INTEGRATION OF TRADITIONAL DISPUTE RESOLUTION INTO KENYA'S CRIMINAL JUSTICE SYSTEM: A PROPORTIONALITY PERSPECTIVE

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By

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DECLARATION

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

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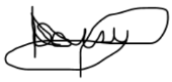

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This dissertation has been submitted for examination with my approval as university Supervisor.

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ABSTRACT

This dissertation explores the intricate balance linking the right to life and the right to culture within the framework of Traditional Dispute Resolution Mechanisms (TDRMs) in the criminal justice system of Kenya. The Constitution of Kenya, 2010, recognizes and shields the right to culture, allowing for the application of TDRMs in resolving felonies. However, concerns arise regarding the potential violation of the proportionality principle, especially in cases involving serious crimes like murder. Despite the historical resilience of TDRMs, questions arise about their compatibility with contemporary legal standards and the conservation of rudimentary liberties.

The study starts by exploring origins of TDRMs and highlighting their importance in African communities' pre-colonial dispute resolution. It recognizes the constraints imposed by the declaration of Rights and emphasizes the constitutional protections of cultural rights. Pre-trial custody issues and case backlogs have been helped by the Criminal Procedure Code's provisions, especially those pertaining to reconciliation for non-felony offences. However, when TDRMs are utilized in place of the official criminal justice system for major offences, there may be a risk to the right to life, which is a fundamental human liberty.

The dissertation undertakes a critical analysis of court rulings, in which the use of TDRMs led to the withdrawal of murder prosecutions. It finds a pattern in which the severity of the punishment administered by TDRMs is not commensurate with the offence committed, leading to unfair practices. Utilizing global human liberties documents, including the European Convention on Human Rights, the research delves into the notion of proportionality when establishing penalties for felonies.

The study employs a qualitative methodology, relying on primary sources like the Constitution of Kenya 2010 and judgments. A comparative analysis is also employed to look at the formalisation of TDRMs and their incorporation into the justice system in Kenya by looking at the Gacaca courts in Rwanda. This study recommends the institutionalisation of TDRMs and proper integration into the criminal law realm. The conclusions drawn will guide future considerations on the appropriateness of incorporating TDRMs in the resolution of serious criminal offenses while ensuring the preservation of constitutional rights and principles of justice.

LIST OF ABREVIATIONS

ADR	Alternative Dispute Resolution
AJS	Alternative Justice Systems
CPC	Criminal Procedure Code
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
EUCFR	European Union Chater of Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
NCIC	National Cohesion and Integration Commission
ODPP	Office of the Director of Public Prosecutions
TDR	Traditional Dispute Resolution
TDRMs	Traditional Dispute Resolution mechanisms

CHAPTER 1

INTRODUCTION TO THE STUDY

1.1 Background to the problem

The right to culture is protected by the Constitution of Kenya, 2010 as well as other regional, and international instruments.[1] It is the foundation of the Kenyan people and nation.[2] Every person has the right to participate in their cultural life.[3] Pre-colonial Africans had developed and used their justice systems based on customary law allowing them to settle disputes amongst themselves, including those of a criminal nature, before the advent of formal penal codes and statutes by the colonialists.[4] These mechanisms are collectively known as Traditional Dispute Resolution Mechanisms (TDRMs) and are legitimized as viable means of out-of-court dispute resolution by the Constitution.[5] However, these mechanisms cannot be used in a way that contravenes the Bill of Rights.[6] TDRMs help to enhance the different cultures that are present in the country.[7] Despite the importation of written penal codes from other jurisdictions, English Law becoming the basis of determination of both civil and criminal matters TDRMs have remained resilient.[8]

Typically, criminal cases have been taken on and handled by the state, as they are for the public good.[9] The overall aim of the criminal justice system is to ensure the promotion of justice. Consequently, the Criminal Procedure Code (CPC) lays out the procedure to be followed in criminal cases and provides for the use of reconciliation in the case of proceedings that do not amount to a felony.[10] Felonies are defined as crimes with the

[1] Article27, *ICCPR*. Article 27, *UNDHR*; Article11, Constitution of Kenya (2010); Article22, *African Charter on Human and Peoples' Rights,1981.*
[2]Article11 (1), Constitution of Kenya (2010).
[3] Article44 (1), Constitution of Kenya (2010).
[4] Coldham S, Criminal Justice Policies in Commonwealth Africa, Trends and Prospects, Journal of African Law, 44 at 219.
[5]Kariuki M & Kariuki F, 'Alternative Dispute Resolution Access to Justice and Development in Kenya' 1 (1) Strathmore Law Journal, (2015), 3.
[6] Article 159 (3), Constitution of Kenya (2010).
[7] Settle J, the Advocate's Practical Guide to Using Mediation, 3-6.
[8] Kariuki F, Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya, 204; Ogendo H.W.O, The Tragic African Commons; A Century of Appropriation, Suppression and Subversion, University of Nairobi Law Journal, Vol 1 (2003), 112
[9] Kenya Legal Resources, 'Nature of criminal proceedings' <http://www.kenyalawresourcecenter.org/2011/07/nature-of-criminal-proceedings.html> on 6 September 2017; Musyoka M, Criminal law, 1ed, Law Africa, Nairobi, 2013, 3.
[10] Section176,*Criminal Procedure Code*,(Act No27 of 2015.

potential of being punished by more than one year in prison, such as murder.[11] This has assisted in the resolution of major obstacles to the efficient operation of the criminal justice system in Kenya which have been identified as case backlog and congestion in pre-trial detention centers.[12]

The right to life has been entrenched in regional as well as international human rights law.[13] The International Covenant on Civil and Political Rights (ICCPR) recognize the inherent right of every person to life, adding that this right shall be protected by the law and nobody shall be arbitrarily deprived of life.[14] This guarantee has been similarly reflected in the 2010 Constitution with exceptions as provided by the Constitution itself and other written laws.[15] However, the cases below clearly demonstrate a deviation.

In *Republic v Mohamed Abdow Mohamed*, despite the accused being charged with murder, the parties resorted to TDRMs leading to the withdrawal of the matter before the court by the office of the Director of Public Prosecutions (ODPP).[16] The reason for this was that the criminal courts ought not to participate in customary legal processes.[17] Other court cases have been terminated on a similar basis whereby murder, as well as manslaughter culprits, had been allowed to settle cases by use of TDRMs.[18] In the end, the punishment given in each instance was not proportional to the felony that was committed with regard to the proportionality principle.

Considering this, the European Convention on Human Rights (ECHR) as well as the European Union Charter of Fundamental Rights (EUCFR) acknowledge the use of the proportionality principle when determining punishments for felonies.[19] The EUCFR

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[11] MR Durose, D Farole, SP Rosenemerkel, Felony sentences in state courts,2006. https://www.ojp.gov/library/publications/felony-sentences-state-courts-2006-statistical-tables

[12] 'Human Rights Report: The Impact of County By-Laws on the Prisons and Pre-Trial Remand Facilities in Nairobi and Nakuru Counties' The Kenyan Section of the International Commission of Jurists, July 2014, 9.

[13] Article26, *Constitution of Kenya (2010), Article* 4, *African Charter on Human and Peoples' Rights, 1* June 1981; Article 6, *International Covenant on Civil and Political Rights*,19 December 1966 and Article 3, *Universal Declaration of Human Rights*,10 December 1948.

[14] Article 6, *ICCPR.*

[15] Article 26(3), Constitution of Kenya (2010).

[16]Republic v Mohamed Abdow Mohamed [2013] eKLR; Article 157, Constitution *of Kenya (2010*), it confers on the DPP State powers of prosecution under which he may discontinue at any stage criminal proceedings against any person.

[17] Ndeto Kimomo v Kavoi Musumba [1977] KLR 170

[18] Republic v Juliana Mwikali Kiteme & three others [2017] eKlr.See Republic v Ishad Abdi Abdullahi (2016) eKLR-the judge allowed the request for discontinuance of the criminal proceedings and discharging of the same as compensation had been paid.

[19] Article7, *European Convention on Human Rights*,4 November 1950.It prohibits punishment that is disproportionate to the crime committed; Article49 (3), *EU Charter of Fundamental Rights*,01 December 2009.

guidelines provide that the severity of penalties must not be disproportionate to the criminal offence.[20] This principle of proportionality can be understood in two senses, cardinal, and absolute proportionality.[21] The former meaning sets absolute measures for punishment that are proportional to a given crime while the latter meaning provides for more serious crimes to be punished more severely than less serious crimes.[22]

1.2 Statement of the problem

The right to access justice is a basic and inviolable right guaranteed in not only national constitutions but also in international human rights instruments.[23] The Kenyan Constitution provides for both formal and informal ways of settling disputes. However, when it comes to balancing the right to life and the right to culture the Constitution has not been clear as to what extent the informal methods of settlement should be implemented in solving crime, more specifically felonies. The lack of proportionality has been evident from the trail of cases handled by the courts in Kenya, that involve murder and manslaughter whereby sheep, goats, or money have been offered by the offenders. It is therefore crucial to understand the balance between the right to life and the right to culture to be able to determine to what extent the TDRMs are to be applied or if at all they are to be applied to resolve felonies. This study assesses the appropriateness of including TDRMs as per Section 159(2) (c) of the Constitution of Kenya within the Criminal Justice System in Kenya in the resolution of felonies.

1.3 Research objectives

1. To examine Kenya's TDRM legal framework.
2. To evaluate the extent of protection of the right to culture through its integration into the criminal justice system.
3. To appraise the level of safeguarding the right to life through the inclusion of traditional dispute resolution mechanisms within the criminal justice system by use of the proportionality principle.

[20] Article49 (3), EU Charter of Fundamental Rights,01 December 2009.
[21] Von Hirsch, Proportionality in the philosophy of punishment,1992,6
[22] MN Berman, Proportionality, constraint, and culpability,2021,12.
[23] Article 48, Constitution of Kenya (2010).

