjgl/article/view/2781/1285 > on 20th December 2024. >
[106] Sergon J, 'Integrating Trdaitional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, Nairobi, 2021,
[107] Rawls J, 'A theory of justice', *Harvard University Press*, Cambridge, 1971, 52-55.
[108] W D Ross, '*Aristotle Nicomachean Ethics Book V*', Batoche Books, Kitchener, 1999.
[109] Rawls J, 'A theory of justic'e, *Harvard University Press*, Cambridge, 1971, 52-55.
[110] Jowell J, 'The Rule of Law and its Underlying Values' *The Changing Constitution*, Oxford University Press, 2011, 24-25.
[111] Kaluma P, 'The Ultra Vires Rule on its Deathbed: The Rule of Law as the Basis of Judicial Review in Kenya' *University of Nairobi,* Nairobi, 2008, 128.

exist, the rule of natural justice shall apply. The concept of natural justice basically encompasses two maxims: the rule against bias and the right to heard.[112] In the context of TDRMs, the maxims shall apply in the respective manner; under the former maxim, any decision arrived at through TDRMs shall be impartial and TDRM practitioners should be independent from any external influence during the course of the proceedings and that their decisions should be based on the material evidence presented. Under the latter maxim, the disputing parties should all be accorded a fair hearing and this includes all the constitutional provisions laid out in Article 50 of the Constitution, such as the adequate and equal opportunity to present their case and adduce evidence.

The concepts of natural justice and rule of law serve as benchmark in the context of adherence with the Bill of Rights especially in the application of TDRMs. Failure to observe them will consequently result in the suppression of the Bill of Rights. Therefore, to avoid this, the State needs to come up with mechanisms beyond textual recognition that ensure that TDRMs ensure access to justice, and this will lead to the strengthening of and legitimization of TDRMs. Such discussions are important, especially in the context of land, where historical injustices still prevail. Such injustices include the subjugation of women in land matters because of how patriarchal the society still is. This coupled up with the fact that the final decision is made by male elders, not only hinders women's access to justice but also limits the realization of the socioeconomic rights as enshrined in the constitution.[113] Other barriers might include the fear of intimidation and victimization by community elders. However, even in the communities that try to be progressive and have women as part of the community elders, the women to men ratio is still alarming, therefore, matters involving women are not adjudicated upon fairly, due to inadequate representation as elders, the persistent negative attitudes towards women elders, limited influence of TDRM decisions by women elders and biased cultural practices and traditions.[114] Consequently, it is clear that some principles of natural justice and the rule of law are not yet met in the application of TDRMs, further suppressing the effective application of TDRMs.

[112] Kaluma P, 'The Ultra Vires Rule on its Deathbed: The Rule of Law as the Basis of Judicial Review in Kenya' University of Nairobi, 2008, 128.
[113] Muigua K, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya' Kariuki Muigua and Company Advocates, 2010, 5- < https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf > on 20th December 2024.
[114] Muigua K, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya' Kariuki Muigua and Company Advocates, 2010, 5- < https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf > on 20th December 2024.

3.4 Constraints that Hinder the Integration of TDRMs with the Formal Justice System

Given the continued acceptance for the use of TDRMs in Kenya, there is a huge need to strengthen and increase their smooth interplay with the courts. It is clear from the analysis above and previous chapters that TDRMs do have some weaknesses that inhibit their effective application. At the centre of this is the repugnancy clause enshrined in Section 3(2) of the Judicature Act.[115] In line with this, this section of the study will address the various constraints that arise, paying specific focus to the repugnancy clause. The argument being made is that there needs to be a TDRM- specific legal, policy or institutional framework that needs to be developed to address these constraints and lead to the effective application of TDRMs, specifically in the resolution of land disputes. The constraints will include: the superimposition of formal laws over customary laws, misalignment with human rights standards and natural justice principles, enforcement of awards and the repugnancy clause.

3.4.1 The Superimposition of the Formal Laws over Customary Law

Transplanting laws from foreign jurisdictions is fraught and more so imposing formal laws on the diverse people of Kenya who mostly rely on customary laws, can be problematic. From the constitution, it is very clear that formal laws trump customary laws.[116] This potentially gives the state discretionary powers in shaping the development of customary laws. However, in line with the spirit of the Constitution through Articles 11 and 159, the State, through Parliament and the courts, has the obligation to alleviate the place of customary justice systems by ensuring that they conform with the Constitution and other written laws and encourage the reliance on customary norms. Imposing national laws on all ethnic groups can be destructive for various reasons: customary norms vary from one ethnic group to another hence subjecting all of them to the same formal law limitations, further subjugates their place in society.[117]

[115] Section 3(2), *Judicature Act*(1967).
[116] Article 2(3), *Constitution of Kenya* (2010).
[117] Witchger K, 'Equality in Process: Community Land Dispute Resolution Mechanisms in Kenyan Law', *Columbia Journal of Gender and Law*, 2018, 42- < https://journals.library.columbia.edu/index.php/cjgl/article/view/2781/1285 > on 20th December 2024.

