Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems

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List of Acronyms

ADR	Alternative Dispute Resolution
APSEA	Association of Professional Societies in East Africa
CADR	Centre for Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators (Kenya Branch)
CIC	Commission for Implementation of the Constitution
CUCs	Court User Committees
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
KEPSA	Kenya Private Sector Alliance
KLA	Kenya Land Alliance
KLRC	Kenya Law Reform Commission
KNHCR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
NCIA	Nairobi Centre for International Arbitration
NCMG	Negotiation & Conflict Management Group
NLC	National Land Commission

SDRC Strathmore Dispute Resolution Centre

TDR Traditional Dispute Resolution

TDRMs Traditional Dispute Resolution Mechanisms

TDRs Traditional Dispute Resolution systems

TJS Traditional Justice Systems

UNDP United Nations Development Programme

Legislation/Statutes

Appellate Jurisdiction Act, Cap 9, Laws of Kenya, Revised Edition 2012 [2010].

Civil Procedure Act& Rules, Cap 21, Laws of Kenya (Government Printer, Nairobi, 2010). Revised Edition 2012 [2010]

Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011).

Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. (Government Printer, Nairobi, 2016).

Constitution of Kenya, 2010. (Government Printer, Nairobi, 2010).

Environment & Land Court Act, No. 19 of 2011, Laws of Kenya. Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

Evidence Act, Chapter 80, Laws of Kenya. Revised Edition 2014 [2012]. (Government Printer, Nairobi).

Industrial Courts Act, No. 20 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011).

Judicature Act, Cap 8, Laws of Kenya. *Revised* Edition 2016 [2012]. (Government Printer, Nairobi, 1967).

Kadhis' Courts Act, Cap 11, Laws of Kenya. Revised Edition 2012 [2010]. (Government Printer, Nairobi, 2012).

Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348. (Government Printer, Nairobi, 2015).

Land Act, 2012, No. 6 of 2012, Laws of Kenya, Revised Edition 2012. (Government Printer, Nairobi, 2012).

Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

Limitations of Actions Act, Cap 22, Laws of Kenya. (Government Printer, Nairobi).

Magistrates' Courts Act, No. 26 of 2015, Laws of Kenya. (Government Printer, Nairobi, 2015).

Marriage Act, No. 4 of 2014, Laws of Kenya. (Government Printer, Nairobi, 2014).

Matrimonial Property Act, No. 49 of 2013, Laws of Kenya. (Government Printer, Nairobi, 2013).

National Cohesion and Integration Act, No. 12 of 2008, Laws of Kenya. (Government Printer, Nairobi, 2008).

National Land Commission Act, No. 5 of 2012, Laws of Kenya. (Government Printer, Nairobi, 2012).

Statute Law (Miscellaneous Amendments), Act No. 18 of 2014. (Government Printer, Nairobi, 2014).

Supreme Court Act, No.7 of 2011, laws of Kenya. (Government Printer, Nairobi, 2011).

The Court of Appeal (Organization and Administration) Act, No. 28 of 2015, Laws of Kenya. (Government Printer, Nairobi, 2015).

The High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya. (Government Printer, Nairobi, 2015).

The Legal Aid Act, No. 6 of 2016, Laws of Kenya. (Government Printer, Nairobi, 2016).

Foreign Jurisdiction Statutes

Chieftaincy Act of 1970 (Act 370), Laws of Ghana.

Customary Courts Act of 1974, Laws of Botswana.

Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems[1]

Kariuki Muigua*

1.0 Introduction

This paper contains the findings and analysis of the outcomes of the research and field study undertaken for TDRs and other community justice systems in Kenya. This includes: an analysis of the status of TDRs, ADR and other community justice systems; a status analysis of the existing policies, legislation and administrative procedures designed to facilitate the promotion and support of TDRs and other informal community justice systems; the gaps that require immediate intervention; recommendations for policy formulation towards the implementation of Article 159(2) and (3) of the Constitution of Kenya 2010; and legislative proposals to address gaps in legislation and regulations to implement Article 159(2) (c) and (3) of the Constitution. In addition, the paper contains the presentations made during the stakeholder forums and workshops as well as the study tools used for data collection.

The Constitution of Kenya, 2010 recognizes application of TDRs and ADR mechanisms in dispute resolution for efficient dispensation of justice.[2] The Constitution establishes a strong elaborate human rights framework embodying the fundamental rights and freedoms entitled to the citizens. To achieve this, the Constitution dedicates an entire Chapter on human rights, that is, Chapter Four which embodies the Bill of Rights. However, the fundamental rights and freedoms cannot be enjoyed in the absence of an enabling framework for their enforcement.[3] To this end, the Constitution provides for the right of access to justice under Article 48 and enjoins

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[1] This paper was informed by consultancy work done by the author for the now defunct Commission for the Implementation of the Constitution (CIC), an independent constitutional commission established under Section 5(6) of the Sixth Schedule to the Constitution of Kenya 2010 and by the Commission for the Implementation of the Constitution Act, No. 9 of 2010, with a mandate to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution.

[2] See Article 159 (2) (c) of the Constitution of Kenya 2010.

[3] See generally, Eide, A., "Making Human Rights Universal: Achievements and Prospects," *Human Rights in Development: Yearbook* 2000 (1999).

the state to ensure access to justice for all persons and stipulates that if any fee is required, the same shall be reasonable and not impede access to justice. The Constitution contemplates 'justice in many rooms' and promotes access to justice through informal systems such as TDRs and ADR mechanisms in addition to the court process.[4] Indeed, a high percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRs or ADR mechanisms.[5] TDRs and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Access to justice is critical in the enforcement of human rights. Undoubtedly, traditional dispute resolution mechanisms guarantee access to justice at the community level especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures. Certainly, a robust legal system based on a hybrid of formal and informal justice systems strengthens the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves. The hybrid system should be coherent and articulate specifying the nature of each system, the advantages and disadvantages and setting out a clear interface between formal and informal systems.

In order to guarantee access to justice for Kenyans, the Constitution embraces dynamism in justice systems by encouraging the utilization of formal and informal justice systems. In this regard, Article 159 recognizes the use of TDRs and ADR mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya. It stipulates that in exercising judicial authority, the courts and tribunals shall be guided by the following principles; (a) justice shall be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDRs shall not be used in a way that (a) contravenes the Bill of Rights, (b)is repugnant to justice and morality or results in outcomes

[4] See generally, Galanter, M., "Justice in many rooms: Courts, private ordering, and indigenous law," *The Journal of Legal Pluralism and Unofficial Law,* Vol.13, No. 19 (1981), pp. 1-47.

[5] See generally, Wily, L. & Mbaya, S., "Land, People, and Forests in Eastern and Southern Africa at the Beginning of the 21st Century: The Impact of Land Relations on the Role of Communities in Forest Future," *Community involvement in forest management in Eastern and Southern Africa: Issue 7 of Forest and social perspectives in conservation,* (IUCN, 2001).

that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

The role of TDRs in implementing access to justice cannot be gainsaid. In Kenya as well as many other African countries, it is trite that TDRs constitute the most basic and fundamental dispute resolution process. From time immemorial, even before the transplantation of the English legal system in Kenya, communities used to resolve a myriad of disputes through traditional justice systems.[6] In most African communities, TDRs derive their validity from the customs and traditions and are deemed to be the primary pillar of the justice system in an African context.[7]

1.1 Background

Article 159(2) (c) of the Constitution of Kenya 2010 recognizes the use of other justice mechanisms in dispute resolution other than the court process. This Article envisages that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Further, courts and tribunals are enjoined, in exercising judicial authority, to be guided by principles that: (*a*) justice shall be done to all**,** irrespective of status;(*b*) justice shall not be delayed; and (*c*) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3). Drawing from 159 2(c) Clause 3 provides that traditional dispute resolution mechanisms shall not be used in a way that (*a*) contravenes the Bill of Rights; (*b*) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (*c*) is inconsistent with the Constitution or any written law.

