The Place of Customary Law in the Hierarchy of Legal Norms in Kenya

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Strathmore University Law School by:

Nyaga Dominic Mutugi

102161

Prepared under the supervision of:

Dr. Antoinette K. Kankindi

At the Faculty of Law, Strathmore University, Nairobi

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Declaration

I, NYAGA DOMINIC MUTUGI, 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.

Signed: D.M

Date: 8/1/2020

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

Signed: Progress Report Signed

Dr. Antoinette K. Kankindi

Strathmore Law School

Date: 8/1/2020

Abstract

The 2010 Kenyan Constitution, unlike the independence Constitution, endorses the significance of customary law and provides for its application within the legal system. The operative integration of customary law is provided for by Article 2(4) and given further credence by Article 159(2)(c). These constitutional provisions entrust the courts with a specific mission to apply and interpret customary law to promote access to justice. However, the jurisprudence emanating from the courts confirms that Kenyan judges give precedence to state law over customary law. Consequently, the state of customary law remains as it was in the colonial and post-independence era. The failure to fulfil the constitutional duty to promote customary law puts in jeopardy access to justice in contexts where customary law would be the most effective norm to apply. Such failure to uphold customary law, as illustrated by evidence from the courts, poses the question of its place within the Kenyan legal system. Through qualitative analysis of case law and secondary sources, this research will investigate the proper place of customary law and the implementation of the mandate that the Constitution placed on the courts to reinforce its place, its application and interpretation. This inquiry finds that customary law, within the country's legal system, still occupies a marginal position in the order of valid legal norms, thus a barrier to access to justice. Suggestions for improvement include the need to create and encourage customary law courts and the re-evaluation of the nature of legal training in Kenya.

Key Words: Customary Law, Jurisprudence, Access to Justice

List of Abbreviations

CoK- Constitution of Kenya, 2010

DPP- Director of Public Prosecutions

C. J- Chief Justice

J- Justice

TDRMs- Traditional Dispute Resolution Mechanisms

List of Cases

CBG v JLW (2017).

Martha Wanjiru Kimata & Another v Wanjiru & Another (2015).

John Omondi Oleng & Another v Radal Oleng (2012).

R v. Mohamed Abdow Mohamed (2013).

R v Lenaas Lenchura (2011).

Nyariba Nyankomba v Munge (2010).

Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga (1987).

Re Ogola Estates (1978).

Re Ruenji (1977).

Kamanza s/o Chiwaya v. Manza w/o Tsuma (1970).

Nyali Limited v. Attorney-General (1955).

Lolkilite ole Ndinoni v. Netwala ole Nebele (1952).

Gwao bin Kilimo v Kisunda bin Ifuti (1938).

R v Amkeyo (1917).

List of Legal Instruments

Constitution of Kenya (2010).

Judicature Act (Act No. 10A of 2012).

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

Chapter One: Introduction

1.1 Background of the Problem

Before the onset of colonial rule in Kenya, access to justice was achieved through customary law in its broad sense, not only within families but within clans and, as far as possible, between clans. Internally within the community there was greater reliance on uncodified law and traditional precedent.[1] The advent of colonial rule was marked by the doctrinal alteration of rules and principles of African communities in order to blend it with English inspired state laws. Throughout this period, customary law was expressly subjugated to English principles of common law which to a great extent informed colonial enactments.[2] In the jurisprudence emanating from English courts established in Kenya, customary law was disregarded even in contexts where it would be the most effective norm to apply.[3] While the 1967 Judicature Act recognised both customary law and English legal norms as valid, it still placed customary law at the lowest echelon.[4] This ensured that common law was given more emphasis at the expense of indigenous body of law.

Today, the body of what is considered to be customary law in Kenya and in other former British colonies, falls within the historical continuation of the Eurocentric colonial project, in which laws informed by the colonial system are deemed superior to the customary ones expected to be subordinated to common law. Although the current Constitution of Kenya operatively integrates the significance of customary law within its framework, and tasks the courts with a specific mission to apply and interpret it in order to promote access to justice, they seem not to achieve that mandate. The attitude of Kenya's courts towards customary law is largely informed by the judicial attitude of the British judges who, in the administration of English law regarded customary law as applicable, but inferior.[5]

It is for this reason that the question on the extent to which state courts can develop customary law jurisprudence has been subjected to intense scholarly debate. Some scholars like Ojwang argue that the nature of legal training of most judges and magistrates makes it unlikely that they will

[1] Mazrui A, *The Africans: A Triple Heritage*, Little Brown and Co., New York, 1986, 69.
[2] Okoth-Ogendo HWO, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' 1 *University of Nairobi Law Journal*, 2003, 111.
[3] Okoth-Ogendo HWO, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,' 111.
[4] Section 3, Judicature Act (Act No. 10A of 2012).
[5] Cotran E, 'The Development and Reform of the Law in Kenya' 27 *Journal of African Law* 1, 1983, 43.

have a positive attitude towards the development of customary law jurisprudence.[6] Justice Makhandia, in *Nyariba Nyankomba v Munge*,[7] conceded that judges are not experts in customary law matters and therefore, require the assistance of elders and other customary law experts in interpreting it.[8] Justice Achode in concurring with the above sentiment in *CBG v JLW* held that the determination of customary law issues is too complex and varies from one community to another to be left to affidavit evidence.[9] However, she does not provide a solution on what should be done to it to inform customary law jurisprudential decisions.

Despite the enhanced place of customary law under the 2010 Constitution, jurisprudential history of the courts' apparent failure to apply customary law would be an impediment to achieving justice. For instance, the courts in the right to burial cases of *Martha Wanjiru Kimata & Another v Wanjiru & Another*[10] and *John Omondi Oleng & Another v Radal*[11] argued that a surviving spouse was the closest in proximity to the deceased, followed by his or her children, parents and, finally, relatives. In these cases, the English doctrine of *legal proximity* was applied based on the premise that a person who can prove fundamental proximity in law to the deceased, has right of burial, ahead of any other claimant.

As illustrated by these cases, the application of English common law is contrary to the position of customary law on proximity which fundamentally differs across communities in Kenya. Proximity is determined either through ancestral lineage, family ties or marriage.[12] For example in Kikuyu and Luo communities from which the litigants in the above cases originate, the deceased is considered to be more proximal to their ancestors than to the living, a logic that explains the strictness with regard to the burial on ancestral land.