3.4.2 Misalignment with Human Rights Standards and Natural Justice Principles

As discussed above, most TDRMs are still patriarchal and contravene the Bill of Rights.[118] For instance, some customs still inhibit women from owning property which contravenes Article 60(1) of the Constitution.[119] In some communities, the voices of women are still limited and this in turn negates the principles of natural justice such as equality before the law, due process and fair hearing.[120]

3.4.3 Enforcement of TDRM Awards

The enforcement of decisions through the force of social conformity is not enough to guarantee that the parties involved will follow through with the verdicts made by the community elders, therefore, people have more confidence in the formal courts because there's a guarantee that court orders will be followed as one can be held in contempt of the court.[121] The parties involved may choose not to follow through with elders' verdicts, defeating the end of justice. One may argue that communities may have complex rituals to deal with rebellious parties, but this becomes controversial if the elders end up being wrong. What about communities that may lack such rituals? How then can verdicts be enforced? Meaning, are the decisions made within TDRMs final, or do they do not be taken to court to be recognized and enforced? There is, therefore, a need to have interplay between courts and such informal systems through court annexation of TDRM decisions. This would come into play where the parties need the court's interference, with the consent of the parties of course, to ensure that the process of use of TDRMs runs smoothly and when it comes to enforcement of decisions, an order issued by the court after the parties come to an agreement would compel the parties to comply with the terms of their agreement.

[118] Republic of Kenya, *Sessional Paper No. 9 of 2009: National Policy on Gender and Development*, Ministry of Gender, Children and Social Development, Nairobi, 2009. Under the Section on Gender and Equity Principles, the Sessional Paper clearly states that "...culture and traditions continue to support male inheritance of family land while there is lack of gender sensitive family laws. There is a conflict between the constitutional provisions and international treaties on gender equality vis-a-vis customary practices that discriminate against women in relation to land ownership and inheritance."
[119] Article 60(1), *Constitution of Kenya* (2010).
[120] Articles 27, 47, 50(1), *Constitution of Kenya* (2010).
[121] Sergon J, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, Nairobi, 2021,

3.4.4 The Repugnancy Clause

The Constitution negatively recognizes TDRMs by limiting their application subject to the repugnancy test. [122] It is from this clause, that the application of TDRMs which is heavily reliant on customary law, would be deemed distasteful if the traditions relied upon are considered to be repugnant to justice and morality.[123] No provision of the law clearly defines what repugnant to justice and morality means hence the interpretation of this is subject to the discretion of the courts.[124]The historical underpinning of the development of this clause was that it was meant to perpetuate prejudice against customary norms in favor of Western ideals. [125] The danger of still relying on this clause is that it continues to make customary laws inferior, hence limiting their application even via TDRMs. Moreover, the danger of leaving the interpretation of this clause to courts is that by the rules of judicial precedence, if a superior court defines what repugnant to justice and morality means, then all inferior courts will be bound by that decision and interpretation meaning that that standards would apply to all customs call into question in courts. The shortcoming of having such precedents is the fact that the interaction between the courts and the informal justice systems would be mainly negative, where instead of courts encouraging the use of TDRMs, they would merely be deciding whether the customs presented in the facts are repugnant to justice and morality. This would further subjugate the place of customary law in the formal justice system. This would be because of the lack of a clear legal framework that defines what such a limitation entails.

Invariably, sometimes instead of contextual interpretation of the clause by relying on the respective customary norms, courts may borrow standards from various jurisdictions to draw evaluative latitudes on the matter. The introduction of such foreign norms would be in contradiction of the decision made in *Nyali Limited vs the Attorney General* where it was clearly stated that common law may only apply in foreign lands with alterations that fit the local contexts because people in those lands have their own customary norms that they hold

[122] Article 159(3)(b), *Constitution of Kenya* (2010).
[123] Article 159(3)(b), *Constitution of Kenya* (2010).
[124] *Virginia Edith Wamboi Otieno* v *Joash Ochieng Ougo* & another (1987) eKLR, which is commonly referred to as the S.M Otieno case, is a landmark case that remains a pivotal moment in Kenya when it comes to the complexities surrounding customary law and its interaction with the formal justice system. The court clearly stated that interpretation of what repugnant to justice and morality would vary on a case-by-case basis and would therefore be subject to judicial discretion in the interpretation whether or not a norm would be repugnant to justice or morality.
[125] Section 3(1), *Judicature Act* (1967).

dear to them.[126] In summation, customary law even recognized as a source of law of law in Kenya, has limited influence and until this is resolved, for instance either by redefining the repugnancy clause or removing it, the legitimization of TDRMs will still be called into question.