1.4 Research questions

1. How is Kenya's legal framework for TDRMs structured?
2. To what extent is the right to culture protected by its inclusion into the criminal justice system?
3. To what extent is the right to life protected by the inclusion of Traditional Dispute Resolution Mechanisms in the criminal justice system by use of the proportionality principle?

1.5 Hypothesis

Kenya's approach to the inclusion of TDRMs in the resolution of felonies as endorsed in Section 159(2) (c) of the Constitution of Kenya is disproportionate to its aims which include access to justice and fairness and thus interferes with the balance between the right to life and the right to culture.

1.6 Justification

TDRMs continue to manifest themselves in the resolution of disputes.[24] They have undoubtedly brought along key societal benefits as people can settle matters out of court, which is cost-friendly amongst other benefits.[25] Despite this, they have experienced several challenges one of them being that they have not been institutionalized to create proper legal and policy mechanisms to access justice as envisaged by the Constitution.[26] Previous proposals towards this discourse have been mainly centered on setting some constraints on the role of the ODPP and the uncodified nature of TDRMs.[27] However, this study will go beyond this by assessing whether the inclusion of TDRMs into the criminal justice system to resolve felonies in Kenya contravenes the principle of proportionality and thus interferes with the balance between the right to life and the right to culture as provided for in the Constitution of Kenya 2010. This will be useful to policymakers within the judiciary as it

[24] Kariuki F. Empowering the Kenyan people through alternative dispute resolution mechanisms, In CIArb Africa Region Centenary Conference,2015.
[25] Palmer R, Justice in whose interest? A proposal for institutionalized Mediation in the criminal justice system,1997,5.
[26] Michael J, Alternative dispute resolution and the rule of law in international development cooperation,2011,15; Elechi 0, Human rights and the African indigenous justice system. In a paper for presentation at the 18th International society for the reform of criminal law,2004,10.
[27]The Judiciary of Kenya, Alternative Justice Systems Baseline Policy, 2020, 37; https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiRpb2EoPuAAxV1UaQEHWB0Af0QFnoECBQQAQ&url=https%3A%2F%2Fpapers.ssrn.com%2Fsol3%2Fpapers.cfm%3Fabstract_id%3D2703888&usg=AOvVaw0deebRlTj-auPWDRdu2QTA&opi=89978449

will also function as a guide to the court, concerning the position of TDRMs in criminal matters specifically felonies, and scholars who are working on scholarly writings such as academic publications. It will also be useful to bodies such as the National Crime Research Centre as they exercise their mandate of carrying out research into the causes of crime, its prevention, and dissemination of the research findings and recommendations to government agencies concerned with the administration of criminal justice, which also involves felonies.

1.7 Theoretical Framework: Utilitarian theory on punishment

This theory depicts punishment as a measure that is justified by a purported capacity to produce future advantages, like crime reduction due to the element of deterrence.[28] Punishment is, therefore, used to make up for the harm already done as well as seeking to punish offenders to deter future wrongdoing.[29] Further, laws should be used to increase the happiness of society. This is because crime and punishment are inconsistent with happiness. Thus, the resolve is that they should be kept at a minimum. Utilitarians hold that a crime-free society does not exist. Nonetheless, they endeavour to inflict only as much punishment as is required to prevent crimes in the future.[30]This study agrees with this view.

Furthermore, this theory is consequentialist.[31] It acknowledges that punishment has effects on both the offender and society and maintains that the total amount of good produced by the punishment should be greater than the total amount of evil. Regarding deterrence of future crime, punishment sets a good example for society as a whole and serves as notice to others that criminal behaviour will be punished.[32]

Specific deterrence means that the punishment should prevent the same person from committing crimes. This is because it functions in two different ways. One of which involves locking up the offender for a predetermined amount of time to physically prevent her from committing another crime. Secondly, this incapacitation is intended to be so unpleasant that the offender will not engage in criminal behaviour ever again.[33] The same applies to the subject matter of this study, the resolution of felonies by use of TDRMs. Finally, this

[28] Cesare Beccaria, Utilitarian or retributivist? DB Young - Journal of Criminal Justice, 1983 – Elsevier,4 https://www.sciencedirect.com/science/article/pii/0047235283900715
[29] Mirko Bagaric, The routledge handbook of the philosophy and science of punishment, 2020, *Taylor and Francis*, 5.
[30] HJ Mc Closkey, Utilitarian and retributive punishment, *JSTOR*, 1967,91
[31] Mark A Michael, Utilitarianism and Retributivism, *American philosophical quarterly vol 29 No 2,* 1992,180.
[32] Saul Smi Lansky, Utilitarianism, and the "punishment" of the innocent: The general problem, *Voliume50.No 4* 1990, 259.
[33] Hugo Adam Bedau, Retribution and the theory of punishment, *The journal on philosophy vol,75 no 11*,1978,615.

technique stops future crime by enabling offenders to prosper within the boundaries of the law. There also exist treatment for illnesses like addiction, participation in educational programs that equip offenders with the knowledge and skills necessary to compete in the job market, and treatment for afflictions such as mental illness, violent behaviour, and chemical dependency.[34]

According to utilitarians, human rights are moral rights that are possessed unconditionally by all persons.[35] Hart endorsed the idea of analyzing rights by identifying their grounds.[36] In other words, he supported the concept of understanding the basis or rationale behind rights to comprehensively analyze their nature and implications. Additionally, he was of the idea that obligations, as well as duties, are foundational features of the law, and they are more basic than the legal rights with which they are associated.[37] Rights should not be said to arise when duties are merely beneficial and utilitarianism is concerned with the service of interests and the protection of interests.[38] Wayne agrees with Hart and further combines a utilitarian theory with a choice conception of rights just as Hart did. Hart emphasized that obligations and duties are fundamental aspects of the law, surpassing the legal rights they are linked to.[39] This are the rights that give people control over other people's freedom and it is Hart's response to the question about what rights add to duties. It is key to this study as it emphasizes the need for proportionality.

Mill who is considered an act utilitarian, opined that the infringement of a right cannot generally be justified by the mere fact that it would promote welfare minimally more than would respecting the right.[40] Further, punishments are authorized by legal rules that impose requirements or prohibitions. He understood punishment broadly enough to encompass guilt feelings and informal social sanctions. Therefore, moral principles, including the requirements of justice, are useful social rules, breaches of which warrant external sanctions

[34] Peter Koritansky, Two theories of retributive punishment: Immanuel Kant and Thomas Aquinas, *History of philosophy Quarterly vol22, No 4,* 2005,320.
[35] Joseph Raz, Practical reason, and norms, *second edition, Princeton university press,* 1990.
[36] H.L.A. Hart, Definition and theory in jurisprudence, *Oxford: Clarendon,* 1953, 12
[37] H.L.A. Hart, Concept of law, *Oxford: Clarendon,* 1961, chapter 3.
[38] Hart, Bentham on legal rights, *Oxford essays in jurisprudence: Second series,182.*
[39]MichaelGreen,Philosophyoflaw,2010.
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjn99T5iLr9AhWnU6QEHRaDD7YQFnoECBMQAw&url=http%3A%2F%2Fcarneades.pomona.edu%2F2010-Law%2Fnts-0310.shtml&usg=AOvVaw0g1XyMVqM1DsJzsxWAAtBp
[40] David Lyons, Rights, welfare and Mill's moral theory, *oxford university press,*1994, 13. Which means holding that morality basically requires each of us to act to promote happiness or welfare as much as possible; David Lyons, On formal justice, *Cornell law review 58,* 1973, 830.

and trigger internal sanctions and bring about, guilt-free feelings.[41] Right conduct is a matter of honouring obligations. Justice, on the other hand, consists of respecting rights, which is honouring obligations that correlate with rights. Considering this reasoning has applied to moral principles but has regulated conduct only indirectly.

In support of this, Hofeld believed that lawyers sometimes draw erroneous inferences about the law because they fail to make relevant distinctions between the various kinds of rights.[42] The work done in this study attempts to improve upon the balancing of the right to life and the right to culture as provided for in the Constitution of Kenya 2010. Additionally, in arguing against the settlement of disputes that involve felonies by use of TDRMs.

1.8 Literature Review

In Kenya, there has been various views revolving around the inclusion of TDRMs within the criminal justice system. The Federation of Women Lawyers in Kenya continue to believe the sentences that the traditional justice system imposes, occasionally run counter to Constitutional and human rights laws.[43] These include beatings, expulsion from communities, the casting of curses, and light penalties for grave violations of human rights. This should not be the case however as more serious crimes require equal serious punishments. Kariuki in his paper opines that the application of conventional justice systems may be hampered by the continued influence of previous judicial decisions and judicial attitude on customary law, even though emerging jurisprudence from courts has been supportive of it.[44] This study agrees with him as the influence of caselaw is evident in courts.

1.8.1 On the traditional dispute resolution mechanisms

Regarding the current debate, Owen's paper claims that institutionalizing settlement as a generalized, indiscriminate practice is not preferable to judgment or something that ought to be done.[45] Instead, it ought to be considered a very problematic docket organization strategy. According to her, the settlement received the civil equivalent of plea bargaining. Consent is sometimes coerced, a deal might be struck by a person without authority, the lack of a trial and a decision makes further judicial involvement challenging, and even though dockets are

[41] PN Tuner, Punishment and discretion in Mill's utilitarianism, *Cambridge.org*,2015, 17.
[42] Wesley Newcomb Hofeld, Fundamental legal conceptions, *Yale university press*, 1964, 34.
[43] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA
Kenya, 2008), p. 9.
[44] Kariuki F, 'Customary law jurisprudence from Kenyan Courts: Implications for traditional justice systems' (2015), 11-13.
[45] Owen M Fiss, Against settlement, *The yale law journal*, volume93, May 1984,4.

smaller, justice might not always be done. She compares it to capping out to the demands of mass society and asserts that it should not be praised or encouraged. This study agrees with this perception. The victims are lured into accepting deals that are far from fair. Only because they were made to see that there could be no way around the issue.

