

# **Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology**

By

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## ***Abstract***

*The legal framework in Kenya on community, customary and traditional justice systems, provides for these mechanisms as if they are similar. The terms 'traditional,' 'customary' and 'community' have also been used interchangeably as if they are synonymous. However, these terms have nuanced meanings, are value-laden and the normative content of the respective justice systems they describe are different to some extent. This paper discusses how the law uses the terms 'traditional,' 'community' and 'customary' in describing the different justice systems. It also highlights the conceptual parameters, juridical content, scope, conflicts and overlaps in the use of the mechanisms in the legal framework. Further, the paper explores the appropriate terminology in describing informal justice system.*

## **1.0 Introduction**

Community, customary and traditional justice systems have for a long time operated outside the formal justice system without adequate recognition and protection in law. They have been described using different tags such as indigenous, informal, non-formal, non-state or non-official justice systems. In recent times, these mechanisms have been recognized within the law subject to some limitations. Due to this semi-formalization, it is now not appropriate to describe them by the aforesaid tags. These mechanisms have a huge potential for enhancing access to justice, strengthen the rule of law and bring about development among communities, hence their recognition. They also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system.<sup>1</sup> Their recognition is also borne out of the increasing acceptance of the validity and legitimacy of the adjudicative power of non-

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<sup>1</sup> E. Hunter, 'Access to justice: to dream the impossible dream?' *The Comparative and International Law Journal of Southern Africa*, Vol. 44, No. 3 (November, 2011), pp. 408-427.

state justice systems,<sup>2</sup> which are home-grown, culturally appropriate and operate on minimal resources and are easily acceptable by the communities they serve.<sup>3</sup> Formal justice systems such as courts, employ legal technicalities and complex procedures, are expensive, not expeditious and are located in major towns, and are therefore not easily accessible by a majority of the people particularly the poor.

## **2.0 Legal Framework on Community-Based Justice Systems in Kenya**

A number of laws apply the terms community, customary and traditional dispute resolution mechanisms interchangeably as if they are synonymous and with the same juridical content.<sup>4</sup> As will be demonstrated shortly, the various justice processes are not coterminous and are different normatively. First, the Constitution requires courts and tribunals to be guided by the principles of traditional dispute resolution mechanisms in delivering justice.<sup>5</sup> However, a limitation is imposed on the applicability of traditional justice systems, in that they are not to be used in a manner that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.<sup>6</sup> Article 159(3) of the Constitution is limited to traditional dispute resolution mechanisms only and does not seem to apply to other community-based systems not based on African customary law. This is erroneous seeing that there are other community-based justice systems not based on African customary law, but which may also violate Article 159(3).

Second, one of the principles of holding, using and managing land is the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.<sup>7</sup> Here, the law talks of ‘local community initiatives.’ These community initiatives, are not necessarily based on African customary law. Third, the Constitution<sup>8</sup> and the National Land Commission Act,<sup>9</sup> enjoins the National Land Commission, to encourage the use of

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<sup>2</sup> M. Forsyth, ‘A Typology of Relationships between State and Non-State Justice Systems,’ *J. Legal Pluralism & Unofficial L.*, (2007), p.69.

<sup>3</sup> D. Pimentel, ‘Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,’ *Harvard International Review*, Vol. 32, No. 2 (Summer 2010), pp.32-36.

<sup>4</sup> These laws include the Constitution, 2010; Judicature Act, Cap. 8; Marriage Act, 2014; Environment and Land Court Act, 2011 and the National Land Commission Act, 2011.

<sup>5</sup> Article 159 (2) (c), Constitution of Kenya, 2010.

<sup>6</sup> *Ibid*, Article 159(3).

<sup>7</sup> *Ibid*, Article 60(1) (g).

<sup>8</sup> *Ibid*, Article 67(2) (f).