3.5 Conclusion

The interplay between TDRMs and the formal justice system viewed with the constraints is weak. This clearly portrays weak legal pluralism as the formal legal system is deemed to be superior to customary laws because even with the multiplicity of laws that exist in Kenya, formal laws are viewed as the overriding laws, further subjugation customary laws. The general constraints discussed above heavily contribute to the inferiority of customary laws. Lack of the resolution of these constraints will make it close to impossible to address the gaps put forward in Chapter 2 regarding the applicability of TDRMs in the resolution of land disputes.

[126] *Nyali Limited vs the Attorney General*, 1995 1 All ER 646.

CHAPTER FOUR: A COMPARATIVE ANALYSIS ON THE INTEGRATION OF TDRMS INTO THE FORMAL JUSTICE SYSTEM IN KENYA, RWANDA AND SOUTH AFRICA

4.1 Introduction

This chapter answers the third research question by undertaking a comparative analysis between Kenya, Rwanda and South Africa regarding the integration of Traditional Dispute Resolution Mechanisms into the formal justice system. Through this analysis, the chapter aims at exploring the different approaches taken by Rwanda and South Africa with regards to the problem (integration of TDRMs with the formal justice system beyond mere textual recognition). An analysis of the similarities and differences in approaches taken by the three countries (Kenya, Rwanda and South Africa) to address the issue will be vital in determining what future policies and/or laws can be drafted and implemented to address the problem.

4.2 Justification for using Rwanda and South Africa for this study's comparative analysis

Kenya, Rwanda and South Africa, despite their unique histories and cultural contexts, share several socio-cultural and political realities that make them suitable for comparative analysis, particularly regarding Traditional Dispute Resolution Mechanisms (TDRMs) and their integration into formal justice systems. Both countries experienced colonial rule that had a significant impact on their legal systems. This colonial history led to the established of a legal pluralistic system where customary law coexists with the formal justice system that necessitated for the recognition of customary law within the judicial framework.

Moreover, the three states are ethnically diverse (with Kenya and South Africa being more diverse than Rwanda, however, such a difference in diversity is not too significant as to pose a threat to the applicability of the policies and laws applied in Rwanda that Kenya could possibly emulate), a characteristic that significantly affects the social fabric, governance and legal systems in both countries. A comparison of the three countries will help in identifying the similarities and differences in laws and policies, as well as best practices that can be integrated into Kenya to solve the issue of integration of TDRMs within the formal justice system to help in resolving land conflicts.

4.3 A comparative analysis of Rwanda

4.3.1 The Abunzi Committee of Rwanda

The term Abunzi can be translated to mean "those who reconcile", therefore, in traditional Rwanda, the Abunzi were men known within their communities who were asked to resolve disputes.[127] The Abunzi Committee was institutionalized in 2004 and has since been run by the Rwandese government and is meant to settle disputes, reconcile the disputing parties and restore harmony within the community.[128] The Committee established pursuant to Law No 37/2016 of 08/09/2016 (hereinafter referred to as "the Law"), which outlines the organization, jurisdiction, competence and functioning of the Abunzi Committee.[129]

Geographically, Rwanda is divided into five (5) provinces, thirty (30) districts, four hundred and sixteen (416) sectors, two thousand, one hundred and forty-eight (2,148) cells, and 14,837 villages. Sectors and cells in Rwanda are equivalent to divisions and locations in Kenta respectively. It is vital to note that this Committee deals with civil matters only.[130] The Law, in determining the organization, jurisdiction, competence and functioning of the Abunzi Committee, provides that the Abunzi Committee at cell level shall deals with civil matters pertaining to:

(a) movable and immovable assets and succession thereto where their value does not exceed three million Rwanda francs (3,000,000 Frw);
(b) breach of contract between individuals, if its value does not exceed three million Rwanda francs (3,000,000 Frw);
(c) . Family issues other than those requiring rendering a decision on civil status.