Ross states that the goal of TDRMs is to resolve disputes with the essential idea being the maintenance of peace and order in the community. [46] The common interest of the community rather than the interests of the contending parties is stressed. This study veers away from this perception. This is because people cannot sacrifice justice at the altar of the common interest of the community. However, Zartman argues that the formal justice system lacks the corrective social effect that TDRMs provide in dispute resolution due to the technical nature of the criminal procedure.[47] The argument that the application of TDRMs should be encouraged in criminal cases but only concerning misdemeanours and not felonies persists and remains dominant.[48] Additionally, other scholars are against the application of TDRMs in various criminal cases as they are plagued with procedural hurdles and that they are contrary to the principles of natural justice and the rule of law.[49]This study agrees with this perception as TDRMs cannot be sole determinants of the punishment for a person who took another person's life away from them. This will be sacrificing justice at the altar of efficiency.

On the other hand, Zehr opines that TDRMs are efficient in that they are not a one-sided affair.[50] These mechanisms allow community members to participate more actively in the justice process, which involves dialogue and negotiation between the parties with a stake in the dispute. The parties are given a chance to express their emotions, tell their side of the story, and come to an understanding about the harm the offence has caused, the offender's accountability, and what should be done to mend the previously peaceful relationships during a collaborative discussion. This goes without a doubt and this study recognizes this

[46] Marc Howard Ross, Conflict resolution among urban squatters, 1974, *The institute, Inc*, 114.
[47] Zartman W, Traditional Cures for Modern Conflict: African Conflict Medicine, Lynne Reiner Publishers, London, 2000, 173.
[48] Chepkoech C, 'The applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi, 2017, 38; Njuguna S, 'The suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi, 40.
[49] Chepkoech C, 'The applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi, 2017, 38; Njuguna S, 'The suitability of traditional dispute resolution mechanisms in criminal matters in Kenya' Unpublished LLB Thesis, Strathmore University, Nairobi, 43.

[50] Zehr, H. (2005), Changing Lenses: A New Focus for Crime and Justice (3rd ed.), Herald Press, p. 19

statement. However, it begs to differ with the fact that the criminal justice system is entirely one-sided. Additionally, Wenzel possesses similar thoughts as Zehr as he decries the one-sided nature of the criminal justice system.[51] Which should however not be the case as the criminal justice system consists of two models which are; crime control and due process.[52] Thus meaning that the crime control focuses on the rights of a society as a whole while the due process focuses on the right of the defendant.

1.8.2 On the principle of proportionality and proportional punishment.

Kant discussed the principle of proportionality in a wide sense. He used the *lex talionis* principle.[53]The principle states that punishments should be similar to the crime committed. Therefore, when someone steals, his property is forfeited; when he commits murder, "he must die." According to Kant, this provided an answer to the means the crime was committed and the extent as well. This study will benefit from this as it proves that felonies may not be resolved by TDRMs.[54] Morris buttressed Kant's proposal that *lex talionis* marked a turning point in the evolution of lawful punishment as it introduced a policy of restraint and sanctified proportionality as a moral principle of punishment.[55] This is useful to this study as felonies meet the highest bar of crime as compared to misdemeanours. Similarly, Hirsch assesses the principle of proportionality as a requirement for fairness using various theories and penal codes. He states that punishments that are scaled to the gravity of offences are fairer than punishments that are not.[56]

Franck suggests that the principle of proportionality should be applied to determine whether the countermeasures are legal.[57] It is meant to serve as a stopgap measure against the spiralling cycles of transactional violence. He describes the steps that must be taken to determine the appropriate punishment while also analyzing the paradigmatic approach. The first step is determining whether the provocation was unlawful, and if it was, the second is

[51] Wenzel, M. and et al (2008), 'Retributive and Restorative Justice', Law Hum Behav., Vol. 32, p. 375
[52] United Nations Office on Drugs and Crime,(module 9), 1997.
[53] Fish M, Proportionality as a moral principle of punishment, Oxford University Press, 2008,2 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjjqNzPufuAAxUfZ_EDHU7mAU4QFnoECBAQAQ&url=https%3A%2F%2Facademic.oup.com%2Fojls%2Farticle-abstract%2F28%2F1%2F57%2F1559023&usg=AOvVaw2VCK8Vno--ueqzXbdYeA77&opi=89978449
[54] Immanuel Kant, The metaphysical principles of morals,1964,95.
[55] Morris J Fish, An Eye for an Eye: Proportionality as a Moral Principle of Punishment, Oxford journal of legal studies, Volume28,2008,13.
[56] Andrew Von Hirsch, Proportionality in the philosophy of punishment, Volume 16, 1992, 55-60. https://www.jstor.org/stable/1147561
[57] Thomas M Franck, On proportionality of countermeasures in international law, Volume 102, 2008, *Cambridge university press*,721.

determining whether the ostensibly legal response was appropriate given the provocation. He asserts that the proportionality principle should be applied in any process used to resolve a dispute.

According to Thomas, it is plausible but untrue that the principle of proportionality, like beauty, is in the eye of the beholder. [58] Thomas wonders how a legal rule, intended to guide the conduct of disputing parties, which cannot be ascertained with precision, can be expected to govern their behaviour in actual situations. However, he contends that whenever there is a conflict, this principle becomes apparent when a party defending its contested rights and interests employs countermeasures that are subsequently contested as being excessive. It also manifests when governments choose to break treaty-based commitments to free trade or the protection of human rights when it is necessary. Therefore, he makes the case that the principle affects both the terms of dispute settlement as well as the terms of discourse or the terms in which the parties to a dispute advance their self-justification.[59]

Frase opined that judges should first define the relevant sentencing factors.[60] These factors include the offence and the offender characteristics to determine appropriate sentences and the weight given to each of these factors. So as to decide whether two offenders, similarly situated should receive similar sentences or different sentences. The factors that determine whether a sentence is imposed are dependent on the intended punishment. Doob contends that without a frame of reference, consistency, or disparity relative to some underlying principle, the reform objective of encouraging reasonable consistency and reducing disparity in sentencing is meaningless.[61] This study agrees with this view as it would further the attainment of justice when the judges access the various felonies step by step instead of directing them to TDRMs. This is without considering the case facts of the felonies keenly.

According to Wilson, sentences have various functions and frequently clash.[62] He claimed that conflicts between proportionality principles and restorative justice goals are some of the most challenging. This study agrees with this view as the law is strict on formalities and following case law. On the other hand, TDRMs are majorly focused on achieving the goal

[58]. Frank M Thomas, The power of legitimacy among nations,1990, *Cambridge printing press/* https//jstor.org,47-48.
[59] Frank M Thomas, The power of legitimacy among nations,1990, *Cambridge printing press/* https//jstor.org,49
[60] Richard S Frace, Punishment purposes,2005, *Stanford Law review*, Volume 58,67.
[61] Anthony N Doob, The United States sentencing commission Guidelines: If you don't know where you are going, you might not get there, in the politics of sentencing reform,2003, CRIM.L.REV, 37.
[62] James Q Wilson, Thinking about crime,2013, *Basic books publishers*, 120.

of restoring peace between the two parties in whatever way possible. According to the retributive theory, sanctions should be scaled by each offender's degree of guilt and equally guilty offenders should face equally harsh punishments.[63]Sentence uniformity and proportionality also have practical advantages, such as maintaining public respect for criminal laws and the criminal justice system and reinforcing public perceptions of relative crime seriousness.

According to Zimring and Hawkins, general deterrence is intended to stop future crimes by members of the public or by subgroups thought to have a higher risk of committing them.[64] It accomplishes this by attempting to deter potential offenders from committing additional crimes by instilling a fear of suffering the same punishment as the prior offender.

According to Coller, domestic courts in Kenya apply proportionality principles when addressing European Community law and fundamental rights under the Human Rights Act.[65] This is important as the Constitution of Kenya recognizes the importance of application of the general rules of international law forming part of the law of Kenya.[66] The English Common Law also recognizes the proportionality principle in the context of Constitutional rights. There is a lot of flexibility and a variable level of review intensity in both the domestic and European courts (EC)applications of proportionality. In his book, Widdershoven expresses the opinion that the European Courts of Justice (ECJ) applies the principle when examining the legislative actions taken by community institutions. He talks about the Fedesa case and claims that it was evident that the ECJ uses caution when examining this measure.[67] This case involved examining whether a measure which is suitable and necessary, damages the interests of a specific group of individuals in a disproportionate manner. Widdershoven accepts the three-question rule that the ECJ established to determine whether the rule has been broken. This has gone a long way toward defining how the proportionality principle should be applied. The three-question rule includes determining whether the measure is appropriate to achieve the objective of the measure, whether the measure is necessary to

[63] James Q Wilson, Thinking about crime,2013, *Basic books publishers*, 121.
[64] Frank E Zimring & Gordon J Hawkins, Deterrence: The legal threat in crime control,1973, *University of Chicago Press*, 71.

[65] Van Coller, Proportionality review: the battle between community standards and English domestic law,2006, *Law Journal of Southern Africa*, 470.
[66] Article 2(5),(6), Constitution of Kenya (2010).
[67] The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others**.**

achieve the measure, and, finally, whether the result obtained is proportionate in the *sense of strict* (strictest sense).[68]

1.8.3 Contribution

The claim made by this study concurs with academics who support the use of conventional dispute resolution procedures in the criminal justice system, but only in the resolution of misdemeanours. Though it seeks to intervene in this discourse by evaluating the balance between the right to life and the right to culture and by using the proportionality principle to argue that the use of TDRMs in Kenya to resolve felonies is not practical, this will help improve data in the field of criminal law.

1.9 Methodology

This research is qualitative with the main sources of data being primary sources, for example, the Constitution of Kenya 2010. Additionally, incorporating secondary sources such as books and book chapters judgments by the various judges in various courts, reports, other internet resources, and publications. The study generally attempts to arrive at findings through a deductive approach.

This study uses the doctrinal analysis approach.[69] In so far as to assess what is incorporated in the right to culture. Thereafter concluding that courts have been interpreting this law in a different way than it should be interpreted at present.