The Constitution envisages the overriding objective of the justice system in Article 48 on the right of access to justice and Article 159 that sets out the guiding principles. Thus, the goal of Article 159 is to ensure that every Kenyan can access justice without any impediment. Indeed, Article 159 as read together with Article 27 embodies the principle of rule of law which guarantees every citizen equal treatment, protection and benefits of the law. By strengthening

[6] Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa‖," available at www.payson.tulane.edu. [Accessed on 20/04/2017]; See also Joireman, S.F., "Inherited legal systems and effective rule of law: Africa and the colonial legacy," *The Journal of Modern African Studies* Vol.39, No. 04, 2001, pp. 571-596; See also Fullerton J.S., "The evolution of the common law: Legal development in Kenya and India," *Commonwealth & Comparative Politics* Vol.44, No. 2 (2006), pp. 190-210.
[7] Ibid.

access to justice, citizens are empowered to readily and affordably access the justice system to seek redress for violation of rights.[8]

Moreover, the constitutional guarantees on access to justice are designed to protect the rights of the economically disadvantaged as well as the vulnerable and marginalized groups.[9] Undoubtedly, TDR and other community based mechanisms are critical in promoting access to justice among many communities in Kenya.[10] Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.[11]

Despite formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDRs and other community justice systems have to date attracted inadequate attention in the ongoing judicial reforms. Recent studies carried out by civil society organisations indicate that TDRs and informal justice systems play a critical role in guaranteeing social order in many communities. They take the form of community council of elders, chieftains, peace committees and other indigenous community-based dispute resolution mechanisms. However, there has not been adequate attempt to give meaningful recognition, promotion and support for these invaluable strategies. There exists no policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations prescribed in Article 159(2) and (3). Consequently, these systems remain untapped with a view to effectively support and complement the conventional justice

[8] United Nations Development programme, "Access to Justice: Practical Note," 9/3/2004, p.3. Available at http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf.

[9] See generally, United Nations General Assembly, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights,' Sixty-seventh session, Item 70 (C) Of the Provisional Agenda (A/67/150), *Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, A/67/278, 9 August 2012; See also generally, Inter-American Commission on Human Rights, "Access To Justice As A Guarantee Of Economic, Social, And Cultural Rights: A Review of the Standards Adopted By the Inter-American System of Human Rights," OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007. Available at http://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf

[10] See generally, Wojkowska, E., *Doing Justice: How Informal Justice Systems Can Contribute*, (United Nations Development Programme – Oslo Governance Centre, December 2006). Available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf

[11] See Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," Paper Presented at the *CIArb Africa Region Centenary Conference 2015*, held on 15-17, July 2015. Available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/empowering_the_kenyan_people_through_alternative_dispute_resolution_mechanisms_-_21st_docx.pdf ; See also generally, Kariuki, F., "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology," available at http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20on%20Traditional%20justice%20terminology.pdf

system that presently spreads too thin over a wide geographical expanse despite the ever-pressing need for accessible and effective judicial services.

The constitutional guarantees in regard to access to justice call for appropriate policy, statutory and administrative interventions to ensure the efficacy of both conventional and alternative dispute resolution mechanisms (ADR) including traditional dispute resolution strategies and community-based justice systems. To this end, research was undertaken and its outcomes form the substance of this paper. The paper explores appropriate policy, statutory and administrative intervention designed to ensure that: (a) TDR strategies and other informal justice systems find their rightful place in the conventional judicial system; (b) the requirements of Article 159(2) and (3) of the 2010 Constitution are meaningfully implemented; and (c) all traditional and informal justice systems observe the minimum standards prescribed in Article 159(3) of the Constitution.

1.2 Methodology and Research Design

The research adopted a hybrid approach comprising of desk research and a field study where the Meru and Luo communities were sampled for field interviews. The research was guided by the constitutional provisions on application of TDRs and ADR. This is mainly Article 159 (2) (c) and (3). Overall, the research adopted a social-legal approach by conducting a study on community justice systems and the analysis of the legal, policy and administrative structures that promote or impact on TDR processes in Kenya. Firstly, the desk research was undertaken on the status of TDRs and other community justice systems, the legal and policy framework impacting on TDRs and their adequacy while identifying gaps and barriers that need to be filled to strengthen application of TDRs. To this end, the research revealed that the legal and policy framework fall short of the constitutional threshold for TDRs and ADR. These gaps have been pointed out in this paper and recommendations suggested to align the legal and policy framework with the Constitution.

Secondly, a field study was conducted in a few selected communities on the status of the TDRs and other community justice systems. For background information, the researcher reviewed and analyzed reports of studies conducted by several civil society organisations as well as academic commentaries on the subject. Moreover, the writer undertook a survey of TDR practice in other jurisdictions in Africa and beyond. Drawing from lessons of best practices in

other jurisdictions, the report makes recommendations for harnessing TDRs in dispute resolution. The paper points out the key weaknesses of TDR systems and makes recommendations for addressing the same in order to mainstream the application of TDRs in line with Article 159 (2) (c) and (3) of the Constitution.

1.3 Stakeholder Consultative Forums

The stakeholder consultations were conducted in form of field interviews in various communities where TDRs are used in dispute resolution. The study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders *(Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru. The findings point to the use of TDR mechanisms in managing conflicts and resolve civil disputes and will contribute to the development of policy on Article 159(2) and (3) of the Constitution

1.4 Limitations

The researcher was able to undertake research on the legal, policy and institutional framework relating to TDRs and other community justice systems. In the analysis, it was established that there is no distinct legal, policy or institutional framework for TDRs but there are various laws that promote the use of TDRs and other community justice systems in dispute resolution.

The writer undertook a comparative analysis of TDRs and other community justice systems in Africa and beyond and identified key best practices that Kenya can emulate. Moreover, it was established that most TDRs in Africa and beyond face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

The main challenge that the author faced was in respect of the field interview. Out of the targeted 342 respondents drawn from six local communities (Digo, Meru, Kikuyu, Somali, Luhya and Luo), Court User Committees and Local Administrators (Chiefs) only 81 respondents from two communities (the Luo community (Kisumu, Siaya and Homabay counties) and the Meru community of Tharaka Nithi County), the Local Administration and Court User Committee members were involved in the study. The study outcome is based on information from respondents drawn from six local communities and does not fully represent the diversity of the Kenyan community.

1.5 Recommendations

The overall objective of the project was to undertake a status analysis of Traditional Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support TDR strategies. The recommendations are contained in section 5 of this paper.

PART II

2.0 Status of TDRs and ADR in Kenya

This section presents the findings of the research and field study conducted on the status of TDRs, ADR and other community based justice systems in Kenya. The research and field study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Further, the research examined the advantages and disadvantages of TDRs and the challenges in their application. In addition, the research explored the historical basis of TDRs in Kenya vis-a-vis the formal court process and how the two have been applied by Kenyan courts. A comparative survey of TDRs in other jurisdictions in Africa and beyond was undertaken. The findings of the field study were used to verify the research outcomes and finalize the report.

For the field study, six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders *(Kaya elders* among the Digo community, the *Njuri Ncheke* of Meru, the *Kiama* of the Kikuyu community and *Ker*

among the Luo community) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru.