In addition to Article 10 of the Law, Article 11 goes further ahead to state that the civil disputes listed in the aforementioned article, will be determined by the Committee with regards to the Abunzi Committee in the territorial jurisdiction of the subject-matter and the Abunzi Committee of the respondent's place of residence if the subject-matter is movable property or the Abunzi Committee of the applicant's place of residence through mutual agreement with the respondent. This provision is especially important to this study as it

[127] Ministry of Justice, *Abunzi Capacity Building Strategy (2020-2024)*, December 2020, 16-18.
[128] Ministry of Justice, *Abunzi Capacity Building Strategy (2020-2024)*, December 2020, 16-18.
[129] Article 4, *Law No 37/2016 OF 08/09/2016.*
[130] Article 10, *Law No 37/2016 OF 08/09/2016.*

mainly focuses on integrating TDRMs in Kenya to the formal justice system with regards to the resolution of land (immovable property) disputes.

The Abunzi dispute resolution mechanism operates on customary law that is not subject to any repugnancy test. [131] However, the operation of the Committee is subject to a constitutionality test where Article 176 of the revised Constitution of Rwanda provides that customary laws shall remain applicable in so far as they are not replaced by written law, not inconsistent with the Constitution, laws, orders, regulations and does not contravene human rights, or are contrary to public security or good morals.[132] Furthermore, recognised under Article 141 of the Constitution of Rwanda[133], the Abunzi Committee as regarded as first instance avenues for the resolution of disputes listed under Article 10 of the Law[134], and this exemplifies the ideal collaboration between TDRMs and the judiciary. The Abunzi Committee operates at cell and sector levels, with 2564 committees currently in operation; where the Abunzi Committee operates at the cell level while the Abunzi Committee of Appeal operates at the sector level.[135]

A huge criticism against TDRMs is the fact that they are often characterised for their gender non-inclusive nature, proving to be discriminatory against women as discussed in earlier chapters. To remedy this, 30% of the members of the Committee must be women.[136] The members of this committee operate on a voluntary and non remunerative basis and subject to a code of conduct that if not followed, may lead to the suspension of the members on the basis of lack of impartiality and misconduct of some other form.[137] The Law also establishes a Bureau at both the cell and sector levels to act as an oversight body, however, it is not allowed to interfere with how members of the committee settle disputes.[138]

[131] Sergon J, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, 2021, 118.
[132] Article 176, *Constitution of Rwanda* (2015).
[133] Article 141, *Constitution of Rwanda* (2015).
[134] Article 10, *Law No 37/2016 OF 08/09/2016.*
[135] Article 4, *Law No 37/2016 OF 08/09/2016.*
[136] Article 4, *Law No 37/2016 OF 08/09/2016.*
[137] Article 32, *Law No 37/2016 OF 08/09/2016.*
[138] Article 33, *Law No 37/2016 OF 08/09/2016.*

4.3.2 Conciliation Process

The Abunzi hearing procedure is outlined under Article 17 of the Law. It first entails parties choosing a panel of three Abunzi from the Abunzi Committee whom they refer their dispute. In case the parties fail to agree on all of them, each party is required to choose one, then the two chosen Abunzi will appoint the third Abunzi; this emulates the optimal synergy with the process of choosing an arbitral tribunal during the Arbitration process in Kenya. An Abunzi cannot sit on that panel if they have an interest in the dispute as this would prevent them from being completely impartial in the resolution of the dispute.

The Abunzi hearing procedure is usually an open one, however, the Abunzi may decide to have a closed session depending on the nature of the dispute.[139] Each party is heard and allowed to call witnesses. The dispute should be resolved within a month from the day it was submitted to the committee, therefore expediting the process. The decision has to be recorded in minutes signed on each page by every member in the Abunzi panel and the disputing parties and the verdict be made available within ten days from the day the decision was rendered.

4.3.3 Appeals

Any party who is aggrieved by a decision made by the Abunzi Panel at the cell level can appeal to the Abunzi Committee at the sector level at no cost, within 30 days from the day the verdict was issued.[140]If the party is still dissatisfied with the decision made at the sector level, they get to appeal to the competent court.[141] This clearly shows a "seamless' relationship between these customary courts and the formal justice system. The court will only deal with matters that were objected or contested at the sector level, hence, if necessary, the court may ask that the minutes recorded by the Abunzi be presented to them.

4.3.4 Enforcement of decisions made by the Abunzi Committee

Execution of a verdict made by the Abunzi Committee is done by consent of the parties.[142] Where a party fails to comply with the verdict issued, then the prejudiced party may turn to a competent court to seek an order to ensure the non-compliant party follows through with their

[139] Article 17, *Law No 37/2016 OF 08/09/2016.*
[140] Article 25, *Law No 37/2016 OF 08/09/2016.*
[141] Article 27, *Law No 37/2016 OF 08/09/2016.*
[142] Article 29, *Law No 37/2016 OF 08/09/2016.*

obligations.[143] Again, this shows a clear relationship between the committee and courts by allowing referrals where parties are non-compliant.