In assessing what the right to life incorporates and to what extent it will be protected with regard to the inclusion of TDRMs in the criminal justice system, a doctrinal analysis approach best suit this. This approach investigates both regional and international law as well as cases and statutes. Additionally, the approach also endeavours to compare the current law with the previous law such as the Constitution and the AJS policy for instance, in relation to TDRMs.

In assessing TDRMs and their efficiency in dealing with felonies as instigated in the Constitution, this study uses historical analysis to demonstrate how these TDRMs were initially used in the resolution of disputes before they were included and protected in the 2010 Constitution. Additionally, this study evaluates their effectiveness in dealing with felonies. In analyzing and understanding the proportionality principle and its relation to

[68] R Widdershoven, The European administrative law' inR Seerden &FStroink(eds) Administrative law of the European Union, its member states and the United States. A comparative analysis (2002), 278.
[69] Bhat P, Idea and methods of legal research, 2020, 13.

proportionate punishment, doctrinal analysis will be key. This will eventually lead to a demonstration of how, because of the development of technology and the passage of time, the issues considered when promulgating the Constitution are different from the criminal issues we now face.

1.10 Chapter Breakdown

Chapter 1: Introduction to the study: This chapter lays the foundation of the research design of this study with parts such as research objectives, theoretical framework, as well as justification of the study, providing the background as well as a frame of reference that will be the foundation for subsequent chapters.

CHAPTER 2: An examination of Kenya's TDRM legal framework: This chapter assesses the application of Traditional Dispute Resolution Mechanisms. It further highlights the history of TDRMs before the 2010 Constitution and after its promulgation and whether it restricts or aids their application in the resolution of felonies.

Chapter 3: An analysis of the right to culture and the extent of its protection by the criminal justice system: This chapter examines the right to culture and its inclusion in the criminal justice system to resolve felonies. It further assesses the measures that are put into place to ensure that the ever-evolving nature of the African and more specifically Kenyan culture does not hinder access to justice. Additionally, it looks at the tenets of the proportionality principle and seeks to relate it to proportionate punishment.

Chapter 4: An analysis of the right to life and the extent of its protection in TDRMs with special regards to the proportionality principle: This chapter assesses the right to life, its tenets, its inclusion into the criminal justice system, and the measures that are in place to protect it. This is with special consideration of the principle of proportionality and proportional punishment. It discusses how the use of TDRMs as opposed to the criminal justice system in the resolution of felonies has undermined the right to life in regional and international laws.

Chapter 5: Conclusion and recommendations: This chapter consolidates the outcomes of the study's research and provides a comprehensive assessment of the findings. It serves as the culmination of this study's investigative efforts, offering insight into the broader implications and significance of the study.

CHAPTER 2

LEGAL FRAMEWORK FOR TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN KENYA

2.0 Introduction

This chapter examines the legal framework for TDRMs in Kenya as well as the history of its applicability. It explores the principles, procedures, and key actors involved in these mechanisms, shedding light on the intricate ways in which they interface with the formal legal systems. Furthermore, this chapter addresses the challenges and opportunities presented by the coexistence of the customary and the modern legal systems, with more emphasis on criminal matters.

2.1 Nature and applicability of TDRMs

2.1.1 The pre-colonial period

TDRMS are mechanisms that have been used to resolve disputes and have been passed from one generation to another.[70] These strategies for resolving disputes are ingrained in the communities' culture and traditions.[71] Africans had their own authentic methods of governance example; Baganda of Uganda and the Zulu of South Africa.[72] Most others lacked a centralized political authority, and functioned without codified law or regular systems of taxation.[73] Customary law was widely used in all aspects of life and was the preeminent normative system among Kenyan communities before the British arrived in East Africa.[74] This was due to the lack of a centralized system of law-making therefore the communities used what they knew best, their customary law.[75]

In Kenya, every society had a unique way of commemorating marriage, divorce, death, and other social events.[76] These systems were used to illustrate everything, even criminal legislation. For instance, the Maasai engaged in self-help, which gave a murdered person's family the right to pursue the murderer with the potential of taking the so-called "blood money" as legal damages instead of death.[77] Additionally the mode of ruling was unique,

[70] Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed [20 13] eKLR,' ,205.
[71] Penal Reform International, Access to Justice in Sub-Saharan Africa, Penal Reform International, 2000,12.
[72] Mazrui AA, The Africans: A triple heritage, Little, Brown and Co., Boston, and Toronto, 1986, 65.
[73] Mazrui AA, The Africans: A triple heritage, Little, Brown and Co., Boston, and Toronto, 1986, 67.
[74] Ochich G 0, 'The Withering Province of Customary Law in Kenya' in Fenrich, Galizzi and Higgins, 'The Future of African Custom my Law' Cambridge University Press, 20II, I 05.
[75] 0chich G 0, 'The Withering Province of Customary Law in Kenya', I 06.
[76] Mazrui, The Africans, 69.
[77] Ocran, 'The clash of legal cultures', 470-480.

some groups in Kenya had a single ruler, such the *Nabongo,* who dominated the Wanga sub-community. Influential figures known as the *orkoiyot* and the *oloibon* (respectively) existed in other communities, including the Nandi and the Maasai. These people's impact came from their position as religious authorities.[78] These officials were tasked frequently with mediating conflicts between parties because they were the guardians of the society's laws. These individuals' responsibilities included formulating the legislation and, to a certain extent, enacting it. Before the colonists arrived, these officials oversaw the numerous communities in Kenya. It is also vital to note that pre-colonial African systems were heavily influenced by religion as seen above, which infiltrated almost every area of life to the point where it was impossible to distinguish between faith and action.[79]

The British restricted the application of TDRMs and customary law in two keyways. First, by enacting English laws that were thought to be superior to all other customary laws.[80] The second way was by repugnancy clauses.[81] In the case of *R v. Amkeyo*, the court considered the effect of repugnancy clauses and concluded that the African concept of bride price amounted to wife purchase and was rejected as being inconsistent with moral and legal norms. As a result, the courts followed British morality and justice principles.[82]

2.1.2 After independence and the 2010 Constitution

The 2010 Kenyan Constitution includes several provisions that acknowledge local groups' customary practices. In contrast, the Independence Constitution did not include any regulations regarding customs and traditions. The Constitution's Article 2(4) first and foremost declares that any law, including customary law, that conflicts with the Constitution would be ruled illegal.[83] This is the first passage in our Constitution that makes it clear that customary law will be used to settle conflicts. These customary laws are what are applied in TDRMs.[84] There are several parliamentary legislations that recognize TDRMs as an

[78] https: l/abawanga. wordpress.com/ accessed on 23'd March 20 13; Okoth A, 'A History of Africa: African societies and the Establishment of Colonial Rule 1800-/915', East African Educational Publishers, 2003, 35; Cheater A, 'Social Anthropology: An Alternative Introduction' Tyler and Francis e-library, 2005, 100.
[79] For fuller treatment, see Magesa L, what is not sacred: African spirituality, Acton Publishers, Nairobi, 2013, 24.
[80] Cotran E, 'The development and reform of the law in Kenya' 27(1) Journal of African Law, 1983, 42; Ocran J, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' 39(2) Akron Law Review, 2006, 470.
[81] Bwire B, 'Integration of African customary legal concepts into modern law: Restorative justice: a Kenyan example' 9(17) Societies, 2019, 8.
[82] Republic v Amkeyo (1917) 7 EALR 14; Abdul Rahman Bin Mohamed and Another v. Republic (1963) E.A 188.
[83] Article 2 (4), Constitution of Kenya (2010)
[84] Article 2 (4), Constitution of Kenya (2010)

alternative for the resolution of disputes, including by virtue of Article 2(6) of the Constitution of Kenya.[85] These provisions are discussed below.

Various Acts of parliament were enacted and put into place. The Alternative Dispute Resolution Bill is a good example. It is a bill for an act of parliament to establish conciliation, mediation, and other conventional conflict resolution mechanisms for the resolution of civil disputes; to specify the appropriate guiding principles; and for related objectives.[86] This goes to promote TDRMs applicability. This bill additionally provides that the person(s) who resolves the disputes should be one who is recognized by the community as well as the customs of the community in question as being, capable of resolving a customary dispute.[87]Nonetheless there exists the possibility of representation by an advocate or any person whom the parties consider appropriate.[88]

According to Section 68 (1) of the Marriage Act, the parties who feel they have been wronged in a customary marriage have the option to settle their differences outside of court through TDRMs.[89] If this doesn't work, the parties may go to court to have the marriage dissolved.