Overall, the field study attracted a total of 81 respondents, 80% male and 20% female who were interviewed from four (4) counties: Kisumu, Siaya and Homabay for the Luo community and the Tharaka Nithi County for the Meru Community (Fig. 1). The respondents comprised of members of the Council of Elders (Luo and Meru) forming 26% of the respondents, local administration (22% of the respondents) and the Court User Committee members (49% of respondents).

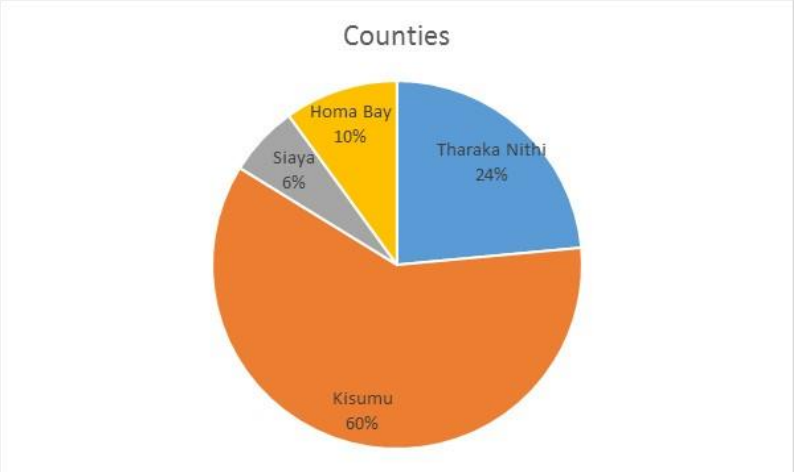

Figure 1*:* Respondents by County

2.1 Overview of TDRs and ADR in Kenya

The recognition of ADR and TDRs under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.[12] This is because TDRs existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate.[13] In most African communities, TDRs existed even before the other alternative dispute

[12] See Muigua, K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf; See also Oraegbunam, I. K. E. "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *OGIRISI: a New Journal of African Studies* 6, no. 1 (2009): 53-85, p.53.

[13] See Brock-Utne, B., "Indigenous conflict resolution in Africa," In *weekend seminar on indigenous solutions to conflicts*, 2001, pp. 23-24; see also Ntuli, P.P., "Indigenous knowledge systems and the African renaissance."

resolution mechanisms were invented. The key guiding principles for successful application of TDRs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.[14]

The main aspects of TDRs and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[15] The main objective of TDRs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.[16] TDRs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRs is to foster peace, cohesion and resolve disputes in the community. The practice of TDRs is not recorded in any form of documentation or record keeping but the rules are handed down from one generation to the next.[17]

Historically, the use of TDRs and other ADR mechanisms in dispute resolution existed even before the introduction of a formal legal system. Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate. However, with the introduction of colonial legal systems, western notions of justice such as the principles of the common law of England were introduced in Kenya. The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.[18]

The use of TDRs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster

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Indigenous knowledge and the integration of knowledge systems: Towards a philosophy of articulation (2002): 53-66.

[14] Anjayi, A.T., "Methods of Conflict Resolution in African Traditional Society," An *International Multidisplinary Journal*, Ethiopia, Vol. (8) Serial No.33, April, 2014, p.142.

[15] See Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf; see also Shamir, Y. and Kutner, R., *Alternative dispute resolution approaches and their application*, Unesco, 2003. Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.2176&rep=rep1&type=pdf[Accessed on 20/04/2017]

[16] Hwedie, K.O. and Rankopo, M.J., Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, University of Botswana. Available at http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf [Accessed on 20/04/2017]

[17] See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47.

[18] See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace." *Cooperation and conflict*, Vol.43, No. 2 (2008), pp.139-163.

relationships, voluntary-based and cost-effective.[19] For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[20] The use of TDRs fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.[21] Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDRs encourage resolution of disputes through restorative justice remedies.[22]

2.1.1 The Repugnancy Test

The transplantation of the English legal system in Kenya overhauled the hitherto African traditional dispute resolution systems and subjected them to a foreign legal system. The various TDRs were deemed to be backward, uncouth and uncivilized. The exclusion of customary law posed a big challenge to the formal courts in determining disputes emanating from customs and traditions of Kenyan Africans. Evidently, most judgments resulted in great injustice since African disputes which could have been better resolved by application of customary law were determined on the basis of notions and jurisprudence of a foreign law. This led to resistance and contempt by Africans against the colonial courts which prompted the colonial administration to integrate customary laws within the formal legal system but they were subordinated to English laws. In this regard, customary law was deemed valid as long as it did not contradict the common

[19] See generally, Singer, L. R., "Non-judicial Dispute Resolution Mechanisms-The Effects on Justice for the Poor." *Clearinghouse Review Dated :(* (1979), pp. 569-583; Osi, C., "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation," *Cardozo J. Conflict Resol.*, Vol.10, 2008, p.163.

[20] See Justice, D., "How informal justice systems can contribute." *Oslo, United Nations* (2006); Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* Vol.3, No. 2 (2013), p.144; Edossa, D.C., et al, "Indigenous systems of conflict resolution in Oromia, Ethiopia," *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (2007), p.146; Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution* Vol.6, No. 2 (2006), pp. 9-33; Akinwale, A.A., "Integrating the traditional and the modern conflict management strategies in Nigeria," *African Journal on Conflict Resolution*, Vol.10, No. 3, 2010.

[21] Muigua, K. and Kariuki, F., "ADR, access to justice and development in Kenya," Paper presented, at the Strathmore Annual Law Conference 2014 held on 3rd and 4th July, 2014 at Strathmore University Law School, Nairobi. Available at http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis [Accessed on 21/04/2017].

[22] Mkangi, K., "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contexualised Paradigm for Examining Conflict in Africa," op cit.

law or any written law. This was the origin of the repugnancy clause encapsulated in section 3(2) of the Judicature Act[23].

The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards.[24] This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.

However, there is an ongoing debate in academia with scholars positing that there is need for customary laws to be recognized at the same pedestal with formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards.[25] Besides, it is argued that the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African societies who have their own conceptions of justice and morality.[26] Redefining the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.[27]

2.1.2 Conflict Resolution versus Dispute Settlement

Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and

[23] Judicature Act, Cap 8, Laws of Kenya.
[24] See Merry, S.E., "Human rights law and the demonization of culture (and anthropology along the way)," *Polar: Political and Legal Anthropology Review* Vol.26, No. 1, 2003, pp.55-76.
[25] See generally, Donnelly, J., "Cultural relativism and universal human rights," *Human Rights Quarterly*, Vol. 6, No. 4, 1984, pp. 400-419; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; See also Cobbah, J.A.M, "African values and the human rights debate: an African perspective," *Human Rights Quarterly*, 1987, pp.309-331.
[26] See Donnelly, J., "Human rights and human dignity: An analytic critique of non-Western conceptions of human rights," *American Political Science Review*, Vol. 76, No. 02, 1982, pp.303-316; See also generally, Heard, A., "Human rights: Chimeras in sheep's clothing." *Simon Fraser University* (1997). Available at https://www.sfu.ca/~aheard/intro.html [Accessed on 20/04/2017]; See also Donnelly, J., "The relative universality of human rights," *Human rights quarterly*, Vol. 29, No. 2, 2007, pp. 281-306; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; Harris, B., "Indigenous Law in South Africa-Lessons for Australia," *James Cook UL Rev.* Vol.5,1998, p.70.
[27] See Juma, L., "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes," *Thomas L. Rev.*, Vol.14, 2001, p.459.

their relationship.[28] Since resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.[29] The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.[30] A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.[31]

On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the issues without venturing into the root causes of the dispute.[32] Examples of dispute settlement mechanisms are arbitration and adjudication.