4.4 Lessons for Kenya that can be drawn from the above analysis

It is quite clear from the above analysis that Rwanda has made significant progress with regards to the integration of Traditional Justice Systems into the formal justice system. This is evident from the enactment of the Law that establishes the Abunzi Committee at both the sector and cell levels and clearly outlines their jurisdiction and how they are to operate. This way, Rwanda has been able to develop a legal framework that goes a step further than merely recognizing the applicability of TDRMs in the formal justice system: it has gone ahead to enact a law that defines the parameters within which TDRMs can fully operate within the formal justice system, something that Kenya is yet to do. However, how applicable would the above comparative analysis of Rwanda be applicable in Kenya given that Kenya is way more culturally diverse? Regardless of the above possible constraint, there are a couple of useful insights that Kenya could borrow from Rwanda to strengthen the interplay between TDRMs and the formal justice system:

4.4.1 A clear regulatory framework

In Rwanda, the Law exists to lay down the framework in which TDRMs can operate; it states the jurisdiction, competence and functioning of the Abunzi Committee. It is quite clear from earlier analysis in the previous chapters that Kenya lacks both a streamlined policy and legal framework that dictates this. What is in play, is the ADR Bill, that could be amended (keeping in mind Kenya cultural diversity) to specifically focus on the operation of TDRMs. Enacting this Bill into a Law would help boost the complementary nature between the informal and formal justice systems and uplift the place of customary laws in Kenya.

4.4.2 Jurisdictional Concerns

The Law in Rwanda is very clear and specific as to the jurisdiction of the Abunzi Committee: civil matters. Kenya has varying jurisprudence regarding this.[144] Lessons can be drawn from

[143] Article 29, *Law No 37/2016 OF 08/09/2016.*
[144] Make reference to both Chapter Two and Three of this dissertation.

Rwanda where Kenya should enact a framework that clearly sets out the jurisdiction under which TDRMs can operate in to avoid varying jurisprudence on the matter. This could be done by amending the ADR Bill to include this and subsequently enacting legislation.

4.4.3 Constitutional and Human Rights Standards

From the analysis above, it is quite clear that the applicability of Traditional Justice Systems in Rwanda, through the Abunzi Committee is not subject to the repugnancy test. They are subject to a constitutional test that includes a condition that customary norms relied upon can only be applicable if they do not contravene human rights standards. Given the history of the repugnancy test, it would only be logical for that section of the Kenyan Law to be considered invalid as it further subjugates the place of customary law in Kenya and hinders the applicability of TDRMs that rely on customary laws to arrive at decisions. Moreover, Kenya should borrow from the provision of the Law that clearly states that women have to be included in such a committee. This would help do away with the characterization of TDRMs not being inclusive of vulnerable groups in society.

4.5 A comparative analysis of South Africa

South Africa's pluralistic legal system and ethnically diverse (with eleven ethnic groups) society provides the perfect comparata with regards to the integration of traditional justice systems with the formal justice system.[145] Like Kenya, the colonialist influence on South Africa is quite event both in substantive and procedural law.[146] Before 1994, customary laws in South Africa were considered to be inferior to formal law and this was used as the yardstick upon which the application of customary laws were subjugated.[147] However, upon repeal by the 1996 Constitution, the Constitution now recognises customary law as a source

[145] Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution Mechanisms in South Africa' *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Verlag Dr Kovag, Hamburg, 2014, 288.

[146] Sergon J, 'Integrating Traditional Dispute Resolution Mechanisms with the Formal Justice System in Kenya: A Case Study of the Kipsigis Community' Unpublished LLB Dissertation, University of Nairobi, 2021, 123.

[147] Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution Mechanisms in South Africa' *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Verlag Dr Kovag, Hamburg, 2014, 288.

of law forming part of the hybrid legal system.[148] This provision, like Article 2 of the Kenyan Constitution, places customary law on the same level as formal law, hence the two constitutions manifest a clear appreciation of customary law but also acknowledges the supremacy and promotion of the Constitution.[149]

Like in Rwanda and unlike in Kenya, customary law and TDRMs are not subject to the repugnancy test: the only recognised yardstick is the Bill of Rights, the national values and principles and any other written law.[150] Section 31 of the Constitution[151] that accords persons belonging to a cultural or linguistic community a right to culture, as read with Section 235[152] on self determination, affirm the right of traditional communities to resolve disputes using their own justice systems.