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[6] Ojwang JB, 'Constitutional development in Kenya: Institutional adaptation and social change' Acts Press, African Centre for Technology Studies, Constitutional working paper 1, 1990, 19-21. https://www.worldcat.org/title/constitutional-development-in-kenya-institutional-adaptation-and-social-change/oclc/23001053 on 10 March 2020.
[7] Nyariba Nyankomba v Munge (2010) eKLR.
[8] Nyariba Nyankomba v Munge (2010) eKLR.
[9] CBG v JLW (2017) eKLR.
[10] Martha Wanjiru Kimata & Another v Wanjiru & Another and John Omondi Oleng & Another v Radal (2015) eKLR.
[11] John Omondi Oleng & Another v Radal (2012) eKLR.
[12] Osogo J and Ahaya O, The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era, 1 *Strathmore Law Review* 1, 2015.

Understood through the prisms of judicial precedents, application of formal law where customary law would apply, does not only degenerate and subjugate the culture, identity and customs of the Kenyan people, but also amounts to injustice to the community relying on customary law.

The background described briefly that the courts are far from developing customary law jurisprudence since it appears that they are limited in implementing the Constitutional provisions on development of customary law. Moreover, this is a problem considering that in doing so the courts are not facilitating access to justice for local communities relying on customary law.

1.2 Statement of the Problem

Kenyan courts have a responsibility to develop jurisprudence congruent with their constitutional duty to apply customary law. To a certain extent, there is an impression of their preference for state law which affects Kenyan communities and persons who still rely on customary law.

This problem demands steps to be taken to establish the proper place of customary law in a bid topromote the development of customary law jurisprudence.

1.3 Justification of the Study

On one hand, there is a need for the courts to actualize the constitutional mandate to develop jurisprudence and promote the application of customary law. On the other hand, considering that a substantial part of communities and persons in Kenya still relies on traditional laws including customary law, this study will attempt to shed light on how best their fundamental rights of access to justice could be provided for.

1.4 Significance of the Study

This study has both academic and policy relevance. Academically, it seeks to contribute to an understanding of the place of customary law within the Kenyan legal system.

From the policy perspective, it seeks to contribute to the development of customary law jurisprudence by the Kenyan courts and in doing so, improve the access to justice for Kenyan communities that rely on customary law and other traditional justice systems.

1.5 Aim and objectives of the Study

The study aims at establishing the place of customary law in Kenyan courts' jurisprudence, in order to facilitate dispensation of justice to Kenyan communities that rely on it.

The objectives of the study are:

1. Investigate the constitutional mandate bestowed on the courts to apply and interpret customary law in Kenya

2. Assess the implications of the jurisprudence emanating from Kenyan courts in terms of providing access to justice for communities and persons that rely on customary law in Kenya

3. Suggest possible ways that would encourage the Kenyan courts to implement the constitutional mandate placed on the courts to reinforce the proper place of customary law in Kenya

1.6 Hypothesis

This research assumes that the Kenyan courts apply state law in preference over customary law which, consequently, falls short in developing jurisprudence coherent to the constitutional mandate to develop the law.

1.7 Research Questions

a. What is the meaning and scope of the constitutional mandate placed on the Kenyan courts with regards to customary law?
b. Considering the evidence in the jurisprudence of the courts, how have the Kenyan courts implemented the constitutional mandate concerning customary law?

1.8 Research Methodology

This study will require a qualitative research design and doctrinal methodology. Through the aid of a desktop, the doctrinal research will deal with studying existing laws, related cases and authoritative materials analytically on customary law. The doctrinal methodology will involve qualitative analysis of primary and secondary data. The primary data will include case law and statutes while secondary data includes literature.

1.9 The Scope of the Study

In attempting to make a case for the place of customary law in Kenya, this study examines the compliance with provisions of Article 159(2)(c) of the Constitution on customary law by the courts, in order to establish whether local communities are afforded their fundamental right of access to justice.

1.10 Limitations of the Study

The present research relies on high courts' jurisprudence as reported by the online portal for Kenya law reports (KLR). This source excludes Kenya's customary law jurisprudence made in the magistrates' court which do not constitute a judicial precedent. While that jurisprudence would be very helpful in establishing the proper place of customary law and the extent to which local communities could be discriminated, it remains unavailable especially in instances where those communities cannot appeal to higher courts competent in the formulation of judicial precedent.

1.11 Definition of terms

For clarity purposes, this research defines the following terms due to their in the context of this study: customary law, repugnancy clause, courts and legal proximity.

i. Customary law- Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws**.**[13]

ii. Repugnancy clause- Those parts of customary law which are held to conflict with the established bill of rights or written law thus unenforceable.[14]

iii. Courts- Judicial bodies that are constituted for the hearing and determination of cases including the High court, court of appeal and the supreme court.

iv. Legal proximity- A fundamental English doctrine that means that parties must be 'sufficiently close' so that it is reasonable to conclude that they are the closest to the deceased in customary burial matters.[15]

1.12 Literature Review

Kenyan scholars and others have studied customary law. Ambani and Ahaya define customary law as "rules of custom, morality and religion that the indigenous people of a given locality view as enforceable either by a central political system or authority, in the case of very serious forms of misconduct…"[16] The interest of this definition is that it shows that indigenous people do have a normative system that governs them. The authority from whom the customary law emanated, in

[13] Black's Law Dictionary, 8th edition, 2004.
[14] Thomas J and Tladi D, 'Legal pluralism or a new repugnancy clause' Institute of Foreign and Comparative Law, 1999, 356.
[15] Martha Wanjiru Kimata & Another v Wanjiru & Another and John Omondi Oleng & Another v Radal.
[16] Ambani J and Ahaya O, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era,' 43.

indigenous people, were also the dispensers of customary law. Such authority was vested upon the native elders who were nonspecialized, nonlegal administrative personnel, in the modern terms of justice administration, whose broad portfolio also included judicial functions.[17] According to Kamau, customary law is made up of unwritten norms and practices of small-scale communities which can be traced back from pre-colonial times. He explains that these unwritten norms were however transformed due to colonialism.[18] The transformation brought by colonialism dictated which norms would be considered in the dispensation of justice. Kariuki concurs with Kamau that customary law applies to small communities and that it cannot be limited to one custom followed by all African communities.[19] To underscore the pluralism of customary law, Olawale states that each ethnic community has its customs, which develop as a response to challenges faced by those communities.[20] Such customs are the ones referred to as customary law.[21] Furthermore, Olawale adds that it is noteworthy that within the obvious pluralism of ethnic groups, scholars have found some similarities in the conceptions of customary law in African communities.[22] The transformation brought about by colonialism on customary law, combined with the inclusion of common law under state law, created a conflict of legal systems.