Traditional justice systems are dispute resolution mechanisms. This is because TDRs utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions. Where these mechanisms have been employed they have been effective in managing conflicts and their declarations and resolutions have been recognized by the formal institutions.[33] For instance, in passing the Modogashe Declaration the people of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socio-economic problems, identifying role of peace committees among others.[34] It also outlined decisions made by the community around the issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.[35]

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[28] Bloomfield, D., "Complementarity in Conflict Management Theory: Resolution and Settlement Approaches7," In *Peacemaking Strategies in Northern Ireland*, pp. 67-95. Palgrave Macmillan UK, 1997.

[29] Cloke, K., "The Culture of Mediation: Settlement versus Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005.

[30] Ibid.

[31] Ibid; Bloomfield, D., "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland," *Journal of Peace Research*, Vol.*32*, No.2, 1995, pp.151-164.

[32] Ibid; See also Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

[33] See generally, Ertel, D., "How to design a conflict management procedure that fits your dispute." *MIT Sloan Management Review*, Vol. 32, No. 4, 1991, p.29.

[34] See generally, Biko, A.S., *The role of informal peace agreements in conflict management: modogashe declaration and its implementation in North Eastern, Kenya* (Doctoral dissertation, University of Nairobi, 2011).

[35] See National Cohesion and Integration Commission, "Review of Modogashe Declaration," available at http://www.cohesion.or.ke/index.php/programmes/review-of-modogashe-declaration [Accessed on 20/04/2017]

2.2 Findings and Analysis

The research conducted on TDRs and other community justice systems indicate that they are distinct from other justice processes and are the most preferred mode of conflict resolution by communities. The main characteristics of TDRs are: they do not adhere to a prescribed or written set of rules; they draw from customs and traditions of the community in which they operate; easily accessible to all people and use local language which is widely understood by people; proceedings are oral and usually there is no record keeping; Veracity of customs and values/rules depends on the memory of the mediators; mostly fail to adhere to the Bill of Rights; remedies are couched on restorative justice; wide and undefined jurisdiction; TDRs practitioners need no formal education and training.

2.2.1 Advantages of TDRs and Other Community Based Justice Systems

The study assessed the advantages of TDRs and other community based justice systems and found out that; traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDRs are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDRs and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions. The majority of the respondents (91%) interviewed do consider community justice systems as valuable. (See Fig. 2 below)

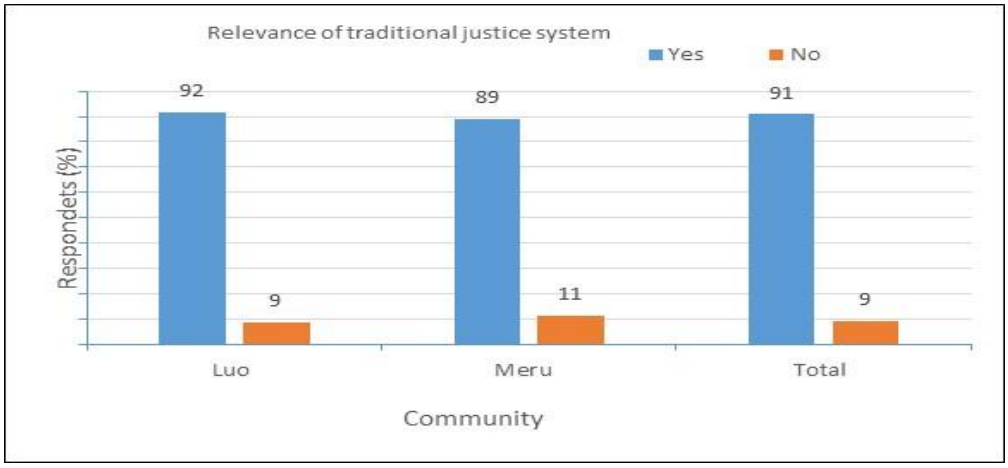

Figure 2: Relevance of Traditional Justice Systems

Further, the respondents were of the view that TDR mechanisms are valuable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grass-root level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other. (See table 1 below on the perceptions on relevance of TDRs)

Reasons	Number of respondents	
	Yes	No
Decongest courts and prison	18	0
Respect traditions of communities	17	0
Promotes peace, harmony and coexistence among communities and security	16	0
Expeditious and most cases are resolved- Allow for handling matters discretely to allow resolution	16	0
Less costly and Easy access by poor	17	0
Resolve disputes at grass-root level and enhances access to justice	10	0
Local solution/more acceptable to people	8	0
Elders understand history of the case and people and have experience	6	0
Agent of change and promotes economic development	9	0
Foster love, cohesion and integrity and promotes respect for each other	7	0
mediate political issues and advise leadership on how to conduct themselves	2	0
Inclusiveness and non-discriminatory	2	0
Lack of framework and policies to enforce and not legally binding	0	2
little involvement of women and there is need for inclusion	0	2
Ignorance of legal knowledge	0	2
Lack of resources and limited financial ability	0	1
Communities have evolved and integrated a lot and sets of common laws do not exist	0	1
Disrespect of resolutions of TDR by many	0	1
Favoritism /biasness at times	0	1

Table 2: Perception on relevance of TDR in community

2.2.2 Disadvantages of TDRs and Other Community Based Systems

However, TDRs were found to have various disadvantages such as: disregard for basic human rights (For example where women as discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Further, the study conducted indicates that there was some form of documentation of TDRs although it is poorly done. Documentation of cases and outcomes creates a historical data for reference. In the traditional setting, documentation was majorly by memorization. The research established that 77% of the respondents said their proceedings are recorded. The recordings are recorded to provide future references in case of need, during appeals and for forwarding the cases to the next level, whether in the same line of the TDR or to the courts of law. (See Fig. 3 below).

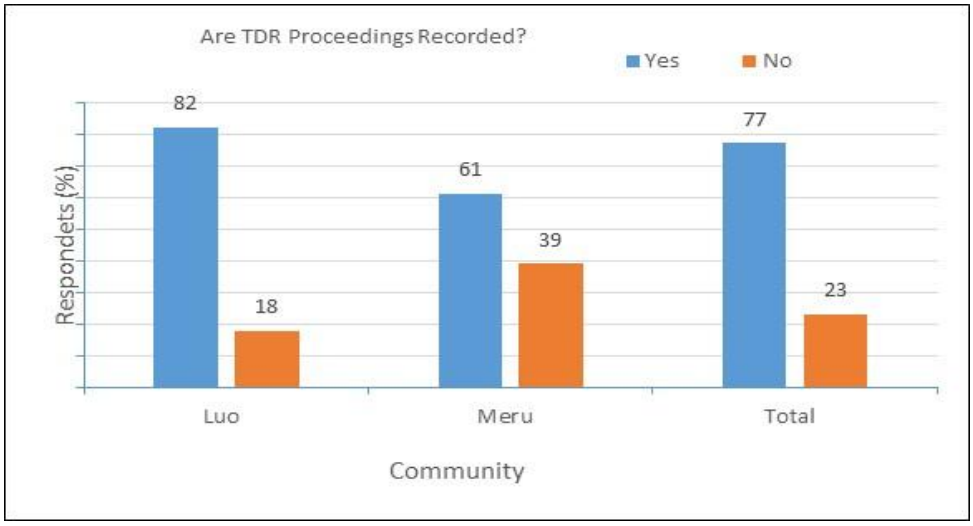

Figure 3: Recording of TDR proceedings in writing

The main challenges reported from the field study include: inadequate resources to finance the meetings and facilitation of the elders to participate actively in the meetings in form of transport. The services are usually voluntary and as such are dependent on the income level of the elders. Some of the meetings fail to take off, as indicated elsewhere in this paper, due to lack of quorums or non-availability of the elders mainly because of lack of transport. Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDRs and general rights, among others. (See Table 2 below)