4.5.1 Traditional Courts Bill 2017

The Traditional Courts Bill was originally developed in order to replace Section 12 and 20 of the Black Administration Act of 1927, that empowered traditional leadership to resolve disputes and certain offences in Traditional Courts.[153] Although the Act has been repealed, the Traditional Courts Bill still purports to *'provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values'*.[154] Most importantly, the Bill addresses the issue of inclusivity by necessitating that the traditional courts to observe the provisions set out in the Bill of Rights during proceedings, paying emphasis on the plight of vulnerable groups in society such as women, children, the elderly and differently abled persons.[155]

[148] Constitution of South Africa (1996).

[149] Article 2, *Constitution of Kenya* (2010).

[150] Section 39(2), *Constitution of South Africa* (1996).

[151] Section 31, *Constitution of South Africa* (1996).

[152] Section 235, *Constitution of South Africa* (1996).

[153] < http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/ > on 17th February 2025.

[154] Preamble, *Traditional Courts Bill* (2017).

[155] Section 7(3), *Traditional Courts Bill* (2017).

The traditional courts in South Africa are based on a proposal developed by the South African Law Commission (SALC) and the South African Department of Justice and Constitutional Development.[156] Furthermore, such courts are constitutionally recognized.[157] While these courts are provided for and formally recognized in statutes, their innate nature varies from community to community as each ethnic groups has a different set of customary norms. [158] The courts are given jurisdiction over civil disputes that arise out of customary norms and laws.[159] Furthermore, these courts are enjoined to resolve disputes in accordance with the respective applicable customary laws and norms; this could be argued to acknowledge the fact that each ethnic group has varying customary norms hence decisions from these courts would vary depending on the norms relied upon, in so far such norms are in line with the Constitution, any other written law and the Bill of Rights.[160] Moreover, like formal courts, the enforcement of decisions by these courts are couple up with sanctions where one party fails to follow through with a decision made by the court; the court may cause such a person to appear before it.[161]

4.5.2 Key Lesson(s) for Kenya

While the Traditional Courts Bill is yet to be enacted, it is quite clear that it addresses the problem of integration of TDRMs with the formal justice system in a multiethnic society. It

[156] Forsyth M, 'The Possibilities and Limitations of Legal Pluralism' *A Bird That Flies with Two Wings: Kastom and state justice systems in Vanuatu,* ANU Press, 2009, 217.

[157] Section 166, *Constitution of South Africa*(1996): The expression "traditional courts" is absent from the list of courts specified in section 166 of the Constitution, but in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa, 1996*, the Constitutional Court held that the words "any other court established or recognised in terms of an Act of Parliament ..." in Section 166(e) read with Section 16(1) of Schedule 6, are broad enough to include traditional courts which were established in terms of the Black Administration Act. Section 16(1) of Schedule 6 stipulates as follows: Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to- (a) any amendment or repeal of that legislation; and (b) consistency with the new Constitution.

[158] Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution Mechanisms in South Africa' *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition*, Verlag Dr Kovag, Hamburg, 2014, 299.

[159] Section 5, *Traditional Courts Bill* (2017).

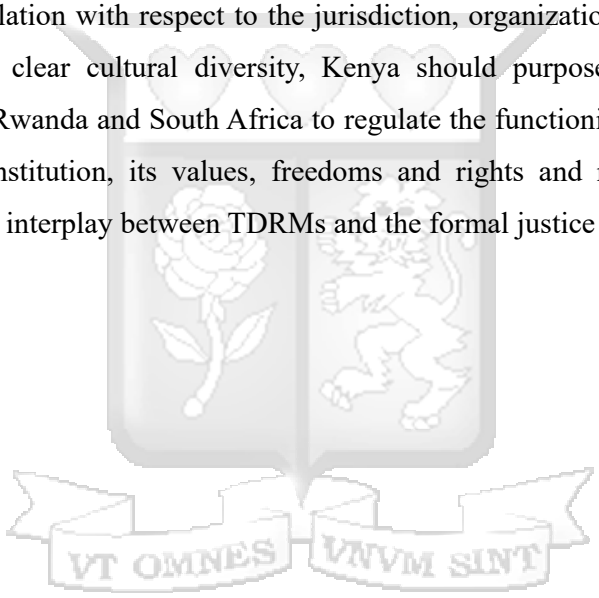
[160] Section 7 & 8, *Traditional Courts Bill* (2017).