Mazrui is of the view that the underlying tension of conflicting legal systems in Kenya, and the suppression of customary law, is historically anchored in the "lopsided nature of colonial acculturation" [23] which disrupted the African mode of the dispensation of justice. Mamdani gives a historical account of this to the effect that, from the beginning of a colonial rule, a clear distinction was made between the civil and criminal aspects of customary law, where the former was to be tolerated and the latter to be suppressed.[24] Additionally, in the face of customary law disintegration, the colonial legal system did not deeply resonate with the cultural fabric of African

[17] Mamdani M, *Citizen and subject: contemporary Africa and the legacy of late colonialism*, 18 ed, Princeton University Press, New Jersey, 1996, 121.
[18] Kamau W, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' 1 *East African Law Journal* 1, 141, 2015.
[19] Kariuki F, 'Customary law Jurisprudence from Kenyan Courts: Implications for traditional justice systems', 2015 https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf?sequence=1&isAllowed=y on 30 July 2020.
[20] Olawale E, *The Nature of African Customary Law*, Manchester University Press, Manchester, 1972, 5.
[21] Lisa O, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts' 1 *Strathmore Law Review* 1, 2016, 143.
[22] Olawale E, *The Nature of African Customary Law*, 4.
[23] Mazrui, *The Africans: A Triple Heritage*, 206.
[24] Mamdani, *Citizen and subject: contemporary Africa and the legacy of late colonialism*, 116.

societies. For instance retribution and compensation, as a customary law principle, became almost irrelevant in criminal justice under Western law.[25]

Nigerian authors such as Idowu and Oke concur with Mazrui by arguing that today, most customary laws in Africa have either been replaced or, where they are still found, are completely obsolete.[26] They further note that justice systems built from traditional lifestyle and cultural practices are currently moribund, and consequently, the modern courts' system patterned from the legacy of colonialism is the mechanism for dispensing justice.[27] Therefore, the modern courts' system leads the indigenous communities to face challenges in accessing justice since they still rely on customary law at the local level.

While Kenyan law does not expressly define customary law, it is implicitly recognised in the Constitution under Article 159(2) (c). This constitutional provision intends to motivate the Kenyan courts to move beyond the vestige of colonial laws, that seems to displace the customary law jurisprudential progress in the country.[28] According to Kariuki, Kenyan courts should develop jurisprudence coherent with this constitutional mandate.[29] He rightly notes that jurisprudence from courts, before 2010, shows that customary law was subjugated to statutory laws in the juridical order of legal norms.[30] It seems that there have not been consistent strides in the development of jurisprudence that upholds and promotes customary law post-2010 constitutional dispensation. This would be an obstacle to justice for individuals and communities in Kenya.

Access to justice is the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.[31] According to Bedner and

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[25] Mazrui, *The Africans: A Triple Heritage*, 206.
[26] Idowu W and Oke M, 'Theories of Law and Morality: Perspectives from Contemporary African Jurisprudence' 3 *In-Spire Journal of Law* 2, 2008, 7.
[27] Idowu W and Oke M, 'Theories of Law and Morality: Perspectives from Contemporary African Jurisprudence,' 7.
[28] The constitutional intentional of promotion of customary law can be derived from the realization of customary law in Articles 2(4) and 259 (2) (c) where in exercising judicial authority, courts shall be guided by traditional dispute resolution mechanisms and Article 259 (1) (c) which is to the effect that the Constitution must be interpreted in a manner that permits the development of law.
[29] Kariuki F, 'Customary law Jurisprudence from Kenyan Courts: Implications for traditional justice systems', 2015 https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf?sequence=1&isAllowed=y on 30 July 2020.
[30]Kariuki F, 'Customary law Jurisprudence from Kenyan Courts: Implications for traditional justice systems', 2015 https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf?sequence=1&isAllowed=y on 30 July 2020.
[31] https://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/democratic_governance/RBAP-DG-2005-Programming-for-Justice.pdf on 30 July 2020.

Vel, judicial institutions must not only be accessible to people in a formal sense but also available to adjudicate over their disputes and be effective in providing redress to injustices based on rules or principles of *inter alia* customary law.[32] In the Kenyan legal discourse, it seems that there is an apparent failure by the courts to apply customary law which is an impediment to achieving justice. The application of formal law where customary law would apply, for instance, does not only degenerate and subjugate the culture, identity and customs of local communities, but also amounts to injustice.

Notably, many scholars have written on customary law. The above section illustrates what scholars and reports have said on customary law, access to justice as well as status of courts in developing customary law jurisprudence. What is clear from the literature is that there is no specific analysis of the place of customary law from a point of view of the Court's jurisprudence while at the same time taking into account the current legal framework in Kenya, as well as considering the challenges and opportunities faced.

For instance, Kariuki posits that courts ought to develop jurisprudence coherent with this constitutional mandate to apply customary law and Traditional Dispute Resolution Mechanisms,[33] but does not consider that additionally, the existing legal framework limits the extent to which customary law can be applied.

He rightly notes that jurisprudence from courts, before 2010, shows that customary law was subjugated to statutory laws in the juridical order of legal norms. However, we fail to see the nexus of the legal framework and the jurisprudence emanating from these Kenyan Courts. Based on the above, this study sought to assess how the Kenyan courts have implemented their mandate to develop customary law jurisprudence, in light of the current legal framework.

[32] Bedner A and Vel J.A.C., 'An Analytical Framework for Empirical Research on Access to Justice' 15 *Law, Social Justice and Global Development Journal* 1, 2010, 7.
[33] Kariuki F, 'Customary law Jurisprudence from Kenyan Courts: Implications for traditional justice systems', 2015 https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20Law.pdf?sequence=1&isAllowed=y on 30 July 2020.

1.13 Estimated duration

In accordance with the Strathmore Law School's dissertation guidelines, this study will be submitted to the Dissertation Board at the end of November. Having been assigned a dissertation supervisor towards the end of May, this study will take approximately six months.

1.14 Chapter Breakdown

This study will be completed in five chapters. **Chapter one** covers the introduction.

The chapter contains the introduction and background of the study; the statement of the problem; the research objectives; the hypothesis; the justification of the study; the literature review; the theoretical framework and the research methodology.