	Number of respondents		
Challenge	Luo	Meru	Total
Limited resources and lack of funds and lack of transport facilities	33	6	39
Inadequate recognition and empowerment of elders -through protection and security, identification, negative attitudes towards elders	24	2	26
Not recognized by law and lack of enforcement mechanism	13	4	17
Non-compliance to rules	9	2	11
Illiteracy and lack of modern technology- illiterate clerks leading to inaccurate records, no records of how resolutions are arrived at	5	6	11
Gender imbalance and lack of representation and bias	10	0	10
Lack of exposure and capacity building	9	0	8
Vested interests in subject matter and lack on honesty with some elders looking at task as gainful employment and not service	5	0	5
No laid down standards/ framework for filing complaints and resolving disputes, how to behave as an elder	2	2	4
Lack of infrastructure and stationery-office space and furniture, buildings for holding courts	0	3	3
Political interference	2	0	2
Lack of quorum and reducing number of elders	2	0	2
Lack of awareness on rights and freedoms of public	4	1	5
Multiplicity of hearings and apathy	2	0	2

Table 3: Challenges facing traditional dispute resolution processes in the community

2.2.3 Disputes Resolved By Use of TDRs

These are anti-communal acts that require resolution through the traditional dispute resolution mechanisms without being referred to courts. The disputes could range from the criminal to the anti-social behavior such as violent acts, disputes over resources, and social misconduct such as murder, theft, sexual misbehavior, etc. The five main disputes, according to the study, requiring resolution under the TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, and welfare issues such as nuisance, child welfare and neglect of elderly in that order.
(See figure 4 below).

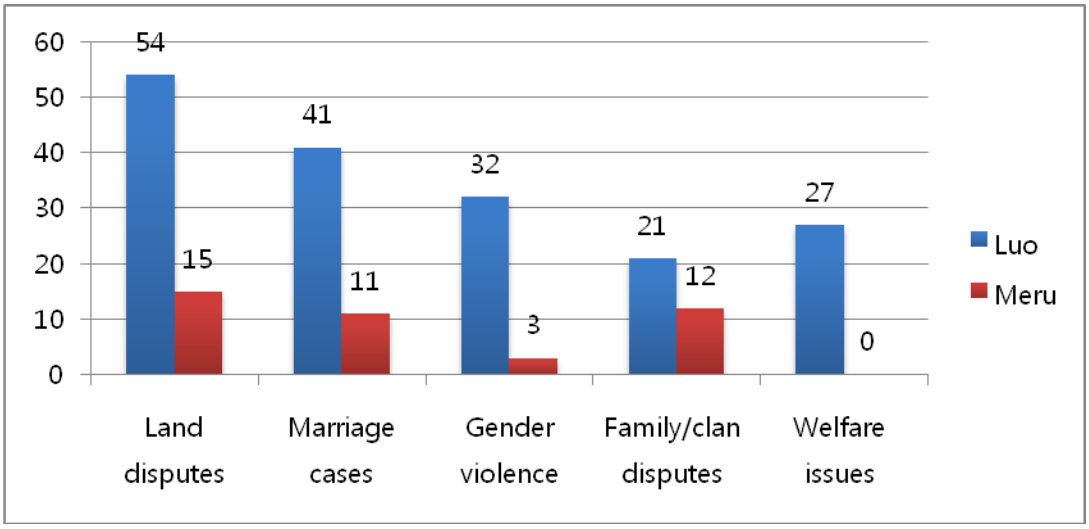

Figure 4: Five main disputes requiring resolution under the TDR mechanisms in the two communities

The Respondents reported that other disputes which required resolution using TDR mechanisms include cattle rustling, debt recovery, crop damages, overall community conflicts and resolution of political disputes in the community. (See table 3 below).

Nature of Dispute	Number of respondents		
	Luo	Meru	Total
Inheritance cases	23	2	25
Theft including cattle rustling	20	4	24
Resource scarcity	11	4	15
Debt recovery	12	3	15
Crop damage	10	0	10

Nature of Dispute	Number of respondents		
Witchcraft cases	0	2	2
Political dispute	3	0	3
Assault	6	3	9

Table 4: Disputes requiring resolution under TDR

Basically majority of respondents indicated that many cases are resolvable through TDRs except for serious criminal offences that require the intervention of the courts. The offences suitable for trial in the court of law in addition to compensation under the traditional dispute resolution mechanism were reported as murder, manslaughter, sexual offences, grievous harm and stock theft.

2.2.4 Role of Women in the Community Justice System

Most TDRs are dominated by men. Women do not hold any substantive stake in TDR proceedings. The literature available on TDRs indicates that they mostly discriminate against women on matters where their rights are involved. This is because TDRs are based on customary law which discriminates against women. However, the study undertaken indicates that women play a significant role in the community justice system. Similarly, there is overall perceived fairness in the determination of women matters (73%). However, the perceived significance of women's role in the TDR mechanisms and fairness in the determination of matters affecting them varied between the communities with more respondents (89%) reporting significant roles in the Luo community compared to 53% in the Meru community. (See figures 5 and 6 below).

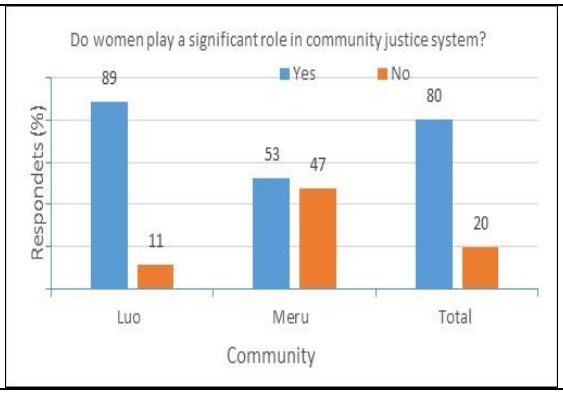

Figure 5*:* Significance of role of women in TDR

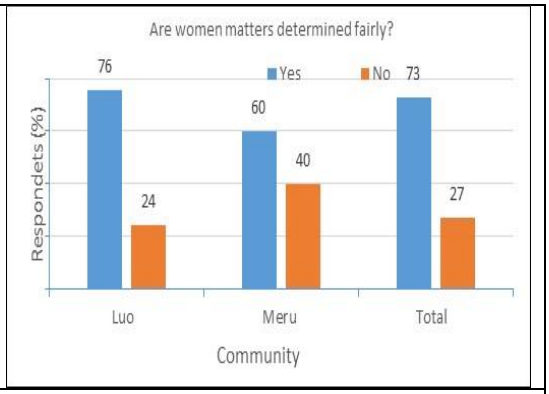

Figure 6: Determination of Women Matters in TDR

Some of the reasons offered to show that there is fair determination of disputes include the fact that elders are always concerned with the lives of the women and the children and are more keen on promoting their (women and children) welfare (25%), women are represented in most of the tribunals (38%), and that there is always room for fair hearing and appeals. Other reasons given were that women have the opportunity to appeal where not satisfied (19%) and tribunals are meticulous in conducting investigations to establish the truth (19%) before any determination. In addition, it was reported that most members of the tribunals have a good understanding of the community and yield fair and just determinations. Finally, councils of elders operate under an oath to do justice and they observe this responsibility without fear or favor. (See figure 7 below).