[161] Section 11, *Traditional Courts Bill* (2017).

acknowledges that different customary norms will apply in each of these courts because of the existence of cultural diversity in South Africa. Therefore, Kenya could adopt such a system of integration that acknowledges the huge cultural diversity that exists in Kenya.

4.6 Conclusion

Given our colonial history, most states, especially in Africa, face a unique problem because in as much as their constitutions acknowledge and recognize multiculturalism and legal pluralism, most legislations have failed to address the interplay between informal and formal justice systems.[162] Therefore, as a consequence, courts have no substantive legislations to rely upon on how to respond to decisions made in informal justice systems.[163] However, some countries, like Rwanda and South Africa, as analyzed above, have been able to bridge that gap, by enacting legislation with respect to the jurisdiction, organization and competence of TDRMs. Despite the clear cultural diversity, Kenya should purpose to adopt a similar framework as that of Rwanda and South Africa to regulate the functioning of TDRMs in line with spirit of the constitution, its values, freedoms and rights and more so to ensure a seamless and effective interplay between TDRMs and the formal justice system (courts).



[162] Forsyth M, 'The Possibilities and Limitations of Legal Pluralism' *A Bird That Flies with Two Wings: Kastom and state justice systems in Vanuatu,* ANU Press, 2009, 215.
[163] Forsyth M, 'The Possibilities and Limitations of Legal Pluralism' *A Bird That Flies with Two Wings: Kastom and state justice systems in Vanuatu,* ANU Press, 2009, 215.

CHAPTER FIVE: CONCLUSION

5.1 Introduction

This Chapter summarizes the findings of the study as developed in the previous Chapters. Recommendations will be made in this Chapter that will help in addressing the issue of the development of a legal and policy framework that will bridge the gap between the interplay of TDRMs with the formal justice system in the resolution of land disputes. This Chapter will therefore conclude this research paper.

5.2 Summary of Findings

This study has examined the existing legal and policy framework that governs TDRMs in the resolution of land disputes. It has sought to examine whether the existing framework is sufficient in addressing land disputes.

Chapter One formed the basis of this research paper. It established the existence of gaps in addressing the issue of integration of customary norms and/or TDRMs in the formal justice system. The Chapter laid out the objectives of the study, the specific questions that are relevant to the study, it laid out the study's theoretical framework and reviewed a couple of scholarly works relevant to the subject matter of the study. The first research question aimed at addressing the existing gaps in the legal and policy framework with regards to the applicability of TDRMs in the resolution of land disputes. The second research question sought to address the constraints that cause the existing gaps addressed in the first question. The third research question sought to address how Rwanda, Abunzi Committee's model has addressed the issue of integration of TDRMs within the formal justice system to ensure their effectiveness and maximization of use.

Chapter Two explores the legal, policy and judicial decisions regarding the applicability of the use of TDRMs in the resolution of land disputes. It then concluded that Kenya has no clear legal and policy framework in addressing the jurisdiction and holistic operation of TDRMs in Kenya; the existing frameworks fail to ensure an interplay between TDRMs and the formal justice system. Such failure has led to the reluctant applicability of TDRMs, especially with regards to land disputes and further subjugation of customary laws in the hierarchy of laws.

Chapter Three explored the general limitations that inhibit the applicability of TDRMs in the resolution of land disputes in Kenya and what causes those limitations. The Chapter deduced that in addition to not having a clear legal and policy framework to govern the applicability of TDRMs, varying jurisprudence has been borne because of this, due to overreliance on the repugnancy test and constitutionality test that limit the application of TDRMs , solely reliant on discretionary interpretation by judges, that has further led to the inferiority of customary law in Kenya despite being heavily used by Kenyans as compared to the formal justice system.

Chapter Four was a comparative analysis on Rwanda's and South Africa's legal systems on how they have addressed the applicability of TDRMs. It started by exploring whether or not Rwanda has a clear legal and policy framework to address these concerns, and it was deduced that it does; through their Constitution and an enacted legislation known as the Law. The Law sets clear parameters within which TDRMs are supposed operate in by establishing an Abunzi Committee, with a set out rules of operation: their jurisdiction (only deal with civil matters), the competence of the members, the enforcement of the decisions made by the committees and the clear interplay between the committees and the courts. In the Second Section, the Chapter analyzed how the legal system in South Africa has addressed the issue of integration of TDRMs with the formal justice system in an ethnically diverse society. This was done by looking into the various provisions of the Traditional Courts Bill that acknowledged the fact that courts would rely on the customary norms that are applicable in that specific case, which could be interpreted to mean the customary norms of the ethnic groups in which the parties belonged to. Moreover, where it was found that such norms would be conflicting, the courts would rely on the customary norms that the parties agree upon. The Chapter concluded by acknowledging how culturally diverse Kenya is as compared to Rwanda and South Africa, however, Kenya could still borrow from the existing legal framework that Rwanda has in place and integrate it into their legal system.