<sup>9</sup> Section 5(1) (f), National Land Commission Act No. 5D of 2012.

traditional dispute resolution mechanisms in resolving land conflicts. It is evident that Articles 60 and 67 of the Constitution provides for community and traditional dispute resolution mechanisms in resolving land disputes interchangeably. On its part, the Marriage Act 2014, allows parties to a customary marriage to undergo a process of conciliation or customary dispute resolution mechanisms before the court may determine a petition for the dissolution of the marriage.<sup>10</sup> From these provisions, it is clear that the terms ‘customary,’ ‘traditional’ and ‘community’ in relation to dispute resolution mechanisms are used interchangeably and in a rather reckless and ignorant manner as if they are synonymous. The three terms do not mean one and the same thing. However, from the above provisions we see three key terminologies being employed in law: ‘traditional dispute resolution mechanisms,’ ‘local community initiatives’ or ‘community justice systems’; and ‘customary dispute resolution mechanisms.’ These terminologies are assessed in the ensuing parts of this paper. The Constitution does not define either of the aforesaid terms that describe the various justice systems. However, in relation to community land, the Constitution provides that community land can be held on the basis of ethnicity, culture or community of interest.<sup>11</sup> This definition offers a broad meaning of the term community and as observed by Kameri-Mbote *et al*:

*“Subjects of community rights lay claims through occupation, long residence and social acceptance by those with earlier claims. Community rights are claimed as the basis for: citizenship, identity or belonging; ensured access to resources and exclusion of perceived outsiders.”<sup>12</sup>*

However, Luc Huyse acknowledges that the terminologies used in describing dispute resolution mechanisms in Africa are problematic due to the dynamic nature of disputes, customs and an ethnocentric based methodology in conceptualizing disputes and dispute resolution.<sup>13</sup> The terminological challenge is further made complex by the fact that customary law is a form of a ‘living law’ which is not static. It keeps changing, growing, evolving and mutating in time and space. Pimentel notes that there has been a misguided thinking that customary law is static and has to be preserved as derived from the pre-colonial period. He observes that:

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<sup>10</sup> Section 68(1), Marriage Act, 2014.

<sup>11</sup> Article 63(1), Constitution of Kenya, 2010.

<sup>12</sup> P. Kameri-Mbote, *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013), p. 151.

<sup>13</sup> L. Huyse, ‘Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,’ in L. Huyse & M. Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (IDEA: Stockholm, 2008), pp. 7-8.

*“Many indigenous systems apply a law reflected in an oral tradition, which is inherently flexible, evolving naturally and almost effortlessly to reflect the changing needs and circumstances of the community.”*<sup>14</sup>

Despite these difficulties, this paper seeks to highlight the conceptual differences, similarities, overlaps and normative content of the different systems arising from the various terminologies as used in the Constitution and the law.

### **3.0 Informal or non-state justice systems/official & non-official/formal & non-formal/state & non-state**

Traditional, community and customary justice systems have been described as informal, non-state, non-official or non-formal justice systems. For a long time, they have operated at the periphery of the formal justice system.<sup>15</sup> Formal justice systems refer to all those systems set out or recognized by the law and backed by government sanctions such as the judiciary, administrative tribunals, the prisons, police and correction systems. These systems are established, supported, promoted and backed by the State. Informal or non-state systems operate outside state control or in the periphery of the state systems.<sup>16</sup> In Kenya, informal justice systems have been incorporated in law, subject to some limitations. The effect of this incorporation is yet to be seen. Will it formalize the mechanisms, and make them lose their key attribute of informality and flexibility? Or will the state-backing allow them to operate in a way that they retain their flexibility and informality? This discussion is important since the formal-informal dichotomy in discussing justice systems mainly turns on the relationship between the two systems. The relationship vacillates between recognition and adoption by the State on one end, and proscription and suppression on the other.<sup>17</sup> Formal state recognition of the informal justice systems may formalize them, though this depends on the nature and extent of State backing. The State may recognize their existence by lending its enforcement and appeal processes. The State may also recognize the informal systems, but fail to actively promote and encourage their use in achieving access to justice.<sup>18</sup> Thus, mere recognition without active State promotion and

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<sup>14</sup> D. Pimentel, ‘Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,’ *Op. cit.*, pp.32-36.

<sup>15</sup> M. Forsyth, ‘A Typology of Relationships between State and Non-State Justice Systems,’ *Op. cit.*, p. 67.

<sup>16</sup> *Ibid.*

<sup>17</sup> J. Macfarlane, ‘Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with Formal Legal System,’ *Cardozo Journal of Conflict Resolution* (2006-2007), p. 491.

<sup>18</sup> M. Forsyth, ‘A Typology of Relationships between State and Non-State Justice Systems,’ *Op. Cit.*, pp. 67-68.

involvement in advocating for their use cannot contribute to enhanced access to justice to their users.