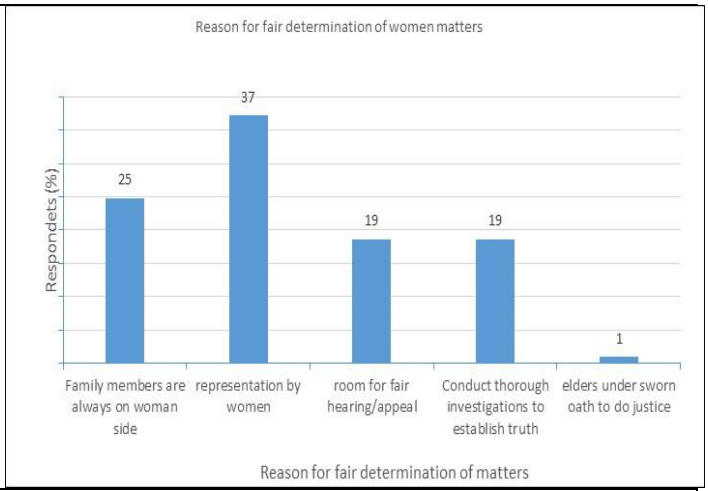

Figure 7: Reason for Fair Determination of Women Matters in TDR

However, some respondents felt that women matters are not (always) determined fairly. The reasons given include limited representation in terms of numbers, negative attitudes towards women by members, limited influence of tribunal outcomes by the women members, inability of women to communicate well and unfair and biased cultural practices and traditions. (See figure 8 below).

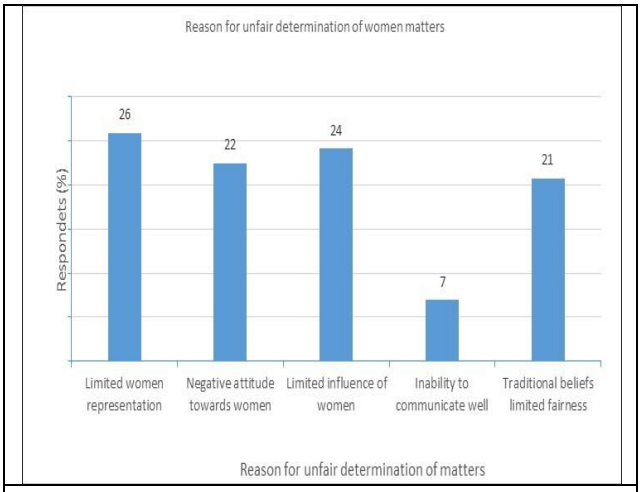

Figure 8: Reason for unfair determination of women matters

2.2.5 TDR Tribunal Proceedings

At the community level, dispute resolution through TDRs involves an informal hearing before a council of elders, local administration such as chiefs and assistant chiefs or highly respected and knowledgeable village elders. TDRs differ from the formal system in that whereas the formal system is a codification of written laws and common law, TDRs draw from communal customary law which is drawn from a community's culture and traditions. The formal system is characterised by retribution, hierarchy, defined jurisdiction and is highly adversarial. On the other hand, TDRs are inconsistent, uncoordinated, scattered and the jurisdiction is abstract. Whereas the formal legal system is individual-oriented, the TDRs are communal-based. Further, the focus of formal law is allocation of rights hence retributive and punitive in nature while the primary goal of TDRs is reconciliation, restoration and peaceful co-existence in the community.

Traditional dispute resolution proceedings are conducted in the open according to majority of the respondents (84%). The open sessions allow for free and open participation and contribute to fairness in the determination of disputes. (See figure 9 below).

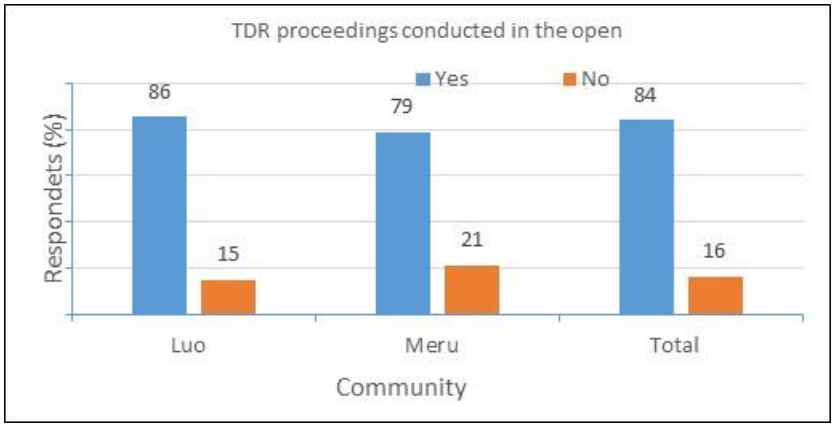

Figure 9: TDR proceedings conducted openly for members of the community to attend

In terms of compensation of council of elders or members of the alternative dispute resolution committees for their work, it was found that the council of elders in the Meru community is usually compensated. For the Luo community payment is mainly made to the committees or tribunals by the local administration including clan elders, village elders, and assistant chiefs. But no payment is made to the committee of the council of elders.

Where payments are made to the committees, the rates were reported to be largely fair, reasonable and affordable to majority of the people (79%). Such payments are usually agreed on between the disputants and can take any of two forms, in kind (in terms of animals or farm produce) or cash. Each of the disputants has to pay similar amounts to avoid any feeling of perceived biasness. The negotiated rates take into consideration the income levels of the disputants and are often made as a token. Sometimes the compensation takes the traditional form of slaughtering animals (goats) for the elders.

2.2.5.1 Composition of TDR Tribunals

The common traditional dispute resolution (tribunals/council of elders) committees mentioned are the Council of elders (Council of elders for the Luo and the Njuri Ncheke for the Meru community), the Local administration (Nyumba Kumi initiative, clan/village elders, Assistant chiefs and Chiefs' barazas), church elders and the children's departments. The councils of elders are mainly composed of men while in the local administration TDR mechanisms include women in the committees. Where both men and women are involved, the majority are men (the average being at 74%) with women forming only 26% of the membership. However the

composition is slightly higher in the Luo community with 74% compared to the Ameru's 67% proportion of men to women. (See figure 10 below).

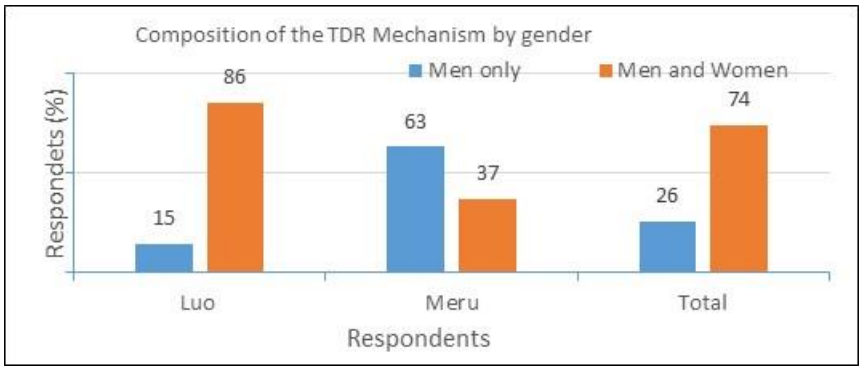

Figure 10: Composition of panels in TDR Mechanisms by Gender

In the Meru community, the membership of the council of elders is predominantly men with women being common mostly in the committees constituted to resolve certain specific issues under the local administration (mostly under the Chief and Assistant Chief's offices). The Luo community has women in both local administration and the council of elders. However participation of women in the Luo council of elders and to some extent in the committees is rather low due to the fact that elders engage in volunteer and free jobs which are not compensated and as such do not attract more women. It was also reported that women are mostly busy in household chores and therefore have limited time to engage in traditional committees.