Chapter Five concludes the study by giving a summary of the findings and recommendations to address the issue of the applicability of the use of TDRMs in the resolution of land disputes in Kenya. It will identify the specific insights from Rwanda & South Africa and

explain how they can be integrated into Kenya's legal and policy framework with regards to the problem at hand.

5.3 Recommendations

This study proposes the following recommendations on four levels:

(a) The Legislative Level

1. Since the Judicature Act is the Law with the Repugnancy Clause, that the clause be considered invalid and be consequently removed. This research paper has shown that the repugnancy clause under Section 3(2) of the Judicature Act was mainly put there by colonialists who deemed customary law as barbaric and uncivilized to further subjugate Africans. The clause only acts as a huge hindrance in the application of customary law in general further inhibiting the applicability of TDRMs. While the researcher acknowledges that some customary norms are discriminatory, oppressive and harmful and therefore need limitation, the repugnancy clause is not the way. This is because Kenya has a transformative constitution that has set a constitutionality test to limit the application of TDRMs and use of customary laws; a test that is quite progressive and encourages multiculturalism and legal pluralism in the Kenyan society.

2. Since there is no TDRM specific legislation, that one be enacted– The researcher recommends that a statute be enacted to govern the jurisdiction and holistic operation of TDRMs; a statute that clearly shows an interplay between TDRMs and the courts. Such a statute could take the form amending the already existing ADR Bill to emulate the Law in Rwanda and/ or the Traditional Courts Bill in South Africa that governs the applicability of TDRMs. Such a legislation should ensure that it is consistent with the principles and values of the Constitution and the Bill of Rights, clearly outline the jurisdiction of TDRMs (whether they would deal with civil and/or criminal matters), referrals to the courts, who will be handling the disputes, appeals of decisions made my TDRMs practitioners as well oversight like the Bureau in Rwanda. The legislation should also further acknowledge the cultural diversity in Kenya like South Africa has; to give room for each ethnic group to rely on their

respective customary norms as each community has their own set of laws and this will be in pursuit of everyone's right to self-determination.

(b) The Judicial Level

In exercising their judicial authority as per Article 159 of the Constitution, judicial officers should encourage the use of traditional courts as a means of resolving disputes through TDRMs, a model adopted in South Africa. If the proposed legal framework is enacted, courts should promote the use of such traditional courts on matters that the law states and only intervene as a matter of last resort.

(c) The Executive Level

Cabinet Secretaries, specifically those from the Ministry of Youth, Sports & Art and the Ministry of Land, Housing & Urban Development, should create a regulatory body, with departments specific to each ethnic group, that deals with matters pertaining to the resolution of disputes through TDRM process and for the latter Ministry, land related disputes. This would help with the integration of TDRMs within formal justice system. Such a regulatory body would oversee auditing of TDRM processes, keeping records of disputes resolved through TDRMs and holding training seminars for chiefs and other local administrators such as community elders on constitutional standards that need to be respected when resolving disputes using TDRMs; such seminars would help in eliminating harmful and discriminatory practices within communities. Having ethnicity specific departments would be in the spirit of acknowledging Kenya's rich ethnic and cultural diversity. Moreover, the Executive should build of the AJS Baseline Policy to reflect the same, together with the legislative requirements that would be borne if the proposed legal framework is enacted.

(d) The Industry Level

In the support of the integration of TDRMs into the formal justice system in Kenya, lobbyists and other stakeholders should focus on strategic advocacy and systemic reforms. They should do this by pushing for the enactment of the proposed TDRM

specific legislation that clarifies on their jurisdiction, enforcement and procedural standards. They should also partner with Non-Governmental Organizations to organize workshops that would train community elders and other TDRM practitioners on human rights standards to help them abide by the constitutional principles and the Bill of Rights as they resolve disputes via TDRM processes. Stakeholders should also engage the media to advocate for the cost effectiveness and the cultural significance of the use of TDRMs and to counter the perceptions that cultural practices and processes are backwards, by framing them as complementary to the formal courts and not competitors.

5.4 Conclusion

In summation, this study has found that generally, the legal and policy framework governing TDRMs is insufficient, hence proving inadequate in the settlement of land disputes in Kenya. The study has pinpointed various insights from Rwanda and South Africa that could be adopted to address the issue above.

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