In Kenya, State recognition and active involvement in informal justice system varies and it is difficult to delineate formal and informal justice systems. The difficulty arises from unequal dispersal and reach of the formal justice system within the country. In some areas, informal justice systems may have the backing of the State while the same system may have little or non-existent State backing elsewhere. For instance, in some areas chiefs work together with village elders. This way, the informal system of village elders gets legitimacy as their decisions may be enforced by the chief and local police officers. In other areas, for example among the Pokot, Turkana, Marakwet and Samburu, village and community elders exercise informal power in customary courts without resort to the formal State enforcement mechanisms.<sup>19</sup> In these courts, obedience is based on goodwill and social pressure from the community. Thus, an informal system such as the institution of village elders may operate independent of the State and remain informal in pastoralist areas while in other areas they are co-opted into formal State systems.

Moreover, the difficulty in delineating informal from formal justice systems also boils down to the nature of conflicts to be resolved. Most communities in arid and semi-arid areas of Kenya are often pastoralists. Most of the conflicts in these areas are mainly about grazing areas, water points, cattle rustling and other problems unique to pastoralist communities.<sup>20</sup> Pastoralist conflicts are therefore different from conflicts faced in the rest of the country. Since the formal justice systems and State enforcement institutions' are located far from rural areas, there is increased use of informal justice systems.<sup>21</sup> Additionally, due to close kinship and communal ties among pastoralist communities, there may be distrust of "external institutions" from the State and hence overreliance on community, customary or traditional dispute resolution systems. This leads to a difficulty in delineating informal and formal justice systems in Kenya.

#### **4.0 Community Justice Systems**

The law allows for the use of 'local community initiatives' consistent with the Constitution in resolving land disputes.<sup>22</sup> It acknowledges the need to decentralize dispute

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<sup>19</sup> K. Martin, B. Rabar, R. Pkalya, M. Adan & I. Masinde, *Indigenous Democracy: Traditional Conflict Resolution Mechanism among the Pokot, Turkana, Samburu and Marakwet,* (ITDE-East Africa, Nairobi, 2004), pp. v-vi.

<sup>20</sup> *Ibid*, p. 96.

<sup>21</sup> *Ibid*, p. 94.

<sup>22</sup> Article 60(1) (g), Constitution of Kenya, 2010.

resolution power and authority to local areas. It also seeks to promote dispute avoidance/prevention and restorative justice as opposed to retributive justice. Although, the Constitution provides for the use of community-based justice systems, it does not define what a community is. The term ‘community’ does not render itself to easy definition. It is, however, critical to define a ‘community,’ as it is the basis for a particular dispute resolution mechanism applying to a particular group of people. Moreover, by defining a community, an individual or group is able to identify with a particular community and gain membership. This is important in modern days where it is possible for one to belong to different communities at a given time and space. For instance, an individual could be a member of a certain group based on his ethnicity, but also on the basis of practicing a particular culture, for example, pastoralism, farming et cetera, belong to another community. Further, the same individual could be a member of another community based on certain common interests or purposes, not based on ethnicity or culture at all. The dispute resolution mechanisms that may be used in the different communities the individual is a member may not necessarily be the same. Moreover, defining a community is essential since by belonging to diverse communities, issues of loyalty and allegiance to the different communities may arise considering that in most of Africa strong allegiance is owed to ethnic or tribal groupings as opposed to any other grouping. A community can be defined variously. It can be described as a group of people with a similar place of residence,<sup>23</sup> independent of traditional state structures such as provinces, districts, divisions, locations, counties or sub-counties. Others describe it as a group with an identifiable organizational purpose or as a process rather than a place.<sup>24</sup> Sheldon Berman defines a community as:

*“...a group of people who acknowledge their common purpose, respect their differences, share in group decision making as well as in responsibility for the actions of the group, and support each other’s growth.”*<sup>25</sup>

Wood and Judikis describe a community as a group of people with a sense of common purpose(s) and/or interest (s), for which they assume mutual responsibility, acknowledge their interconnectedness, respect individual differences among members, and commit themselves to

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<sup>23</sup> D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework* (Criminal Justice, 2000), p.327.

<sup>24</sup> See G.S. Wood Jr & J.C. Judikis, *Conversations on Community Theory* (Purdue University Press, 2002), pp.2-10.