Chapter two will present the theoretical framework used to analyse customary law within the Kenyan legal system.

Chapter three seeks to analyze the legal framework organizing the determination of customary law matters. The chapter contains the legal framework recognizing customary law in Kenya which shall include an analysis of the Constitution of Kenya (2010) and Acts of Parliament.

Chapter four endeavours to analyse the available customary law jurisprudence from the KenyanCourts and its impact on the right to access justice, especially for communities and persons that still rely on customary practices. The chapter contains a discussion of the nature of customary law cases, in particular their determination by Kenyan courts in dispute resolution.

Chapter five presents this inquiry's findings, makes recommendations and provides a conclusionon the place of customary law in Kenya from a jurisprudence point of view. The chapter will demonstrate how the research objectives have been met and whether the study hypothesis has been proved or disproved.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

Two theories have been selected to analyse the objectives of this research and seek to answer the corresponding questions. The first is the theory of legal pluralism and the second one is the contextualism theory. Legal pluralism refers to the possibility of two or more distinct normative systems co-existing within the same legal system.[34] Contextualism is a theory technically used in constitutional interpretation: it takes into consideration as many factors as possible when resolving disputes.[35] This research recurs to legal pluralism to show the interaction between customary law and other normative systems within the Kenyan context. Contextualism provides the lenses through which the context of customary practices could inform customary law jurisprudence.

2.2 The Theory of Legal Pluralism

Kenya is a typical example of a country which, from its colonial history, has adopted the British common law system while it is characterised by ethnic diversity, hence the pluralism of its legal and judicial system.[36] Kamau argues that as a consequence of the introduction of common law during the colonial era, the Kenyan legal system is pluralistic where customary law operates alongside state law.[37] Legal pluralism assumes a diversity of normative traditions co-existing within the same community.[38]

The interpretation of the current legal system in Kenya can be examined in the light of legal pluralism to demonstrate instances of the interaction of customary law and other normative systems such as national and international laws. Legal pluralism applies in contexts where there exists more than one legal order in a social field.[39] Where legal pluralism exists, there is a variety of options for courts to choose from when resolving disputes.[40]

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[34] Griffiths J, 'What is Legal Pluralism?' 18 *The Journal of Legal Pluralism and Unofficial Law* 24, 1986, 1-55.
[35] Khatiwada A, 'Interpreting the Constitution: The Formalism and Contextualism Debate' 2 *National Judicial Academy Law Journal* 1, 2008, 40.
[36] House-Midamba B, 'Legal Pluralism And Attendant Internal Conflicts In Marital And Inheritance Laws In Kenya' 49 *Istituto Italiano per l'Africa e l'Oriente 3*, 1994, 375.
[37] Kamau W, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' 1 *East African Law Journal* 1, 141, 2015.
[38] Griffiths J, 'What is Legal Pluralism?,' 1-55.
[39] Griffiths J, 'What is Legal Pluralism?,' 1.
[40] Benda-Beckmann B and Turner B, 'Legal pluralism, social theory, and the state' 50 *The Journal of Legal Pluralism and Unofficial Law* 3, 2019, 261.

The Kenyan legal system is pluralistic because it has adopted a hybrid system in which both customary law and state law are subject to interpretation by state courts. The interaction of customary law and state law plays an influential role in the adjudication of customary matters by the courts. [41] However, it seems that upholding and promoting customary law is hindered by factors such as the colonial legacy of common law-based adjudication, disregard for customary law with a preference of state law, and judges seeming unwillingness to apply customary law where it would be naturally and technically required. Legal pluralism presents a challenge because state law in Kenya is dominant over other forms of legality.

From the cases referred to in the background, this explains the divergent and conflicting approaches taken by the courts, over the years, in applying and interpreting customary law. As demonstrated in the background, the jurisprudence from the courts shows that state law is given precedence over customary law and, thereby, failing to do justice to Kenya's pluralistic legal system. Therefore, such a trend poses a serious risk on the right to justice of local communities which rely on customary law for order and settlement of disputes.

2.3 Contextualism

Contextualism is a theory of constitutional interpretation in which there is a blend of factual and normative considerations taken into account while interpreting the Constitution.[42] Contextualism refers to the process of interpreting the law in relation to other influential factors that come into play when resolving disputes.[43] This theory involves understanding the practical efficacy of constitutional provisions in the present context which is Kenya in this study.

Contextualism includes factors such as the context of a dispute to be presided over, constitutional values, access to justice and rights accorded to persons who subscribe to a certain normative system.[44] In this sense, the theory is envisaged in the constitutional provisions that require the courts to apply and interpret customary law in a way that promotes the right to access to justice in the context ethnic diversity in the country.

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[41] Diala A, 'The concept of living customary law: a critique' 49 *The Journal of Legal Pluralism and Unofficial Law* 2, 2017, 159.
[42] Khatiwada A, 'Interpreting the Constitution: The Formalism and Contextualism Debate' 2 *National Judicial Academy Law Journal* 1, 2008, 40.
[43] Villa V, Theory of Legal Interpretation and Contextualism: Replies to Kristan, Poggi and Vignolo, *Journal for Constitutional theory and philosophy of law*, 2012, 151-178.
[44] Khatiwada A, 'Interpreting the Constitution,' 40.

Contextualism implies that courts must put into consideration broader social norms that guide the resolution of disputes in Kenyan communities.[45] In conclusion, this theory appears to explain why the Constitution of Kenya would mandate the courts to interpret and uphold customary law.

2.4 Conclusion

The above description of legal pluralism and contextualism theories attempted to demonstrate why they have been selected to support the application of customary law, in a bid to improve access to justice.

The investigation of the place of customary law in Kenya recurs to these theories to first analyse the legal framework integrating customary law in the Kenyan legal system.

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[45] R. v. Big M Drug Mart, (1985), The Supreme Court of Canada.

CHAPTER THREE: ANALYSING THE LEGAL FRAMEWORK RECOGNISING THE DETERMINATION OF CUSTOMARY LAW MATTERS IN KENYA

3.1 Introduction

The attempt by colonial powers to create a unified legal system in Kenya encountered considerable challenges, owing to the presence of different normative systems, with conflicting views about a desirable legal system.[46] The creation of a unified legal system applied specifically because customary law is ideally an unwritten discipline.[47]

The current customary law framework in Kenya reflects the formalisation of rules of custom, morality, and practices of communities, in order to establish a formal legal system similar to the written British laws. For instance, the 2012 Judicature Act[48] only recognizes written laws when establishing the laws that the courts shall conform with in determination of their jurisdiction. Ambani argues that this is because African customs were and still are hardly written and only recognised formal legislative laws were considered in the adjudication of disputes.[49] According to Kariuki, the existence of grounds of subjection to other written laws provided fertile grounds for rejection of customary law.[50] Consequently, there arose a need to incorporate the customs and practices of Kenyan communities into written law. The incorporation of such practices resulted in the current legal framework organizing customary law in Kenya.