Under Section 39 of the community land Act, if there arise disputes involving community land the people may use TDRMs to resolve the disputes.[90] Utilizing TDRMs is meant to promote restorative justice. Moreover, to guarantee that the community maintains a peaceful environment even after the conflict has occurred and been settled. In accordance with Section 3 (c)of the Judicature Act, TDRMs and African customary law can be used to settle civil disputes if they don't conflict with written law's requirements or the principles of justice and morality.[91]This Act however limited the applicability of TDRMs to use in civil cases. The National Land Commission Act, is given effect by the Article 60 of the Constitution by mandating the National Land Commission to use TDRMs to resolve disputes.[92] According

[85] Article 2(6), Constitution of Kenya (2010)
[86] FIDA Kenya, https://www.fida-kenya.org/2022/04/19/submissions-on-the-alternative-dispute-resolution-bill-2021/
[87] Section 2, Alternative Dispute Resolution Bill, Senate bill (2021).
[88]Section 19(1), Alternative Dispute Resolution Bill, Senate bill (2021).
[89] Section 68 (1), Marriage Act (Act No.4 of2014).
[90] Section 39 (1), Community Land Act (Act No. 27 of 20 16).
[91] Section 3(2), Judicature Act, (Act No. 16 of 1967).
[92] Article 60 (I), Constitution of Kenya (2010).

to clause 5 (1) (f), the National Land Commission should promote the use of TDRMs to settle land disputes.[93]

First off Article 11 of the Constitution promotes application of TDRMs. This is as it provides that culture is the foundation of the nation and the people of Kenya and additionally people have a right to enjoy and participate in their cultural life.[94] Article 159 (2)(c) provides for use of Alternative dispute resolution mechanisms, including TDRMs.[95] However the following Article 159(3) has a repugnancy clause that is similar to the one under the Judicature Act.[96] It provides that TDRMs cannot be used in a manner that contravenes with the bill of rights, is repugnant to justice and morality or is inconsistent with the Constitution or any other written laws.[97] According to the criminal procedure code, the courts may encourage peacemaking efforts and any other type of amicable conflict resolution. The promotion of peace may lead to the suspension or termination of criminal proceedings.[98] Justice Maraga was of the opinion that Section 176 is only applicable in cases of minor assault.[99]This is a clear example of limited use of culture. The goal of the National Cohesion and Integration Commission (hence referred to as NCIC) is to foster positive relationships, cohesion, and social harmony among Kenya's various ethnic communities.[100] The significance of the NCIA is that it opens the door to the use of TDRMs in felonies, as opposed to the Criminal Procedure Code, which restricts their use to misdemeanors.[101]

2.2 International provisions by virtue of Article 2(6) of the Constitution of Kenya

Article 15 provides that state parties are to recognize the right of everyone to take part in cultural life including those necessary for the conservation, development, and diffusion of culture.[102] This shows that there is recognition of the use of culture. It additionally portrays TDRMs as being appropriate as they are cultural institutions and community inclusive.[103]

[93] Section 5 (1), National Land Commission Act, (Act No.5 of2012).
[94] Article 11, Constitution of Kenya (2010); Article 44, Constitution of Kenya (2010).
[95] Article 159(2)(c), Constitution of Kenya (2010).
[96] Section 3(2), Judicature Act (1967);) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.
[97] Article 159(3), Constitution of Kenya (2010)
[98] Section 176, Criminal Procedure Code (2012).
[99] Juma Hamisi v Republic (2007) eKLR.
[100] Section 25(1), National Cohesion, and Integration Act (2008).
[101] Section 47 and 51, National Cohesion and Integration Act (2008).
[102] Article 15, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.
[103] Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.

Article 27 provides for states which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with others to enjoy their culture and use their language.[104] In Kenya there exists various minority groups. These minority groups have been benefiting from the use of culture and TDRMs to resolve their disputes. Article 33 of the Chater of the United Nations provides that individuals and parties to a dispute may settle it by negotiation, mediation, and peaceful means of their own choice.[105] This gives an actual picture of TDRMs and their application. TDRMS are cheap, restorative, peaceful and community inclusive. Article 5 of the UNDRIP provides that indigenous peoples have the right to maintain and strengthen their distinct legal, economic, social, and cultural institutions.[106] Additionally, Article31 guarantees that indigenous peoples have the right to preserve, manage, safeguard, and advance their cultural heritage and cultural expressions.[107] TDRMs are clearly emphasized here as evident above and thus note is taken. Article 17 asserts that everyone has a right to freely participate in their community's cultural activities and that the State has a responsibility to uphold and safeguard the community's morality and customary values.[108]In a similar manner it is evident that the importance of TDRMs is acknowledged here as well.

2.2.1 Applicability of TDRMs in criminal disputes (case law)

The first prominent case is that of *Republic V Mohamed Abdow Mohamed*.[109] According to reports, the crime took place in the Eastleigh neighborhood of Nairobi County. The defendant entered a not guilty plea after being arraigned in court. Thus, a hearing date was determined. The prosecution noted that the defense attorney representing the relatives of the deceased had written to the prosecution's office on the date of the hearing to seek that the case be dropped. The explanation was that the two resentful parties had reached an understanding. The families had agreed that the accused should compensate the family of the dead. This payment was made in the form of camels, goats, and other customary decorations. Furthermore, it was said that one of the rites paid for the deceased's blood according to Islamic practice. Therefore, they decided against continuing to investigate. The

[104] Article 27, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.
[105] Article 33, Charter of the United Nations, 24 October 1945, 1 UNTS 24.
[106] Article 5, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295
[107] Article 31, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295.
[108] Article 17(2), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3; Article 17(3), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3.
[109] R v Mohamed Abdow Mohamed [2013] eKLR

arrangement was accepted by both parties. The prosecution asked that the case be listed as resolved as with regards to Article 159 (1). The trial judge authorized the case to be regarded as resolved.

In the case of *Republic v Musili Iva,* the High Court allowed for the dispute to be resolved by use off TDRMs.[110] The reason for this is that no witnesses had testified yet thus the persons were discharged. The prosecution additionally informed the court that the clan members of the deceased and the accused had requested for the termination of the criminal proceedings. As they wanted to pursue TDRMs for the resolution.

In *Republic v Juliana Mwikali Kiteme,* the court case was withdrawn in favor of resolution via TDRMs.[111] The two accused had murdered Dominic Mukungi Mutemia. The prosecution did not list any prospective witnesses. Additionally, the prosecution presented a development that the clan members of the deceased and the accused wanted to pursue an amicable resolution on the issue of the death of the deceased. The judge stated that she had not received any objections from the community or the public. Therefore, accorded the clan settlement consideration in the matter. The accused persons were thereby discharged.

In conclusion the case of *Stephen Kipruto Cheboi & 2 others v Republic*, Jude Fred Ochieng directed that the conviction remained even though there had been the employment of TDRMs.[112] This is after three of the brothers accused appealed after the previous court's conviction on basis that TDRMs are applicable to misdemeanors and not felonies.[113]

2.3 Conclusion

From the above there is need to establish clear guidelines on the scope of TDRMs in criminal matters more specifically felonies and additionally institutionalize TDRMs. This is because felonies carry a high degree of importance. To promote growth through TDRMs therefore attention needs to be paid to the fact that justice and fairness cannot be sacrificed at the altar of community satisfaction. Additionally, the contradiction between different legal provisions as seen above between the Criminal Procedure Code stating that TDRMs are only limited to

[110]Republic v Musili Ivia and another (2017) eKLR.
[111] Republic v Juliana Mwikali Kiteme and 3 others (2017) eKLR
[112] Stephen Kipruto Cheboi & 2 others v Republic [2014] eKLR
[113] Kariuki F, Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR, 12 http://kmco.co.ke/wp-content/uploads/2018/08/download1352184239.pdf

misdemeanors. While the NCIA providing that TDRMs may be applicable to resolve felonies, needs to be addressed.

CHAPTER 3

THE EXTENT OF PROTECTION OF THE RIGHT TO CULTURE WITHIN THE CRIMINAL JUSTICE SYSTEM

3.1 Introduction

This chapter seeks to delve into the intricate intersection of cultural rights and the administration of justice. Thus, shedding light on the challenges and opportunities that arise when protecting and preserving an individual's right to culture within the confines of criminal proceedings. It analyses the enabling constitutional and statutory provisions as well as the jurisprudence on the same as expounded by the courts. In a world where diversity and cultural identity are celebrated, this study navigates the multifaceted dimensions of culture within the context of criminal justice, offering insight into the evolving landscape of human rights, justice, and societal harmony.

3.2 Historical analysis of customary law in Kenya

3.2.1 Colonial Period

During this era, colonial courts exclusively utilized customary law as a reference point in legal proceedings when its application was explicitly stipulated by written statutes.[114] In the case of *R v Amkeyo*, the issue at hand involved a situation where the husband had married a second wife.[115] The central question during the legal proceedings was whether the first wife, who was married under customary law, could serve as a witness against her husband. In common law, the principle holds that a husband and wife are seen as a single legal entity, and as such, neither of them can be obligated to present evidence against the other. However, Hamilton C.J observed that a wife married under customary law was not recognized as a legal spouse. As a result, the court compelled her to testify against her husband.[116] The court's interpretation of a customary African marriage based on the payment of dowry reduced it to a mere purchase of a wife within the context of civilized societies. The ruling did not establish a convincing rationale for why a common-law wife was considered a legal wife, while a customary law wife did not enjoy the same status. Chief Justice Hamilton stated that describing such a union between an African native and a woman from his tribe, in accordance with tribal customs, as a "marriage" was a misnomer and did not suffice to establish the legal status of a wife.

[114] Magistrates Courts Act (Act No. 26 of 2015).
[115] R v Amkeyo, (1917) 7 E.K.L.R. (Kenya).
[116] R v Amkeyo, (1917) 7 E.K.L.R. (Kenya).

Similarly, in *Lolkilite ole Ndinoni v. Netwala ole Nebele,* the East African Court of Appeal addressed issues related to the Maasai customary practice of blood money and the application of the 1934 Limitation Ordinance by the Native Tribunals.[117] The case revolved around the appellant's deceased father, who was accused of committing homicide, and the matter was initially brought before the Native Tribunal. However, the claim for blood money was filed thirty-five years after the alleged homicide. The Tribunal dismissed the claim, but the Supreme Court upheld it. On appeal, the East African Court of Appeal rejected the claim, citing that it was morally and justly repugnant to reopen a case after such a lengthy period.

This court recognized the validity of claims for blood money but rejected their pursuit after such a prolonged time. Despite indirectly supporting the claim for blood money, Sir Edward C.J. asserted that the Native Tribunals did not qualify as conventional courts and, consequently, the 1934 Limitation Ordinance did not apply to them.[118] The ruling that the Native Tribunals were not customary courts highlights the judges' reluctance to acknowledge customary dispute resolution methods in their interpretation of common law, which, in turn, limited litigants' access to justice.

The courts seem to have been discerning when it came to deciding which customary law issues they would preside over.[119]This selectivity arose from the fact that the common law did not inherently encompass the resolution of customary matters, such as disputes related to burial customs. Consequently, customary law had to be employed to address and resolve these disputes in order to uphold order. However, the courts would resort to customary law as a final option, only when no other legal framework was available for adjudication.