<sup>25</sup> S. Berman, ‘Educating for Social Responsibility,’ *Service Learning, Paper 43* (1990), available at <http://digitalcommons.unomaha.edu/slceslgen>, accessed on 02/02/2015.

the wellbeing of each other and the integrity and wellbeing of the group.<sup>26</sup> However, Wood and Judikis emphasize that in order to be regarded as a community ‘...a group must exist long enough to demonstrate with its membership and to its membership that it is a community.’<sup>27</sup> The above definitions are useful in the discourse on dispute resolution within a community context. They emphasize on the interconnectedness, mutual responsibility and commitment of a community which are vital for dispute resolution and enforcement of group decisions. They also go beyond the view that a community must share ethnicity, language, religion, region or common interests.

The Constitution of Kenya, 2010 defines a community on the basis of ethnicity, culture or community of interest.<sup>28</sup> From the earlier discussions on what a community is, the three bases for defining a community in the Constitution can be limiting. For example, ethnicity as a basis of defining community applies in describing tribal groups with a common ascendancy, ancestry or origin. People of the same ethnic origin have similar culture, language and lifestyle, and may be living in the same region. However, ethnocentrism in the discourse on justice systems is problematic. In modern times, there is rising social integration, where rural-urban migration has forced different ethnicities to co-exist together in urban areas. This explains the use of ‘culture’ and ‘community of interest’ as other bases for defining a community.

Culture is the foundation of the nation and the cumulative civilization of the Kenyan people and nation,<sup>29</sup> and therefore cultural communities are inevitable in the countries development prospects. The Constitution guarantees every person the right to participate in the cultural life of his choice,<sup>30</sup> meaning that one can maintain membership in different cultural communities. A person belonging to a cultural community has the right with other members of that community to enjoy his culture, form or join and maintain cultural associations.<sup>31</sup> There is a duty on the State and any person not to discriminate directly or indirectly against another person on the basis of culture.<sup>32</sup> It is instructive to note that the Constitution appreciates that even though culture may refer to the lifestyle and way of life of a particular ethnic group, learned and passed from one generation to another, new cultures can evolve over time that have nothing to do

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<sup>26</sup> G.S. Wood Jr & J.C. Judikis, *Conversations on Community Theory*, *Op. cit*, p.12.

<sup>27</sup> *Ibid*, p. 83.

<sup>28</sup> Article 63(1) of the Constitution of Kenya, 2010.

<sup>29</sup> *Ibid*, Article 11(1).

<sup>30</sup> *Ibid*, 44(1).

<sup>31</sup> *Ibid*, 44 (2).

<sup>32</sup> *Ibid*, 27(4) & (5).

with the valorization of culture as either savage or archaic or civilized.<sup>33</sup> Culture as the traditional lifestyle and livelihood of a people is seen in the definition of a ‘marginalised community.’<sup>34</sup> A marginalised community is defined in the Constitution as:

“...(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

(d) pastoral persons and communities, whether they are—

(i) nomadic; or

(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole...”

It is notable that in defining a marginalized community there is reference to the tradition or indigeneity of the community which reinforces ethnocentrism in defining a cultural community.

Ramsey and Beesley define a ‘community of interest’ not by space, but by some common bond-like feeling of attachment or sense of belonging to an entity or group. They say that a ‘community of interest’ connotes a sense of belonging, coming together for a common purpose, and feelings of closeness.<sup>35</sup> However, Kameri-Mbote *et al*, writing on community land opine that a community of interest can be acquired through occupancy, long residence in a given locality and social acceptance.<sup>36</sup> Although, this view is in consonance with the definition proffered by Wood and Judikis which emphasises on longevity and membership in defining a community, space and longevity alone cannot be the defining factors of a community. A group of people can also self-treat or regard itself as a community.<sup>37</sup> Community of interest does not require the people to be of the same ethnic or tribal origin, only similar or shared interests. Often, people

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<sup>33</sup> See generally, what is Culture? Available at [http://www2.warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global\\_pad\\_-\\_what\\_is\\_culture.pdf](http://www2.warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global_pad_-_what_is_culture.pdf), accessed on 02/02/2015.

<sup>34</sup> Article 260, Constitution of Kenya, 2010.

<sup>35</sup> D. Ramsey & KB. Beesley, ‘Perimeteritis’ and rural health in Manitoba, Canada: perspectives from rural healthcare managers,’ *Rural and Remote Health*, Vol. 7: 850 (2007).