It was established that a person's age is an important determinant factor in a person's membership to TDR tribunals/committees and especially with respect to membership in the council of elders. Most Councils of elders are constituted by persons who are above 50 years according to majority (79%) of the respondents, with the younger elders (51-50 years) being mostly clan/village elders under the local administration. In the Luo community, to be a member of the Council of Elders one has to be at-least 55 years for women and at least 65 years for men. The Meru have an age limit of over 50 years for one to be a member of the Njuri Ncheke. (See figure 11 below).

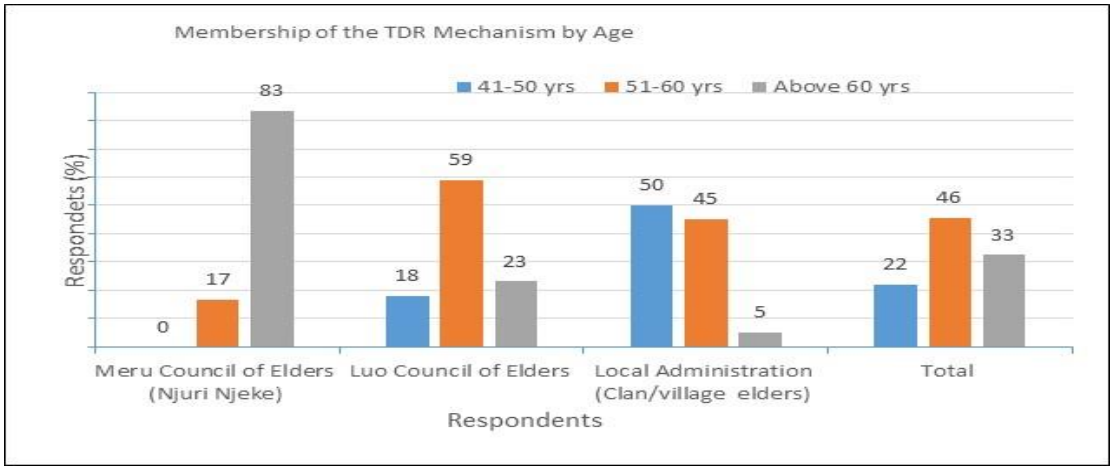

Figure 11: Age of the Members in TDR Tribunals/Committees

Other considerations for membership into these committees include gender, experience, knowledge and understanding of the traditions. Others are the overall status in the community including the social standing, integrity and commitment, maturity and family status such as marital status and success in raising a family. Special considerations among the communities include the residency status, clan representation, desire to volunteer, ability to keep matters confidential, foresightedness for the Luo and religious background among the Meru.

2.2.5.2 Accessibility of Traditional Dispute Resolution Mechanisms

Any dispute resolution mechanism should ensure access to justice for all persons and should be fair and affordable. The overall results from the field study indicate that majority of the respondents (84%) perceived TDR mechanisms as being accessible to all in the community. Among the Luo and Meru communities 85% and 83% of the respondents respectively, reported that TDR mechanisms are accessible. In cases where respondents felt some members of the community did not have equal opportunity to access traditional dispute resolution mechanisms, that was attributed to factors such as age, the status in the community, health/sanity, a person's character/behaviour with errant members of the community being dismissed, awareness of the TDRs with many people not being aware of the existence of the TDRs, lack of harmony between the TDRs and the statutes, conflict of interest, gender, high fees for some communities, knowledge of meeting venues and time, and proximity to the office.

The length of time taken to resolve most of the disputes in the two communities was found to be relatively short. According to 69% of respondents, disputes take less than 1 month to resolve, while 20% thought cases take 1-2 months. In the Meru community, majority of respondents (47%) said that cases take 1-2 months to resolve while 35% think cases take less than 1 month. In the Luo community, according to majority of respondents (79%), cases take less than 1 month to resolve, with only 12% expressing the view that cases take 1-2 months to resolve. (See figure 12 below).

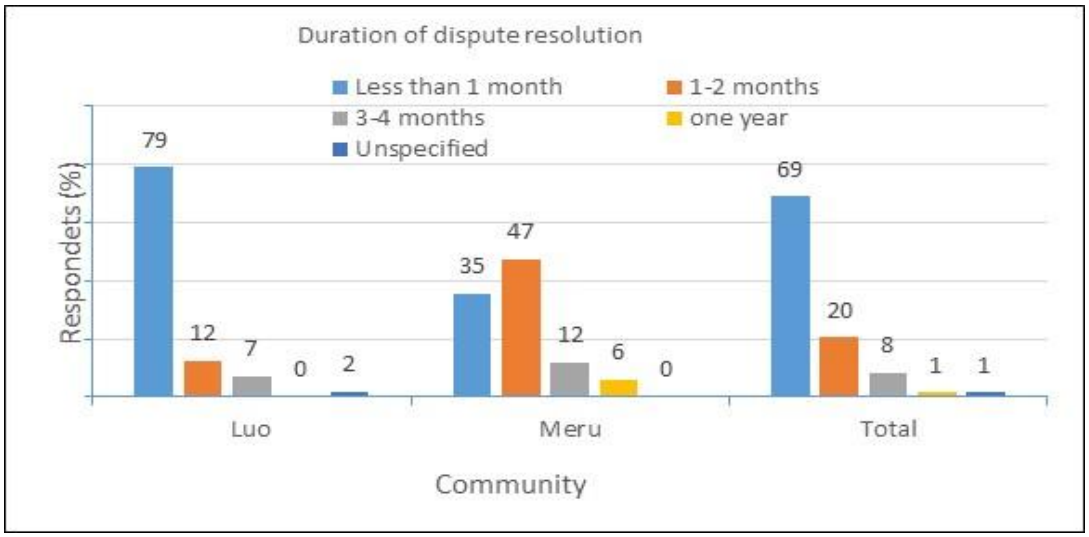

Figure 12: Duration of dispute resolution using the TDR mechanism

The period taken to resolve a dispute is heavily dependent on a number of factors including; the nature of the dispute with complex disputes involving land, communities and clans taking longer to resolve. Other determinants include the types of parties with the inter-clan and community disputes taking longer, the availability of the elders with cases being postponed severally due to lack of quorum or where the elders fail to turn up owing to lack of resources. The availability and number of witnesses and compliance of parties to the agreements is also crucial with longer periods taken where witnesses are many and do not comply with requirements. Accessibility of records and availability of adequate information about the issue under dispute is also important in determining the duration with longer durations taken to resolve cases which require time for further investigations and consolidation of background information.

In some instances, the disputants appeal to the elders to take a longer period to resolve the dispute.

2.2.5.3 Outcomes of Traditional Dispute Resolutions

Traditional dispute resolution processes often take various forms including arbitration, mediation or conciliation. The main forms in the communities include agreements facilitated by reconciliation (64%), mediated agreements (63%) and arbitral awards of the council of elders (35%). Other forms specific to the Luo community include peace building, cohesion and friendship (6%), advisory opinions and counseling (1%) and compensation of aggrieved parties (1%).

Usually the expected outcomes of traditional dispute resolution processes are transformation and overall behavior change, compensation of the complainant (restorative) and retribution or punishment of the offender for the offence. Other results common to the Luo community include reconciliation and maintenance of peace, security and harmony, enhanced development and self-sustenance, overall reduction of poverty, cohesion, integrity and avoidance of recurrence of the dispute.

2.2.5.4 Enforcement of Traditional Dispute Resolutions

The success of a mechanism depends on the enforceability of its resolutions. The field study found that parties are always willing to comply with resolutions and that court assistance may not be necessary to enforce the outcomes. However, in some complex cases, TDR Tribunals will require enforcement by courts of law. (See figures 13 and 14 below).