Customary law is provided in several statutes in Kenya. Since this chapter is interested in the powers and jurisdiction of judges in applying customary law, it will analyse three instruments within the Kenyan legal system: the Constitution, the 2012 Judicature Act, and the 2015 Magistrates Courts' Act. A brief analysis of each of these instruments is required to first

[46] Ghai Y.P and McAuslan J, *Public law and political change in Kenya*, Oxford University Press, London, 1970, 125.
[47] Ocran M, *The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa*, Akron Law Review, 2006, 467-468.
[48] Section 3(1) and (2), Judicature Act (Act No. 10A of 2012).
[49] Ambani J and Ahaya O, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era,' 49.
[50] Kariuki F, Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems, 9.

demonstrate the determination of customary law matters as contemplated in the current legal framework, and secondly to identify the basis for the development of customary law jurisprudence.

3.2 Customary Law and the 2010 Constitution

The Constitution is the most important legal instrument in Kenya's legal system due to its supremacy status. The Constitution, being the supreme law that guides and binds the Republic of Kenya, its people and institutions, provides that "any law, *including customary law*, that is inconsistent with it is void to the extent of the inconsistency".[51] It should be interpreted in a way that promotes its purposes, values and principles and provides for the development of law.[52] Its interpretation includes the development of customary law jurisprudence. It is understood that the inclusion of customary law is to the effect that, in its application defined as including morality, religions, customs, and community practices, the courts shall apply customary law only if it is coherent with the Constitution. It then follows that the standard for determining the relevance and application of customary law in Kenya must be measured in reference to Article 2 of the Constitution, which establishes it as the supreme law.

Additionally, the Constitution establishes culture as a breeding ground for customary law,[53] thereby recognizing it as the nation's foundation and the cumulative civilisation of the Kenyan people.[54] Customary law is given further credence by constitutional recognition of TDRMs,[55] anchored in the customs of communities.[56] In fact, TDRMs place an obligation on the courts to promote alternative forms of dispute resolution.[57] It is assumed that they can be found in the customs and the culture of the people.

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[51] Article 2(1), Constitution of Kenya (2010).
[52] Article 259 (1), Constitution of Kenya (2010).
[53] Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?,' 47.
[54] Article 11(1), Constitution of Kenya (2010).
[55] Article 159(3), Constitution of Kenya (2010).
[56] Muigua K, 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' 2014, 6 http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf on 10 January 2020.
[57] This student has argued before that although difficulties still arise in subjecting TDRMs to the Constitutional standards set out in Article 159(3), courts are obliged to apply them in a bid to promote access to justice. Nyaga D, 'Promoting the Practice of Traditional Dispute Resolution Mechanisms in Kenya' Strathmore Dispute Resolution Centre, 14 January 2020

Article 159 (2)(c) provides that in exercising judicial authority, the courts shall be guided by alternative forms of resolving disputes. This position establishes that customary matters do not only have to be presided over in a courtroom, so long as the law used does not contravene the Constitution. The provisions regarding the supremacy of the Constitution over customary law, culture and application of TDRMs, appear to be a deliberate adoption of customary law, in a meaningful development compared to the pre-2010 Constitution. Indeed, the 1963 Constitution seemed to give less consideration to customary law such as in the case of TDRMs.[58]

Historically, colonial legislation considered traditional practices as applicable subjecting them to a repugnancy clause.[59] This clause indicates that the court has the discretion to determine whether a certain custom or practice is repugnant to justice and morality, or the established bill of rights or written law.[60] Those parts of customary law which were held to conflict with the principles of justice, fairness or equity were unenforceable.[61] The use of a repugnancy clause was applied solely or consistently to the customary law of colonised people,[62] thus setting the limits to the application of customary law. Kenya's 2010 Constitution carries a similar provision that limits the use of TDRMs, where they lead to outcomes that are repugnant to justice and morality.[63] It further extends the repugnancy to all customary principles and rules that contravene justice and morality, thereby limiting the application of customary law.[64]

Besides the constitutional provisions regarding customary law that are discussed above, judges, in the resolution of disputes and maintenance of order, are guided by the existing legislation organizing customary law. The 2012 Judicature Act is the first legislation that predates the Constitution and still guides the judges in promoting access to justice in Kenya.

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https://sdrcentre.wordpress.com/2020/01/14/promoting-the-practice-of-traditional-dispute-resolution-mechanisms-in-kenya/ on 14 January 2020.

[58] Section 77, Constitution of Kenya (1963).

[59] 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, 24.

[60] Lisa O, 'Application of African Customary Law: Tracing its Degradation and Analysing the Challenges it Confronts,' 57.

[61] Thomas J and Tladi D, 'Legal pluralism or a new repugnancy clause' *Institute of Foreign and Comparative Law*, 1999, 356.

[62] Demian M, 'On the Repugnance of Customary Law' 56 *Comparative Studies in Society and History* 2, 2014, 510.

[63] Article 159(3), Constitution of Kenya (2010).

[64] Kinama E, Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 27.

3.3 The Application of Customary Law according to the 2012 Judicature Act

When the colonial powers conquered Kenya, they introduced the common law.[65] This law sought to incorporate English practices into the Kenyan legal system through local ordinances, some of which were mere copies of English Acts and others which applied the English law by reference.[66] This process meant that where Kenyan law did not expressly apply, the judges would directly use British laws as reference. By setting up of English-type courts to administer justice, the local communities were subjected to them in order to achieve justice. This adjudication of customary matters by English- type courts led to undermining local cultures and destabilizing society as well as establishing the western dominance of laws.[67] To administer the English laws in Kenya, the Judicature Act was put in place in 1967.[68] It was promulgated to establish the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the judges and officers of courts.[69] It echoes the common law by giving the mandate to the courts to apply customary law as long as it is not repugnant to justice, morality or contrary to written laws. This rule provides that a tradition would be considered by a judicial officer or judge only if it meets the requirements of equity, a good conscience, and common sense.[70]

The Judicature Act does not oblige the courts to apply customary law but provides that courts shall be guided by customary law in civil cases, where one or more parties are affected by it.[71] The Supreme Court and subordinate courts also had the power to administer native law though they were not bound to apply it but only to be guided by it. The Judicature Act considers customary law as native law.