<sup>36</sup> P. Kameri-Mbote, *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, *Op. cit.*, p. 151.

<sup>37</sup> See generally, M.D. Steinberg & H.J. Coleman, *Sacred Stories, Religion and Spirituality in Modern Russia* (Indiana University Press, 2007), p. 12.

living in a community have same living conditions and face similar social problems. Likewise, they face similar challenges and struggles in accessing justice. Therefore, when disputes arise they would be well managed through locally established, home-grown, culturally appropriate justice systems, that operate on minimal resources and embraced by the communities they serve.<sup>38</sup>

The above discussions on what a community is are critical, since an effective community influences how conflicts are viewed and handled. An effective community is able to deal with disputes effectively because of certain attributes inherent in a community such as developed trust; acceptance and belonging even in times of conflict; strong valued relationships; community's response to crisis; new growth and perspectives results in the discovery of new perspectives and feelings, and the fact that communities are built upon diversity may make conflicts complex but also increases the ability and creativity to resolve conflicts.<sup>39</sup>

In Kenya today, people from different ethnic backgrounds co-exist together, especially in urban and peri-urban areas, where they are faced with similar social-cultural problems. These include problems of access to basic services like water, education, health, security and general poverty which hinders their access to formal justice systems. Similar challenges face people in rural areas. Based on the concept of 'community of interest' communities have been able to come up with frameworks for peace building, problem-solving, dispute resolution, improving community's way of life, community crime prevention, community policing and community defense.<sup>40</sup> These communities could benefit a lot from locally-developed justice mechanisms that are sensitive to their plight, easily accessible and that dispense justice expeditiously. It is reported that communities living in the informal settlements of Kibera and Mukuru slums have formed their own dispute resolution mechanisms that are independent of the state's formal dispute resolution mechanisms.<sup>41</sup> Dispute resolution mechanisms based on community of interest can also be developed in areas where different ethnic communities share vital resources such as pastures and water as in pastoralist areas. A good example is the Isiolo Peace and Reconciliation Committee was created to resolve disputes among different ethnic communities and clans around

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<sup>38</sup> D. Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,' *Op. cit.*, pp.32-36.

<sup>39</sup> Available at [www.calvin.edu/.../Creating%20a%20Community.doc](http://www.calvin.edu/.../Creating%20a%20Community.doc), accessed on 02/02/2015.

<sup>40</sup> D.K. Tharp & T.R. Clear, *Community Justice: A Conceptual Framework*, *Op. cit.*, pp. 323-329.

<sup>41</sup> FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya* (FIDA Kenya, 2008), p. 4.

Isiolo.<sup>42</sup> Where a community of interest comprises of people from different ethnicities, certain cultural aspects from the diverse ethnicities, may easily find their way into the community, where they may be adopted wholly or with modifications. Therefore, dispute resolution in the two contexts may not differ very much, thus creating difficulties in delineating justice systems based on ethnicity and community of interest.

Community justice systems, anchored on ethnicity or tribe, may also be described as traditional or customary justice systems, if the tribal customs and traditions that have existed since time immemorial are applied in dispute resolution. The law fails to appreciate the overlap between traditional and community justice systems, by not subjecting community justice systems to the test in Article 159(3) of the Constitution. The limitation in the said Article is specific to traditional justice systems. Although, some have argued that the use of the term ‘community’ in describing community justice systems is the best alternative as it can be adaptive to change and avoid ethnocentrism.<sup>43</sup> However, this should not be taken to mean that it is only community justice systems based on ethnicity that can be repugnant to justice and morality.

## **5.0 Customary Justice Systems**

Customary justice systems refer to all dispute resolution mechanisms that develop from the customs and other customary practices of a group of people.<sup>44</sup> Therefore, what customary justice systems are, is dependent on the meaning of the term ‘custom.’ A customary justice system may be based on tribal custom (that is African customary law) or modern custom.<sup>45</sup> Their nature is thus, dependent on an understanding of the term ‘custom.’ Sapir describes a ‘custom’ as the totality of behaviour patterns carried by tradition and lodged in a group.<sup>46</sup> Some customs can be explained in historical terms, by focusing back to remote antiquity. These are customs that have been practiced by communities since time immemorial, gained the force of law and are generally regarded as customary law. Customary law is described as a body of general rules within African tribal communities that govern personal status, communal resources and local

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<sup>42</sup> *Ibid.*

<sup>43</sup> L. Huyse, ‘Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,’ *Op. cit.*, pp.7-8.