3.3 Independent Kenya and protection of the right to culture

Kenya's recent constitution arrives as the culmination of a phase of constitutional revisions in Africa that commenced in the 1990s.[120] This was a part of a more extensive global movement toward promoting democracy in governance.[121] In many cases, the amended constitutions placed a stronger emphasis on human rights, frequently addressing discrimination in private or religious domains. This discrimination had previously been

[117] Lolkilite ole Ndinoni v. Netwala ole Nebele (1952) 19 EACA
[118] Lolkilite ole Ndinoni v. Netwala ole Nebele (1952) 19 EACA
[119] Kinama E, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya' 1 Strathmore Law Journal 1, 2010, 27.
[120] Lisa O, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts' 1 Strathmore Law Review 1, 2016, 143.
[121] Diamond L., Plattner, 'Consolidating the Third Wave Democracies. Baltimore: Johns Hopkins University Press, 1997.

addressed during the initial post-independence era, whether due to the absence of anti-discrimination provisions or the validation of customary practices and societal norms that facilitated or endorsed discrimination.[122] Governments have endeavoured to find ways to leverage the societal underpinnings of cultural traditions to underpin and validate the human rights agenda during constitutional reforms.[123] In the Banjul Charter, also referred to as the African Charter on Human and Peoples' Rights, for instance, African cultural values that were in harmony with human rights, specifically termed as 'positive African cultural values' and the 'morals and customary values recognized by the community' (as stated in Article 29), were promoted as the foundation for national identity, social unity, and communal solidarity. As a result, universal human rights principles are imbued with an 'African cultural touch.'[124]

The right to culture is a right that is enshrined in the Constitution of Kenya as well as other international human rights instruments. Cultural defense raises important questions about the fairness and universality of criminal justice systems.[125]Various International laws with which Kenya is a party or a signatory to promote the right to culture in various ways as can be seen below; Everyone has a right to freely participate in the cultural, artistic, and scientific life of the community.[126] Right to culture is part of the right to freedom of conscience, religion and belief.[127] In those states which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture.[128] Right to culture is also protected including the right to cultural identity and the duty to preserve cultural values.[129]All the above provisions illustrate the regard that international law has towards the right to culture.

There is emergence of the question of validity of African customary law being termed as law. Under this there arises two sides which is the positivists and the other comprises of those against the positivist way of thinking.

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[122] Hydén G. & Venter, D 'Constitution-making in Africa: Political and theoretical challenges', Pretoria: AISA, 2001, 29.
[123] Wanda, R 'Constituting folklore: A dialogue on the 2010 Constitution in Kenya'. Africology: The Journal of Pan African Studies 9(1) 2016, 59–83.
[124] Wa Mutua M, 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties', Virginia Journal of International Law 35: 1995, 339–380.
[125] Kaplan P, Cultural defence and criminal justice, journal of criminal justice and popular culture Sandiego University Press, Vol 16, 6-11.
[126] *UDHR Article27.*
[127] Article44, Constitution of Kenya (2010).
[128] *ICCPR Article 27.*
[129] *Article 17, African Chater on Human and Peoples Rights, 1986.*

The first thinker this study looks at is that of Hart. According to Hart, he opines that ordering of society by behavioural norms cannot be deemed to be law.[130] According to him, these kinds of rules are only present in cultures that are "closely knit by kinship, common sentiment, belief" and that are situated in a stable environment. Hart claims that only after that can behavioural standards or conventions be appropriate.[131]He thus feels that this system is likely to fail given such norms ordinarily lack sufficient coercive power as would ordinary laws.

John Austine is the second scholar who opines that it would be improper to refer to customary law as law.[132]This is stemming from the fact that he defines law as he goes on to characterize the fundamental essence of a command as involving the power of the party giving it to cause suffering to those who disobey it.[133] According to Austin, such an order was expressed verbally or through signals and was the will of the political elite, with consequences for disobedience.[134] This was the proper definition of law.

In Hobbes' view, the 'Leviathan' would enact laws for a specific rationale, the political superior envisioned by Austin would issue commands that are rational, and Dworkin's 'Judge Hercules' would render judicial decisions rooted in superior wisdom.[135] Conversely, for positivists, customary law evolves from the customs and practices of the communities it governs and is thus grounded in the actions of the people rather than the reasoned authority of a political body.[136]A law thus rightly called is founded on authority as it is more certain.

In accordance with Gordon R Wood, customary laws contain different degrees of mandatory force.[137]These laws are obligatory and enforceable, often with the backing of community consensus and sanctions for non-compliance. They hold significant influence in regulating various aspects of social life, including dispute resolution, property rights, and social behaviour.[138]

[130] Hart, HLA, 'The concept of law', Clarendon Press,1961, 92.
[131] Hart, Hart, HLA, 'The concept of law', Clarendon Press,1961, 93.
[132] Austin J, 'The Province of Jurisprudence Determined ', Published by John Murray, Albemarle Street London, 1832, 6.
[133] Austin J, ' The Province of Jurisprudence Determined', 10.
[134] Austin J, ' The Province of Jurisprudence Determined', 11.
[135] Gachenga E. W, Integrating Customary and Statutory Law Systems of Water Governance for Sustainable Development: The Case of The Marakwet of Kenya, 2012, 65.
[136] Gachenga E. W, Integrating Customary and Statutory Law Systems of Water Governance for Sustainable Development: The Case of The Marakwet of Kenya, 68.
[137]Woodman G, ' A Survey of Customary Laws In Africa', The Future Of African Custommy Law, edited by Fenrich, Galizzi and Higgins, published by Cambridge University Press, New York 2011 , 13-14.
[138] Woodman G, ' A Survey of Customary Laws in Africa' 12-14.

To sum up, the critique from positivists regarding customary legal systems hinges on two central arguments. First, they argue that customs lack the necessary authoritative power to be considered valid laws. Second, they assert that customs do not derive their legitimacy from the deliberate judgment of a governing authority; instead, they are primarily rooted in the actions and behaviours of the populace.

Legal experts who have refuted these claims using a variety of legal grounds make up the second side of this dispute. Concerning the argument that customary law lacks a basis in the judicious decision-making of an officially recognized authority, the positivists are mistaken. This is because in customary African contexts, governance was frequently entrusted to assemblies of elders, chiefs, and in certain instances, monarchs, who held significant political authority.[139] In times of disputes, these figures of authority were frequently consulted, especially in more advanced societies like the Baganda, who established a legislative institution known as the *lukiiko*.[140] These authorities played an active role in crafting and enforcing the legal framework of the land, as opposed to merely adhering to the customary traditions of the populace without reason. These political authorities were entrusted with the responsibility of exercising wisdom when implementing the laws that governed the community, with the primary aim of maintaining social harmony.[141]

Olawale Elias grappled with the question of whether customary law can legitimately qualify as a legal system.[142] He highlights that the means of maintaining social order in a society doesn't necessarily have to be extensively institutionalized to be classified as law. He contends that the presence of a normative framework, governing the society, is adequate to define a legal system, without requiring the formalization and institutionalization found in Western legal systems. Consequently, Elias argues that it would be inappropriate to dismiss customary law simply due to its lack of formal structure.[143] Acknowledging that unwritten laws, although informal and not codified, still fall under the broader definition of law, it becomes apparent that these unwritten and informal legal norms, while perhaps not as legally potent, continue to govern people's behaviour. In this context, they can rightfully be

[139] Kenyatta J, 'Facing Mount Kenya: The Tribal Life of the Gikuyu' Mercury Books, London, 1976, 186-203.
[140] https://www.britannica.com/place/Buganda accessed on 30 October 2023.
[141] https://www.britannica.com/place/Buganda accessed on 30 October 2023.
[142] Elias T, 'Legal Theory: A Nigerian Perspective' in M.l Jegede, Nigerian Essays in Jurisprudence, Lagos: MJJ Publishers L TO, 1993, 12-13.
[143] Elias T, ' Legal Theory: A Nigerian Perspective ' in M 1 Jegede, Nigerian Essays in Jurisprudence, Lagos: MJJ Publishers LTD, 1993, 12-13.

considered as laws. Therefore, according to *Nyasani,* customary law can be legitimately recognized as a form of law.[144]

It is currently evident that despite the appreciation of culture in the form of customary law both internationally and locally, customary law and traditional justice systems are still inferior to common law and the principles of equity which courts take judicial notice of under Section 60 of the Evidence Act.[145]Customary law has to be proved in court consequently.[146] Additionally, a challenge then arises due to the unwritten and uncodified nature of customary law. Inadequate codification of customary law principles into statutes ensures that customary laws remain at the bottom of the legal totem pole.[147]

3.4 Conclusion

In conclusion, this chapter thoroughly explores the intricate dynamics of safeguarding the right to culture within the criminal justice system. It meticulously traces the historical trajectory of customary law in Kenya, emphasizing the evolving impact of constitutional and statutory changes on cultural rights from the colonial era to independent Kenya. The study critically examines the interplay between international human rights instruments, particularly the Banjul Charter, and Kenya's constitutional framework in protecting the right to culture. Engaging in a nuanced discussion on the validity of African customary law, the chapter navigates debates between positivists and advocates of customary law as a legitimate legal system. Despite global and local recognition of cultural rights, the chapter acknowledges persistent challenges faced by customary law and traditional justice systems, often overshadowed by common law and equity principles. The unwritten and uncodified nature of customary law, coupled with the requirement for proof in court, presents obstacles to its acknowledgment and elevation within the legal hierarchy.

[144] Nyasani M. J, 'Legal Philosophy: Jurisprudence ', Consolata Institute of Philosophy Press, 1995, 10-12.
[145] Section 60, Evidence Act (Cap80).
[146] Section 60, Evidence Act.
[147] Kariuki F, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Justice Systems'2015,12.