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[65] Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era', 1(1) Strathmore Law Journal, 2015, 49-50.
[66] Cotran E, The Development and Reform of the Law in Kenya, 42.
[67] Mamdani M, *Citizen and subject: contemporary Africa and the legacy of late colonialism*, 199.
[68] Judicature Act (Act No. 10A of 2012).
[69] Preamble, Judicature Act (Act No. 10A of 2012).
[70] Brobbey A, Explaining legal pluralism in African countries: Ghana as a case study, http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_pt_br/anexo/Explaining_legal_pluralism_in_African_Countries_Ghana_as_a_case_study.pdf on 7 May 2014.
[71] Section 3(2), Judicature Act (Act No. 10A of 2012).

Section 3(2) states that courts shall be guided by 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.[72] By this, the Act enjoins the courts to be guided by customary law subject to the question of repugnancy, but notably, it shows that a written law is to be preferred to customary law, even where the parties or one of them is subject to it.[73] Through this law, it is clear that not only did the colonial judiciary look at customary law as an inferior system but also, in doing so, made it difficult to adapt the English law to suit local conditions and the circumstances of the local inhabitants.[74] This apparent failure is also reflected in the Magistrates Courts' Act.

3.4 The Mandate of the Courts on Customary Law according to the 2015 Magistrates Courts Act

In 1967, a decision was made to remove the role of administrators from the judicial system. This was done via the Magistrates Courts' Act establishing the system still operating today. The Act provided for the application of customary law by District Magistrates with jurisdiction and power of a civil nature. Section 10 of the 1967 Magistrates Courts' Act established that a District Magistrate's Court shall have and exercise jurisdiction and powers of a civil nature where the proceedings concern a "claim under customary law".[75]

"Claim under customary law means a claim concerning any of the following matters under African customary law-

(a) land held under customary tenure;

(b) marriage, divorce, maintenance or dowry;

(c) seduction or pregnancy of an unmarried woman or girl;

(d) enticement of or adultery with a married woman;

(e) matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy;

[72] Section 3(2), Judicature Act (Act No. 10A of 2012).
[73] Section 3 (2), Judicature Act (Act No. 10A of 2012).
[74] Cotran E, The Development and Reform of the Law in Kenya, 44.
[75] Section 2, Magistrates Courts Act.

(f) succession, both testate and intestate, and administration of estates, except as regards property disposed of by a will made under a written law."[76]

In 2015, the 1967 Magistrates Courts' Act was revised in, among other provisions, its preamble to give effect to articles 23 (2), 169 (1) (a) and (2) of the Constitution.[77] These provisions confer jurisdiction, functions and powers upon the magistrates' courts and the procedures before the same.[78] Section 16 is to the effect that a magistrate's court may call for and hear evidence of the customary law applicable to any case before it.[79]

3.5 Conclusion

After examining the status of customary law in the Constitutional provisions, the 1967 Judicature Act and the 2015 Magistrates Courts Act, this chapter concludes that the application of customary law in Kenya is adequately provided for by the existing legal framework. These legal instruments provide for the jurisdiction and powers of the judges in the application of customary law. However, it seems that customary law within the country's legal system still occupies a marginal position in the order of valid legal norms as seen in the 1967 Judicature Act.

Even if it has not defined customary law, the legal framework mandates judges to apply it in the determination of disputes concerning local communities. There is need to find evidence from the courts as to whether disputes are actually determined by applying customary law, under which circumstances, and by which courts among other factors. Therefore, the next chapter will examine the jurisprudence from the courts in order to establish whether judges interpret and apply the legal framework analysed under the present chapter.

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[76] Sections 2 and 7(3), Magistrates Courts Act, (No. 26 of 2015).
[77] Articles 23(2) and 169(1)(a) and (2), Constitution of Kenya (2010).
[78] Preamble, Magistrates Courts Act, (No. 26 of 2015).
[79] Section 16, Magistrates Courts Act, (No. 26 of 2015).

CHAPTER FOUR: EXAMINING CUSTOMARY LAW JURISPRUDENCE FROM THE KENYAN COURTS

4.1 Introduction

As established from analysing the legal framework organizing the determination of customary law matters, the question of the place of customary law vis-a-vis other legal norms in Kenya has been and remains to the present a largely contentious one, since the introduction of the common law. Lord Denning, in the matter of *Nyali Limited v. Attorney-General*, stated that the application of common law in foreign lands is valid upon making changes that fit local circumstances, because people are organized by specific laws and customs promulgated by them.[80] Unfortunately, as Kamau notes, common law in Kenya was not modified to take into consideration the customs, morality and religions of the indigenous people.[81] In 1938, while presiding over the matter of *Gwao bin Kilimo v Kisunda bin Ifuti*, a British judge in an East African colonial court, ruled that the only standard of justice and morality, which a British court in Africa can apply, is its British standard.[82] Subjecting the determination of customary law matters to the British standard of justice illustrates how the application of common law by the courts, ignoring indigenous customs, could, to some extent, put at risk the local communities' access justice.

In a common law system, the role of a court is primarily to develop and generate sound customary jurisprudence that aids in the growth and promotion of customary law.[83] This present chapter aims at examining, through the prism of high courts' precedents, the established customary law jurisprudence in Kenya. The chapter seeks to understand whether the jurisprudence has contributed to enhanced access to justice. The treatment of customary law, as will be seen in judicial decisions in the era of independence Constitution and post-2010 Constitutional dispensation in Kenya, will

[80] Nyali Ltd. v. AG {1955] ALL ER 646.
[81] Kamau W, 'Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya' 1 *East African Law Journal* 1, 141, 2015.
[82] Gwao bin Kilimo v Kisunda bin Ifuti (1938) 1 TLR (R) 403.
[83] Article 159(2)(c), Constitution of Kenya (2010).

aid in the investigation of the status of customary law. In this chapter, legal pluralism and contextualism are illustrated through the application of common and customary law in consideration of different communities under customary practices in their specific contexts.