<sup>44</sup> E. Henrysson & SF. Joireman, ‘On the Edge of the law: Women’s Property Rights and Dispute Resolution in Kisii, Kenya,’ *Law and Society Review*, Vol. 43, No. 1, (2009), pp. 39-41.

<sup>45</sup> *Ibid.*

<sup>46</sup> E. Sapir, “Custom,” *Encyclopaedia of the Social Sciences* (New York, 1931), pp. 658-662.

organization of the people.<sup>47</sup> Each tribal community has its own customary law. Customs therefore, differ from community to community and serve to preserve cultural aspects of the people. In customary justice systems anchored on customary law, the latter becomes a critical part of its normative content and in the development of tribal/customary law jurisprudence. In this regard, it is argued that customary law provides a better methodology in delivering justice to the people in tribal court adjudication.<sup>48</sup> However, in most of Africa, formal laws have been accused of subjugating, expropriating and subverting African customary law,<sup>49</sup> thus undermining its utility and applicability in the justice sector.

There are other types of customs, which are not traditional in the sense of being archaic, but may develop from current social practices such as in trade, business or profession, and thereafter gain legal recognition. Additionally, in the international law arena, some practices and laws gain notoriety and become international customary law through usage and practices. Thus, conceptually, for an unwritten custom or practice to become customary, it must be practiced widely by a group of people, whether the group is ethnic-based, business or otherwise, and it must gain notoriety. Although, African customary law is critical in adjudicating disputes within tribal courts, the law that will govern dispute resolution in a modern 'customary' dispute resolution forum is not clear. Is it the modern 'customs' developed by the people? Or is it the formal laws codified in statutes? If customary justice systems, are aimed at giving people the power to adjudicate disputes locally and culturally, one would argue that it is the developed customs that should apply subject to the Constitution and other formal laws. It is also arguable that such customs should apply only where the law allows for their specific application.

Customs, whether remote in antiquity or modern, are dynamic and can change according to new trends and social norms.<sup>50</sup> This dynamism of customs and their change over time leads to a dichotomy of dispute resolution mechanisms, such that there can be pre-modern or traditional and modern justice systems. Customs that survive over time and are passed from one generation to another become customary law, while modern or new 'customs' operate as informal justice

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<sup>47</sup> E. Henrysson & S.F. Joireman, 'On the Edge of the law: Women's Property Rights and Dispute Resolution in Kisii, Kenya,' *Op. cit.*, p. 40.

<sup>48</sup> M.L.M Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence,' *13 Mich. J. Race & L.* 57 (2007), p. 61.

<sup>49</sup> H.W.O, Okoth-Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion,' *University of Nairobi Law Journal Vol. 1* (2003), pp.107-117.

<sup>50</sup> M. Zurstrassen, 'Customary Dispute Resolution Project: Final Report,' *Pacific Judicial Development Programme*, (2002), p.4.

systems since they have not gained enough public notoriety to be recognized as customary law. Thus, informal justice systems amongst people living in informal settlements would remain informal since they have not gained acceptance by the law.

## **6.0 Traditional Dispute Resolution Mechanisms**

Although, the term ‘customary’ is close in meaning to ‘traditional,’ they are not coterminous.<sup>51</sup> ‘Tradition’ refers to practices and usages that derive their authority from practices and beliefs that are ancient, old or pre-modern. The term ‘tradition’ may mean or emphasize that a certain practice is old, ancient or not modern. In this sense, traditional dispute resolution mechanisms may refer to those mechanisms that have been practiced by communities since time immemorial and passed from one generation to the other. The mechanisms must have had a long, tried and tested history. Consequently, traditional dispute resolution mechanisms can be regarded as a subset of customary dispute resolution mechanisms as they are based on customary laws of a particular ethnic group practiced since time immemorial. However, a ‘tradition,’ is not a static or absolute phenomenon, it is inherently dynamic, fluid and subject to change. Since customary law is dynamic, traditional dispute resolution mechanisms can also keep evolving. They can be influenced by developments over time, changing some aspects and retaining others.<sup>52</sup> In effect, some have questioned, whether it is justified to use the term ‘traditional’ if traditional justice systems are susceptible to change. Moreover, doubts have been expressed as to whether it is appropriate to describe them as ‘traditional’ after years of neglect and suppression by formal laws.<sup>53</sup>

Some scholars have opined that it is possible to invent traditions. This arises where certain practices based on and developed out of tradition in a given society are enacted into law.<sup>54</sup> The fact that something appears to be traditional, but nevertheless has been enacted in law suggests that there can be modern traditions or alternative modernities. As such, the term traditional can marry recent enactments with traditions that have existed since time

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<sup>51</sup> L. Huyse, ‘Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Practices,’ *Op. cit.*, pp.7-8.