CHAPTER 4

USING THE PROPORTIONALITY PRINCIPLE TO FIND OUT TO WHAT EXTENT THE RIGHT TO LIFE IS PROTECTED BY INCORPORATIONG TDRMS IN THE CRIMINAL JUSTICE SYSTEM

4.1 Introduction

This chapter explores the convoluted relationship between the fundamental right to life and the incorporation of Traditional Dispute Resolution Mechanisms (TDRMs) within the criminal justice system. It assesses the extent to which this integration safeguards the right to life, applying the prism of the proportionality principle. This is by examining the delicate balance between security needs and individual rights. It delves into the implications, challenges, and potential improvements brought about by the amalgamation of these customary methods into modern criminal justice. Thus, shedding light on the complex interplay between age-old dispute resolution practices and contemporary human rights concerns as well as the institutionalization of TDRMs.

4.2 The right to life within the criminal justice system

The paramount entitlement to existence serves as the cornerstone from which all other entitlements stem. In the event that an individual's right to life has been transgressed, they are precluded from asserting any additional entitlements.[148] Apart from the domestic legislation of nations, there exist regional and global agreements that safeguard the fundamental right to life. First off, the focus here will be on the regional and international conventions, as they supplement most states' laws.

Under the Universal Declaration of Human Rights, it provides for the right to life for everyone as a basic right.[149] The European Convention on Human Rights (ECHR), that is applicable to all members of the Council of Europe provides that everyone's right to life shall be protected by law.[150] Nobody shall be deprived of his life intentionally except in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.[151] The American Convention on Human Rights (ACHR), provides that for every person has the right to have his life respected and the right shall be protected by

[148] M Mbondenyi & J Ambani, the New Constitutional Law of Kenya Principles, Government & Human Rights, 2012, 161
[149] Article 3, Universal Declaration of Human Rights, 1948
[150] Article 2, European Convention on Human Rights, 1953
[151] 1 Article 2(1), European Convention on Human Rights, 1953

law and, in general, from the moment of conception.[152] No one shall be arbitrarily deprived of his life.[153]Last but not least, the African Convention on Human and People's Rights (ACHPR) provides that human beings are inviolable.[154] Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.[155]

The Kenyan position on the right to life has evolved with the change in the Constitution. This is from the one of 1969 to the 2010 Constitution, which remains valid to date. The constitution of Kenya that preceded the current one contained stipulations concerning the right to life within chapter V, addressing the safeguarding of fundamental rights and freedoms of individuals.[156] The particular section articulated that no individual shall have their life deliberately taken away, except when carrying out a court-ordered punishment for a criminal offense they have been lawfully convicted of in accordance with the laws of Kenya.[157] It also delineated situations where the entitlement to life would not be deemed as being infringed.[158]

The human life is accorded a high degree of reverence. The current Constitution provides for the right to life under Part one, the general provisions to the bill of rights.[159] Under the provision it provides that, every person has the right to life, life of a person begins at conception.[160] A person shall also not be deprived of life intentionally, except to the extent authorised by the Constitution or other written law. [161]

However, from the above it implies that both Kenyan law and regional and international conventions fall short of providing complete protection for the right to life. This right is not considered absolute, and it allows for the state to make exceptions or restrictions.The Constitution states this point and provides detailed provisions on when and how a right may be limited.[162] According to Lumumba and Franceschi, they assert that the right to life is the fundamental cornerstone of human rights and is generally acknowledged by the majority of

[152] Article 4, American Convention on Human Rights, 1978.
[153] Article 4(1), American Convention on Human Rights, 1978.
[154] Article 4, African Convention on Human and People's Rights, 1986.
[155] Article 4, African Convention on Human and People's Rights, 1986.
[156] Constitution of Kenya, 1969.
[157] Section 71(1), Constitution of Kenya, 1969.
[158] Section 71(2), Constitution of Kenya, 1969
[159] Constitution of Kenya, 2010.
[160] Article 26, Constitution of Kenya 2010.
[161] Article 26, Constitution of Kenya 2010.
[162] Article 24, Constitution of Kenya, 2010

legal systems.[163] Safeguarding this right is crucial for the prosperity and endurance of any society. Additionally, in the African context, life and reproduction are held in hight value and have a certain level of sacredness.[164] This shows the right to life is valued as well in customary culture and practice.

4.3 The Proportionality principle

The major reason for use of TDRMs is that it promotes the access of justice for the marginalized, particularly the poor.[165] This is a right that every citizen is entitled to.[166] However, the major question that looms over peoples' heads is that of whether the punishment that is given is proportional to the crimes committed and is it fair? This leads us to the discussion of the proportionality of punishment with regards to specific and particular crimes which in this case are felonies.

In Anglo-American legal principles, a core belief is that the severity of punishment should align proportionally with the nature of the committed crime.[167] In *Solem V Helm,* Justice Powell subsequently outlined three "objective" factors that should guide the analysis of proportionality and they include; First and foremost, attention should be given to the gravity of the offense and the severity of the imposed penalty. This is due to the fact that it is imperative for a court to assess whether the punishment aligns proportionally with the seriousness of the crime.[168] Another valuable consideration is the comparison of sentences meted out to other offenders within the same jurisdiction.[169] If more serious offenses are subject to similar penalties or less severe punishments, it suggests a potential disproportionality in the penalty under scrutiny. Additionally, courts may find it beneficial to examine the sentences imposed for the commission of the same crime in different jurisdictions. Drawing comparisons can provide insights into the appropriateness and proportionality of the punishment in question.

[163] PLO Lumumba & Luis Franceschi, The Constitution of Kenya 2010: An Introductory Commentary, Strathmore University Press, 2014, 156
[164] PLO Lumumba & Luis Franceschi, The Constitution of Kenya 2010: An Introductory Commentary, Strathmore University Press, 2014, 156.
[165] Muigua K & Kariuki F, ADR, Access to Justice and Development in Kenya, Strathmore Annual Law Conference 2014 held on 3rd & 4th July 2014 at Strathmore University Law School at 1.
[166] Article 48, Constitution of Kenya (2010)
[167] Weems v. United States, 217 U.S. 349, 367 (1910)
[168] Solem V Helm (1983), South Dakota Supreme Court.
[169] Solem V Helm (1983), South Dakota Supreme Court.

It is also important to note that proportionality bars punishment in excess of the moral blame of the offender.[170]Justice Brennan is of the opinion that proportionality analysis requires that we compare 'the gravity of the offense,' understood to include not only the injury caused but also the defendant's culpability, with the harshness of the penalty.[171] Although proportionality may be said to serve broad utilitarian goals, it is at bottom a requirement premised on retributive doctrine, and more specifically on the imperative that an offender receive his or her "just deserts".[172] Central to the retributive theory is the notion that the criminal offender is a rational actor and as such deserves punishment in accordance with the degree of harm caused and the blameworthiness involved.[173]

Proportionality in effect operates as a wedge against the broader utilitarian goals of legislators, who may attempt to justify extreme sentences with utilitarian principals, even at the expense of the individual.[174] This is with regard to the utilitarian theory of punishment that was earlier alluded to. In both Kansas and California, they have both adopted this test which involves looking at the nature of the offense and the character of the offender.[175] This is with particular regard to the degree of danger present to society and then to the *Solem* comparative factors.[176] Additionally, punishment should fit the offender and not merely the crime.[177]

A criminal sentence must be proportionate to the crime for which the defendant has been sentenced, therefore. Reviewing courts, of course, should grant substantial deference to the board authority that legislatures necessarily possess. No penalty is per se constitutional. Thus, Powell J alludes that the current system of justice always has recognized that appellate courts do have a responsibility-expressed in the proportionality principle.[178] This includes for them not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.

[170] Stanford V Kentucky, United States Supreme Court (1989).
[171] Stanford V Kentucky, United States Supreme Court (1989).
[172] Lewis CS, 'The Humanitarian theory of punishment in contemporary punishment,2019, 194.
[173] Lewis CS, 'The Humanitarian theory of punishment in contemporary punishment,2019, 194.
[174] Rummel V Estelle, United States Supreme Court, (1980).
[175] State v. Scott, United States Supreme Court, (1978).
[176] State v. Scott, United States Supreme Court, (1978).
[177] Williams V New York, United States Supreme Court (1949).
[178] Hutto V Davis, United States Supreme Court (1982).

4.4 On institutionalizing TDRMs

Rwanda stands alone as the sole nation where two distinct transitional justice institutions have been concurrently established, each with its unique purpose directed at the reconstruction of the country.[179] From April to July 1994, a surge of extrajudicial killings and widespread atrocities resulted in the loss of approximately eight hundred thousand lives, plunging Rwanda into a state of turmoil and earning the grim distinction of the fastest genocide in history, as noted by scholars.[180] It required the creation of customized transitional processes and institutions specifically designed to act as a suitable means for reinstating a shared sense of national unity.[181] There was immergence of the Gacaca courts and the International Criminal Court of Rwanda.[182]

The term "gacaca" is translated to mean short grass which refers to the public space where neighbourhood male leaders met to solve the local problems that arose.[183] The system was adopted in 2001 and was used to try those deemed responsible for the 1994 Rwandan genocide.[184] The classification of Gacaca courts in Rwanda is structured around the notion of a cell and a sector.[185] In this context, a cell corresponds to a small community, and a sector is akin to a grouping of cells forming a village. In the overall framework, there were 9013 cells and 1545 sectors, resulting in the establishment of more than 12,103 Gacaca courts across the country.[186] Responsible for overseeing Gacaca meetings are judges referred to as *inyangamugayo,* who are elected to sit on a nine-member council[187] The Rwandan approach

[179] Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. My Neighbor, My Enemy: Justice and Community in the Aftermath ofMass Atrocity, Cambridge University Press, Cambridge, 2004, 56; Moturi M, 'The pertinence of restorative justice in kenya's penal laws'1 Strathmore Law Journal 1, 2018, 23.

[180] Burundi violence: Scores fle e homes before crackdown starts' BBC News, 7 November 2015, https://www.google.com/search?sca_esv=585680499&q=http://www.bbc+.com/news/wor+lcl-afi%22ica-34758791&spell=1&sa=X&ved=2ahUKEwiIwruu7eSCAxXMtqQKHQx2B3wQBSgAegQICBAC accessed on 8 November 2023.