4.2 Customary Law Jurisprudence before the 2010 Constitution

During the colonial period, the formal colonial courts only applied customary law as a guide in cases where their usage was expressly provided for by written laws.[84] In the case of *Kamanza s/o Chiwaya v. Manza w/o Tsuma*,[85] the court was faced with the question on whether written law has the effect of abolishing the customary law governing tort and contract where the persons concerned are bound by it, as they are likely to be in small-scale, close-knit local communities. Through application of the Magistrates' Courts Act, the High Court held that the list of claims under section 2 were exhaustive and barred any customary law claims related to tort or contract. Such claims were not included in section 2 of the Magistrates' Courts Act. Most claims in which customary laws were used as a guide related to probate and administration matters.[86] For example, both in *Re Ruenji*[87] and *Re Ogola Estates*[88] testators drafted wills that did not cater to their customary wives in terms of property. The respective courts held that these wives were not wives for purposes of succession. The wives were therefore denied their right to access property.

In the matter of *R v Amkeyo*, the husband had a second wife and, the question that arose during the proceedings was if the first woman married under customary law could testify against her husband. The first wife of the defendant was called to testify against her husband. In common law, a husband and wife are considered as one person, and neither can be compelled to adduce evidence against the other. However, Hamilton C. J.,[89] noted that a wife married under customary law does not qualify as a legal wife or spouse. Consequently, the court obliged her to give evidence against her husband. The court interpreted a traditional African marriage pegged on payment of dowry as

[84] Magistrates Courts Act (Act No. 26 of 2015).
[85] Unreported High Court Civil Appeal No. 6 of 1970.
[86] This is in accordance with Section 3(2) of the Judicature Act and Section 2 of the Magistrates Courts Act.
[87] Re Ruenji (1977) eKLR.
[88] Re Ogola Estates (1978) eKLR.
[89] R v Amkeyo, (1917) 7 E.A.L.R. (Kenya).

simply wife purchase in the context of civilised peoples. The decision failed to provide a sound basis as to why a common-law wife was regarded as a legal wife, while a customary law wife could not get a similar status. Hamilton C. J stated that the use of the word 'marriage' to describe such a relationship entered by an African native with a woman of his tribe, according to tribal custom, is a misnomer and does not suffice. [90]

In the case of *Lolkilite ole Ndinoni v. Netwala ole Nebele*,[91] the East African Court of Appeal dealt with matters relating to the Maasai customary practice of blood money, and the application of the Limitation Ordinance of 1934 by the Native Tribunals. The appellant's father, who was deceased at the time of the case, had allegedly committed homicide and the matter was taken to the Native Tribunal. However, this claim for blood money was made at the native tribunal thirty-five years after the alleged homicide. The Tribunal dismissed the suit but the claim was awarded by the Supreme Court. Upon appeal, the East African Court of Appeal dismissed the claim on the ground that it was repugnant to justice and morality, to bring a matter for hearing after thirty-five years. This court considered claims for blood money valid but rejected bringing the matter after such a long period. Despite the ruling that indirectly supported the claim for blood money, Sir Edward C.J. held that the Native Tribunals were not courts in the proper sense and, therefore the Limitation Ordinance of 1934 did not apply to them.[92] The finding that the Native Tribunals were not proper courts illustrates the judges' dismissal of customary dispute resolution methods, in their interpretation of common law, which denies litigants access to justice.

It appears that the courts were selective in determining which customary law matters they would dictate upon. This happened because the common law, in itself, did not provide for the adjudication of customary matters, for instance, the burial disputes. For this reason, it was customary law that had to be applied to solve such disputes and maintain order, but the courts referred to it only as a last resort. In the case of *Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga,*[93] a precedent was set to uphold customary law. The dispute concerned the burial of S.M. Otieno's body after he died intestate. His wife wished him to be buried in his home at Ngong in Nairobi, while his Umira Kager clansmen wished that be buried at his ancestral home in Luo land, following

[90] R v Amkeyo, (1917) 7 E.A.L.R. (Kenya).
[91] Lolkilite ole Ndinoni v. Netwala ole Nebele (1952) 19 EACA.
[92] Lolkilite ole Ndinoni v. Netwala ole Nebele (1952) 19 EACA.
[93] Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga (1987) eKLR.

the Luo customs. The High Court directed that both parties bury the deceased in his ancestral home. Upon appeal, the court held that an African man could only be buried according to the customs of his community, since he is not disassociated from the customs and practices of his tribe.[94]

It has been argued by some commentators,[95] and this research position agrees with them, that although the S.M Otieno case is considered a triumph for customary law, the decision did not settle the legal question regarding the juridical status of customary law vis-à-vis other legal norms in the hierarchy of norms. However, this decision did confirm that customary law could still have a place in Kenya's legal system.

4.3 Customary Law Jurisprudence Post-2010 Constitution

Court decisions coming after the promulgation of the 2010 Constitution still follow the precedents created before its advent. The High Court has gone to an extent of admitting that judges are not experts in customary law and therefore, need the assistance of elders and other customary law experts in interpreting it.[96] However, besides appreciating the complexity of customary law matters,[97] they do not provide a solution on what should be done to it in order to develop customary law jurisprudence and enhance access to justice.

Notably, though, it seems that some courts are more willing to apply customary law principles and TDRMs as per Article 159 (2) (c) of the Constitution, which states that courts are to be guided by the principles of TDRMs. The case of *R v. Mohamed Abdow*[98] applied TDRMs in resolving a murder case. Initially, Abdow Mohamed was charged together with others before a council of elders, for the murder of Osman Ali Abdi on 19 October 2011in Eastleigh, within the Starehe District of Nairobi. An appeal was made before the High Court by the accused to challenge the council's decision. On the date of the trial, the prosecution made an application to the court to mark the matter settled based on Islamic laws and customs. The prosecution claimed that the accused's family had paid compensation to the deceased family in form of camels, goats, and performed rituals. The rituals were a form of blood money to the deceased's family. Further, the

[94] Virginia Edith Wambui v. Joash Ochieng Ougo and Omolo Siranga (1987) eKLR.
[95] Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era', 1(1) Strathmore Law Journal, 2015.
[96] Nyariba Nyankomba v Munge (2010) eKLR.
[97] CBG v JLW (2017) eKLR.
[98] R v. Mohamed Abdow (2013) eKLR.

prosecution claimed that witnesses to the murder were not willing to testify, and therefore, they could not be able to proceed with the case. The court upheld the application of the traditional dispute resolution system based on Article 159 and Article 157 of the Constitution that allowed the DPP to withdraw cases with the leave of the court. This decision depicts the widening scope of TDRMs towards promoting access to justice, a position rarely held by courts in pre-2010 jurisprudence on customary law.