<sup>52</sup> E. Henrysson & S.F. Joireman, ‘On the Edge of the law: Women’s Property Rights and Dispute Resolution in Kisii, Kenya,’ *Op. cit.*, pp. 40-41.

<sup>53</sup> D. Pimentel, ‘Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law,’ *Op. cit.*

<sup>54</sup> M.O. Hinz, ‘Traditional governance and African customary Law: Comparative observations from a Namibian Perspective,’ available at [www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf](http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/hinz.pdf), accessed on 02/02/2015.

immemorial.<sup>55</sup> Because, traditional justice systems can respond to current circumstances, they cannot be classified as being purely traditional.

Traditional dispute resolution, like the wider customary resolution mechanism, differs from one ethnicity or tribe to another. There may have been similar structures across most ethnic communities, for example the council of elders. However, they have had different names across different tribes and their roles and mechanisms of resolving disputes were subtly different according to the circumstances of individual tribes. Examples of names for council of elders include the *kokwo* of the Pokot,<sup>56</sup> *Nabo* of the Samburu and Marakwet,<sup>57</sup> *tree men* of the Turkana,<sup>58</sup> *Njuri Ncheke* of the Meru, and *Kiama* of the Kikuyu.

The mechanisms used to resolve disputes under traditional justice fora include negotiation, mediation, conciliation, settlement, consensus approach and restoration. These mechanisms focus on restoring peace and maintaining social bonds. Since traditional or primitive societies have complex relationships, the social bonds and social capital help dispute resolution institutions such as council of elders or tribal chiefs to enforce the dispute resolution decisions.<sup>59</sup> Thus, traditional dispute resolution mechanisms may be stronger in communal societies such as rural areas compared to urban areas where the dispute resolution mechanisms are individualistic, self-interested and are not aimed at maintaining relationships.

## **7.0 Community, Customary & Traditional Justice Systems: Overlaps, Differences and Similarities**

Inasmuch as the paper states that community, customary and traditional dispute resolution mechanisms are not synonymous, there exist similarities and overlaps between the three. All the three justice systems are localized, home-grown, culturally appropriate systems operating on minimal resources and can easily be embraced by communities. As stated elsewhere, they can contribute to enhanced access to justice as they build on existing resources within a community such as trust amongst members, interconnectedness, commitment, acceptance and belonging, diversity, mutual responsibility and common purposes. A community, in one sense means a group

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<sup>55</sup> *Ibid.*

<sup>56</sup> K. Martin, B. Rabar, R. Pkalya, M. Adan & I. Masinde, '*Indigenous Democracy: Traditional Conflict Resolution Mechanism among the Pokot, Turkana, Samburu and Marakwet,*' *Op. cit.*, p. v.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> FIDA Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya*, *Op. cit.*, p. 2.

of people based on ethnicity, culture or community of interest. A community justice system can therefore, be premised on the customary law of the different ethnic groups in a country. Similarly, a customary justice system can be based on ethnicity or the traditional cultural lifestyle of a people. The normative content of justice systems based on ethnicity and traditional or indigenous lifestyles will most likely be African customary law. However, and as argued elsewhere in this contribution, the normative framework of justice systems based on culture or community of interest will not necessarily be African customary law. There are certain cultures that are modern with no attachment to any ethnic traditions or customs. This perhaps explains why the Constitution, subjects only traditional justice systems to the repugnancy test. Thus, there is an overlap between community justice systems not based on customary law and those that are based on culture and ethnicity. Moreover, the line between community of interest, where people resolve disputes or prevent disputes based on their interest(s) and modern cultures is very blurred. Despite these overlaps, a hierarchy among the three justice systems is discernible. First, community justice systems are not subjected to the repugnancy test in Article 159(3) of the Constitution. It therefore appears that they rank higher than customary and traditional justice systems. Secondly, community justice systems are broad as per the Constitution which suggests that a community can be based on ethnicity, culture or community of interest. Community justice systems, therefore encompass, customary and traditional dispute resolution mechanisms. Similarly, customary dispute resolution is wide enough to accommodate traditional dispute resolution. However, Article 63 of the Constitution, in providing for the three bases for holding community land, starts with ethnicity, culture and then community of interest implying that a community based on ethnicity ranks in priority in comparison to the other communities.