[181] Sadat L, 'Transjudicial Dialogue and the Rwandan Genocide: Aspects of Antagonism and Complementarity', Leiden Journal ofInternational Law, Vo1.22, 2009,552.

[182] Forges A and Longman T, 'Legal Responses to genocide in Rwanda,' in Stover E and Weinstein H, ed. My Neighbor, My Enemy: Justice and Community in the Aftermath ofMass Atrocity, Cambridge University Press, Cambridge, 2004, 65.

[183] Geraghty M, "Gacaca, Genocide, Genocide Ideology: The Violent Aftermaths of Transitional Justice in the New Rwanda" Cambridge University press, 2020, 62.

[184] Bert Ingelaere, "Traditional justice and reconciliation after violent conflict: Learning from African Experiences"2008, 30-37.

[185] Bert Ingelaere, "Traditional justice and reconciliation after violent conflict: Learning from African Experiences"2008, 30-36.

[186] Wambua C, Remembering genocide against tutsi, Al Jazeera, https://www.aljazeera.com/features/2012/7/1/remembering-rwandas-genocide June 2012.

[187] Wambua C, Remembering genocide against tutsi, Al Jazeera, https://www.aljazeera.com/features/2012/7/1/remembering-rwandas-genocide June 2012.

was a direct reaction to the UN Security Council's recognition of the necessity to move away from rejecting the adoption of a Eurocentric transitional justice model based on a one-size-fits-all perspective.[188]

In early 2004, the Rwandan government took the lead in an effort to modernize and formalize by categorising into institutions through the enactment of Organic Law 16/2004.[189] In a move to recognize the Gacaca system, the government of Rwanda abolished courts at the district and also provisional level.[190] This lead to the leaving of one court at each cell and establishing courts at each sector level; a court of fist instance and an appellate court.[191] Every Gacaca court had three arms which included a general assembly, a bench of judges and a co-ordinating committee.[192]

After the institutionalisation of this Gacaca courts, the contemporary Gacaca system now differs significantly from its traditional counterpart in numerous aspects.[193] In contrast to the traditional Gacaca, the current version was established through written laws and is seamlessly integrated into the formal state framework for the administration of justice.[194] This is because the formal system contains rules of procedure it is also not as flexible as the traditional former counterpart.[195] In the updated Gacaca system, the agreement of the involved parties holds no significance, as participation is mandatory not only for the accused but also for the general public.[196] Individuals who have been convicted have the option to pursue an avenue of appeal. Their case may be subject to a reconsideration opportunity in the appeal court at the sector level, which consists of judges from the identical

[188] Report of the independent inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, Letter from Kofi A. Annan, Secretary-General, United Nations, to the President of the Security Council 3, December 16, 1999,3.
[189] Tully L, 'Human Rights Compliance and the Gacaca Jurisdictions in Rwanda " 26 Boston College of International and Comparative Law Review, (2003), 393.
[190] Teitel R, 'Transitional Justice Genealogy' , 16 Harvard Human Rights Journal (2003), 69.
[191] Teitel R, 'Transitional Justice Genealogy', 16 Harvard Human Rights Journal (2003), 75.
[192] Teitel R, 'Transitional Justice Genealogy', 16 Harvard Human Rights Journal (2003), 77.
[193] Waldorf L, ' Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' , 79 Temple Law Review, (2006), 48.
[194] Waldorf L, ' Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice' , 79 Temple Law Review, (2006), 50-52.
[195] Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice ', 79 Temple Law Review, (2006), 58.
[196] Teitel R, 'Transitional Justice Genealogy', 16 Harvard Human Rights Journal (2003), 77-78.

constituency.[197] In conclusion truth and reconciliation is a dominant consideration for the courts.[198]

4.4 Conclusion

This chapter explores the complex interconnection between the right to life and the integration of TDRMs in criminal justice. It evaluates the protective measures of regional and international conventions, revealing gaps in absolute protection within Kenya's legal framework. The proportionality principle is a crucial lens through which the chapter assesses how the integration of TDRMs balances security needs and individual rights, particularly in ensuring justice aligns with the gravity of offenses. The examination underscores the importance of fairness in punishment within the criminal justice system. The institutionalization of TDRMs, illustrated by Rwanda's Gacaca courts, highlights the intricate relationship between traditional practices and contemporary justice, emphasizing the significance of truth and reconciliation in the pursuit of justice. Kenya can derive benefits from looking into that.

[197] Teitel R, 'Transitional Justice Genealogy', 16 Harvard Human Rights Journal (2003), 78.
[198] Waldorf L, 'Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice ', 79 Temple Law Review, (2006), 48.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter encapsulates the study's discoveries, suggestions, and overall conclusions. It also assesses whether the research objectives and hypotheses have been successfully addressed.

5.2 Findings

The status of TDRMs in criminal matters in Kenya is a complex and evolving subject. It is deeply rooted in the Kenyan Culture and traditions. TDRMs have historically played a significant role in resolving disputes, including criminal cases as seen above and also within local communities.

However, co-existence of TDRMs with the formal legal system has presented both opportunities and challenges as discussed herein. On the positive side, TDRMs can provide a quicker and more accessible means of resolving conflicts, often involving restorative justice and community-based solutions. They can be particularly effective in dealing with minor offenses and promoting reconciliation among the parties involved. Furthermore, TDRMs can alleviate the burden on the formal criminal justice system, which is often overloaded and under-resourced.

Nonetheless, the integration of TDRMs into the formal legal framework raises several important issues. There is a need for clear guidelines and regulations to ensure fairness, transparency, and accountability within the TDRMs. Additionally, questions about human rights and the potential for discrimination and bias must be addressed. The compatibility of TDRMs with international human rights standards, particularly in cases involving serious crimes, remains a point of contention. However, there is still much work to be done to strike the right balance between preserving cultural practices and ensuring justice is served, particularly in serious criminal matters in this case felonies.

5.3 Conclusion

This research paper has proved its hypothesis, in that Kenya's approach to the inclusion of TDRMs in the resolution of felonies as endorsed in Section 159(2) (c) of the Constitution of Kenya is disproportionate to its aims which include access to justice and fairness and thus interferes with the balance between the right to life and the right to culture.

This research has proved this hypothesis by analysing the system that was in place in pre-2010 era as well as the system that is currently in place that supports customary law in resolution of criminal cases. This builds on the consequent chapter 3, which highlights on the effects of, lack of institutionalisation of TDRMs and the challenges that face incorporation of customary law into the criminal justice system. Chapter 4 outlined the incorporation of the principle of proportionality to assess fairness as to punishment rendered for felonies. As well as to prove the importance of institutionalisation of TDRMs.

This research has also fulfilled the research objectives and additionally given a response to the problem statement. According to the first objective, this research has assessed the institutional framework for the application of TDRMs in resolution of criminal disputes most especially felonies. It has highlighted the challenges that could be addressed as well as the improvements needed.

In accordance with research objective two, by examining the interplay between international human rights instruments and Kenya's constitutional framework in protecting the right to culture. This study has shed light on the persistent challenges faced by customary law and obstacles to its acknowledgment and elevation within the legal hierarchy.

This research has shed light on the importance of the proportionality principle, as a crucial lens through which the assessment of fairness in the incorporation of TDRMs into the criminal justice system is assessed. Additionally, the institutionalization of TDRMs, illustrated by Rwanda's Gacaca courts, highlights the possibilities of institutionalizing TDRMs in Kenya as per the third objective.

5.4 Recommendations

5.4.1 Need for legislative adjustments

Kenya should contemplate the introduction and modification of laws to explicitly include the notion of proportional penalties for felonies in the case of TDRMs. This would necessitate a reevaluation of sentencing guidelines to guarantee that the punishment corresponds with the gravity of the offense, while considering aspects such as the nature of the crime, the extent of harm caused, and the culpability of the offender.

5.4.2 The need for education and Training

Offer education and training to judges, legal practitioners, and law enforcement personnel concerning the principles of proportionate punishment and proportionality.As well as the importance of institutionalising TDRMs to avoid unfair trial outcomes. This will ensure that stakeholders within the criminal justice system possess a comprehensive understanding of the significance of aligning penalties with the gravity of the crime.

5.4.3 Need for categorization and distinguishing of offences by data collection and analysis.

Establish a robust system for gathering and analysing data related to felony convictions, sentences, and their outcomes. This data can be utilized to evaluate the practical implementation of the principle of proportionality and facilitate informed policy decisions towards settlement of disputes under TDRMs.

5.4.4 Promotion of restorative justice programs

Advocate for and expand restorative justice programs as an alternative method for addressing specific felonies, particularly those involving non-violent offenses or first-time offenders. These programs emphasize rehabilitation, dialogue between victims and offenders, and reintegration into the community, ultimately leading to more balanced outcomes.

5.4.5 Sentencing Framework

Develop comprehensive sentencing guidelines that furnish judges and certified dispute settlers with a structured framework for ascertaining appropriate penalties for felonies. These guidelines should factor in the seriousness of the offense and the individual circumstances of the perpetrator, including previous criminal history, age, and potential for rehabilitation.

5.4.6 Public Awareness Initiatives

Initiate public awareness campaigns to inform the general populace about the importance of proportionality in sentencing in cases that result to TDRMs for settlement. A well-informed public can advocate for equitable and fair penalties and hold policymakers accountable for necessary legal adjustments.

5.5 Recommendations for further study

5.5.1 TDRMs and gender equality

There is need for research to examine the role of TDRMs in addressing gender-related disputes. Analyse whether these mechanisms uphold or hinder gender equality and women's rights, considering cultural nuances.

5.5.2 TDRMS and human rights

Need arises for further research on how TDRMs contribute to or challenge the protection of human rights on the continent.

5.5.3 TDRMs and community conflict

There is need for further research and exploration into the role of TDRMs in preventing conflicts within communities. How these mechanisms contribute to sustainable peacebuilding and reconciliation.

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