In the case of *R v. Lenaas Lenchura*,[99] the court sentenced the defendant using customary laws on conviction of manslaughter. The defendant stabbed the deceased after a dispute arose between the two on who would fetch water first. Following a plea bargain, the accused pleaded guilty and consequently the court reduced the charge to manslaughter. As such, the only question that remained was on sentencing. The prosecution argued that, in addition to the accused pleading guilty, more circumstances should be taken into consideration: mainly the fact that the accused was a first offender, and that water being very rare in Turkana, was depended upon for the people and livestock life. Emukule J resorted to the customary laws of the accused. He sentenced the accused to five years suspended sentence, and required him to compensate the deceased's family with one female camel according to their customs. The case played a significant role in ensuring that justice was served for the family of the deceased and the accused was convicted under customary law.

4.4 Conclusion

From a point of view of jurisprudence emanating from courts, it seems that since independence, customary law was considerably overlooked by the courts even in cases where it was most applicable. Up to date, customary law has to be evidentially proved in court for it to be regarded as law in Kenya.[100] Similarly, where customary law is not notorious or written, the party relying on it must prove it in court.[101] This means that compared to the Constitution and statutes, which the courts take judicial notice of, customary law has to fulfil a high standard before it is applied in court. The situation as it stands seems to illustrate the negligible place it still occupies in the juridical order. Consequently, customary law is left with a very limited application within the legal system. It looks like some courts are fulfilling their constitutional mandate but there is no clarity

[99] R v. Lenaas Lenchura (2011) eKLR.
[100] Angu v. Attah in Atemo v. Imujaro.
[101] Ernest Kinyajui Kimani v. Muiru Gikanga and Another.

in the courts for the determination of customary law disputes. The jurisprudential status as described in the examined cases here, if unchecked, would remain an impediment to the application and development of customary law jurisprudence.

It is notable that since the advent of the 2010 Constitution, some judges have applied customary law in enhancing access to justice. The application of TDRMs for instance, is pegged on the significant role and recognition of customary law as an important source of law. Progressive application of customary law by Kenyan courts will enhance the implementation of the constitutional mandate to uphold and promote customary law. While Chapter three contributed to examining the place of customary law from point of view of legislation in Kenya, the present chapter did the same from the point of view of courts' jurisprudence. In the basis of such analysis, chapter five presents the findings, the conclusion and recommendations of this study.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter serves as the conclusion of the whole dissertation. It has four objectives. First, it starts by restating the initial problem that this dissertation intended to solve. Secondly, it considers how the theoretical framework was used to analyse the legal framework and customary law jurisprudence emanating from Kenyan courts. Thirdly, the chapter covers a summary of findings showing whether the research' hypothesis has been confirmed or disproved. Fourthly, a conclusion is drawn and some recommendations on possible ways of solving the research problems are made.

5.2 The initial problem

This dissertation started by demonstrating the need for Kenyan courts to develop jurisprudence harmonious with their constitutional duty to apply and uphold customary law. This need was occasioned by the seeming impression of courts' preference for state law in detriment of customary law. By using the theory of legal pluralism and contextualism, the research attempted to demonstrate how the application of state law where customary law would exclusively apply, could prevent Kenyan communities and persons that still rely on customary law.

The Constitutional mandate requires the courts to apply and uphold customary law in a bid to develop jurisprudence and enhance access to justice, a task that seems unachieved owing to the inconsistent precedents, and the nature of legal training among judges beyond the common law to include more customary knowledge. The study has proved the hypothesis by concluding that the state of customary law jurisprudence as it is in Kenya, shows that there is inconsistency in the determination of customary law disputes. As a result, this position acts as a barrier to access to justice for communities in Kenya.

5.3 Summary of Findings

5.3.1 The Status of Customary Law within the Legal Framework

This study found that the legal framework integrating customary law provides for the jurisdiction and powers of the judges in the application of customary law. However, it seems that customary law, within the country's legal system, still occupies a marginal position in the order of valid legal norms. It was found that one of the reasons why this position remains is because the current legal framework determining customary matters is influenced by common law as opposed to customary law principles. Application of state law where customary law would be the most applicable results in a negative outcome to the parties seeking justice. Additionally, it is a huge injustice where the legal framework governing the lives of people who are subjects of customary law subjugates their customs in the determination of disputes.

5.3.2 The Determination of Customary Law Matters in Kenyan Courts

This study found that since the advent of the 2010 Constitution, some judges have embraced customary law in enhancing access to justice. However, the challenge has been that there is no consistency in developing customary law jurisprudence thus a barrier to access to justice. Though there are decisions that apply customary law, this research found that they do not form a significant precedent for other courts in the determination of customary matters.

5.4 Conclusion

In conclusion to this study, it seems that the Kenyan courts have failed to consistently apply and uphold customary law according to the constitutional mandate bestowed upon them. Therefore, the place of customary law within the legal system of the country lacks the clarity that would make access to justice for persons and communities relying on it achievable. To address this situation, the following recommendations are made:

5.5 Recommendations

5.1.1 The need to create and encourage customary law courts manned by custodians or experts of customary law in Kenya

This paper recommends a piece of legislation that creates courts that follow informality like mediation with specific jurisdiction over customary law matters. Such an initiative would not only ensure the development of customary law jurisprudence in customary courts, but also restore the

place and role of customs within the legal system for persons and communities. Enhancing the place of customs in the society will also restore the social fabric and cohesion within the country.

5.5.2 The need for applying customary law jurisprudence from customary law courts in Kenya

As pointed out in the discussion on the jurisprudence emanating from Kenyan courts, judges have produced contrasting jurisprudence regarding the application of customary law. Although the application of TDRMs sets a positive trajectory in the application of customary law, all customary law precedents should exhibit coherent jurisprudence affirming its significant place in Kenya.

5.5.3 The need to re-evaluate the nature of legal training in Kenya

The research recommends a paradigm shift in the approach used in legal training in the country. Legal education should appreciate and incorporate customary law principles, and its practical context, enabling future judges to develop a coherent customary law jurisprudence. Additionally, judges and magistrates should also have special training on customary law where such are deployed. A step in this direction will contribute to a positive mindset and perceptions amongst judges and magistrates, for them to appreciate and uphold customary law.

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