Additionally, there is an overlap between customary dispute resolution and traditional dispute resolution mechanisms. Most, customary dispute resolution mechanisms are ethnic-based and have developed over a long period, gaining notoriety within a particular ethnic group. Similarly, traditional dispute resolution mechanisms can be based on traditions practiced by communities over a long period in a particular ethnic group. However, customary dispute resolution mechanisms are broader than traditional dispute resolution mechanisms. This is because there can be modern customs and some customary dispute resolution mechanisms may not fall under traditional dispute resolution mechanisms.

Even within traditional justice mechanisms, there are evident overlaps when one distinguishes ‘modern’ and ‘pre-modern’ traditions. Whereas the normative content for the pre-‘modern’ traditional justice systems is the African customary law, the normative content for ‘modern’ traditional justice systems may not necessarily be African customary law. The limitation in the use of traditional justice systems in the Constitution seems to appear to the ‘pre-modern’ traditional justice systems only as they are the ones premised on African customary law.

## **8.0 Conclusion and Way forward**

The paper has discussed the terminological problems that are likely to arise from the typologization of informal justice systems as either community, traditional or customary in Kenya. It has been argued that, the term community is broad and all-encompassing, as it includes the traditional and customary justice systems. A hierarchy of sort is also discernible from the way the law has typologized and used these justice systems. One can argue that the traditional dispute resolution mechanisms form the lower rungs, followed by customary dispute resolution and at the apex is community justice system. Article 159(2)(c) of the Constitution highlights the principles that are to guide courts and tribunals in the exercise of judicial authority. One of the principles is the promotion of traditional dispute resolution mechanisms subject to Article 159(3). Article 159(3) states that traditional dispute resolution mechanisms are not to be used in a way that contravenes the Bill of rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any other written law.

A question that arises is whether the framing of Article 159(2) (c) and (3) was deliberate or an oversight. From the typology, we have seen that of the three mechanisms, traditional dispute resolution mechanisms are the most restrictive. Thus, a reading of Article 159(2)(c) would exempt the application of community and customary dispute resolution mechanisms that are not traditional. It would also mean that community and certain customary dispute resolution mechanisms not based on African customary law, may not fall into the traditional pigeonhole and are therefore not subject to the limitation under Article 159 (3) of the Constitution. A similar limitation in the use of community justice systems is not available in law, save that in the use of ‘local community initiatives’ in dealing with land disputes they are to be used in a manner that is consistent with the Constitution. Thus, non-traditional justice systems may continue to operate

with minimal control of the formal State systems in so far as they are consistent with the Constitution.

In conclusion, the terms community, traditional and customary conflict resolution have been used as if they are synonymous, with far reaching ramifications as explained above. A careful analysis of the terminologies used in describing them reveals that they are different conceptually, juridically and there is a hierarchical order in their typologization. Community justice systems are broader and encompass customary and traditional justice systems. The normative content of community justice systems may not be African customary law. However, the normative content for traditional and certain customary justice systems is the African customary law of the different ethnic groups. This is the reason why the law subjects traditional justice systems to the repugnancy test. Moreover, a community justice system, as explained above, may be made up of modern heterogeneous and multi-ethnic neighbourhoods, while in most cases traditional and customary justice systems may be made up of homogenous and ethnic-based groups. It is also my submission, that in terms of a conceptual framework, the community justice systems represent the broader framework, while customary and traditional justice systems are subsets within that wider framework. This being the case, Article 159 (2) (c) and (3) of the Constitution is restrictive, narrow, limited and does not cover the whole spectrum of community justice systems as envisaged in the Constitution. It fails to adequately cover all the community justice systems by focusing only on traditional justice systems. The paper concludes that the phrase 'community justice systems' is the most appropriate in describing all the informal, local, culturally appropriate and home-grown justice systems in Kenya.

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