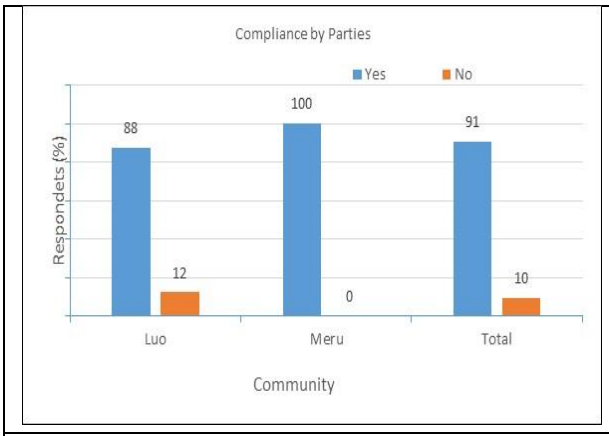

Figure 13: Willingness of parties to comply

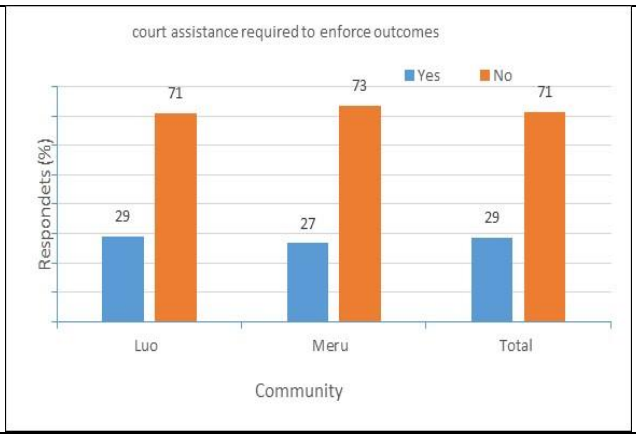

Figure 14: Requirement of court assistance to enforce outcomes

Awards emanating from traditional dispute resolution mechanisms are enforced through the elders and the communities who make follow-ups and observations to take note of the compliance, behavioral changes and existence of peace. There is also self-enforcing or individual persuasion where individuals opt to comply with the agreements made for fear of curses from the elders and the community. Parties are also required to report back to the committees and community on the compliance status after specified periods.

Other enforcement mechanisms include symbolism and oath taking by parties, which increase compliance for fear of curses, award of penalties with double fines awarded in case of non-compliance. Parties are forced to make formal decrees of compliance through signed agreements and involvement of government officers including the chiefs, ministry of agriculture officials in case of crop damage, among others. (See table 4 below)

Enforcement	Number of Respondents		
	Luo	Meru	Total
By Elders and community- through follow-ups and observance of the changes in a person's behavior, compliance and existence of peace	26	4	30
Self-enforcing -Individual persuasion since parties agree and that people fear curses from elders	5	8	13
Parties report back at specified period	12	0	12
Symbolism and oath taking- people fear curses from elders	6	2	8
Penalties and fines-Offenders forced to give according to verdict and fine is doubled in case of failure	2	4	6
Signature of decree/formal decrees	5	1	6
Involvement of government officials (local administration)	4	0	4
Compensation and awards done in public	4	0	4
Unleashing of threats	3	0	3
Appeal system	1	0	1

Table 5: Enforcement of the decisions/awards of the TDR mechanisms

Non-compliance to resolutions/decisions of the TDR Tribunals has various consequences. The main consequences include review of the resolutions through an appeal mechanism to establish if they are reasonable, forwarding of cases to the courts or disputants advised to appeal to a higher level. There is also provision for forceful enforcement by authorities including the chiefs, police and the elders. This could be through forceful payment of awards and confiscation of properties to pay the awards. Other consequences include heavy punishments and penalties, performance of rituals and invocation of curses on the party, unleashing of threats of excommunication from the community or being outlawed and sanctioned by the community.

2.2.5.5 Appeal Mechanisms in TDR

The field study found the existence of appeal mechanisms in Traditional Dispute Resolution mechanisms among the Luo and Meru communities. Overall, 70% of respondents indicated that the community dispute resolution process has appeal mechanisms through which unsatisfied disputants can lodge their complaints. The purpose of the existence of appeal mechanisms is to guarantee the disputants quality assurance in the decisions rendered by TDR Tribunals at all times. (See figure 15 below)

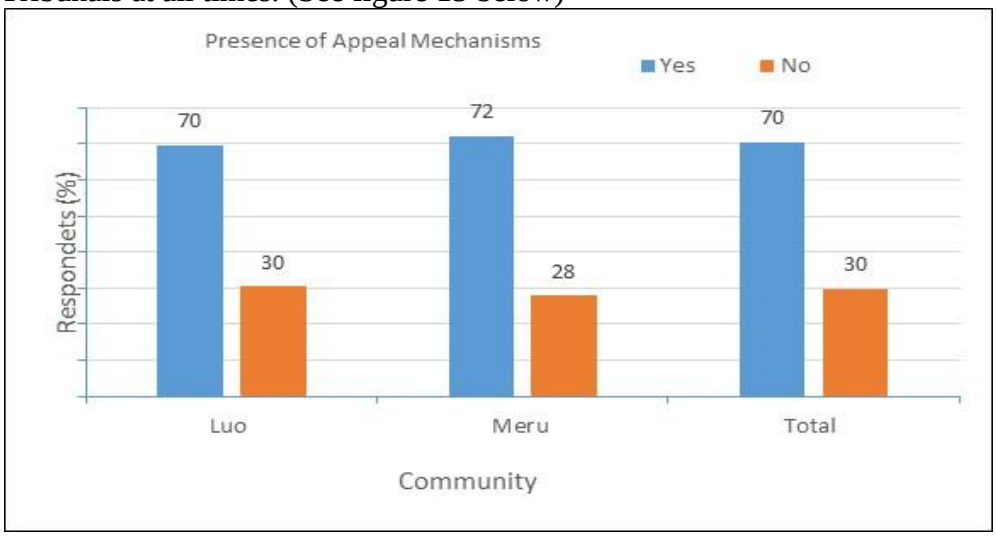

Figure 15: Presence of Appeal Mechanisms

The place to lodge an appeal is dependent on the nature and level of the dispute. Overall the disputants can either appeal at the same level in which case a new committee will be constituted to look into the case or at a higher level. Where disputes are handled by the local administration, the Nyumba Kumi groups are the first to consider the dispute. In the event a resolution is not reached, the dispute can then be referred to the Assistant Chief, then to the Chief. If the dispute is not resolved by the latter, it is referred to the Assistant County Commissioner and finally to the Deputy County Commissioner. Cases that cannot be resolved at that level are then referred to a court of law.

Where a dispute is heard by a Council of Elders, an unsatisfied disputant can appeal to the same committee of the council of elders, in which case a new committee chaired by a different council of elders will be formed to look into the case. The dispute can then proceed to the next level from village to location, to sub-county, to county, to president of the council of elders. Unsatisfied disputants at this level are then advised to go to court. It is noteworthy that

the Luo council of elders is organized into counties and sub-counties in line with the Constitution.

2.3 Other Field Studies

The Federation of Women Lawyers conducted a study on Traditional Justice Systems among communities in the coast province of Kenya. The main objective of the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.[36]

The International Commission of Jurists also published a report on the interface between the formal and informal justice systems in Kenya. The report examines and analyses the different

[36] The study found that there is a hierarchy of Traditional Justice Systems (TJS) from village, locational, divisional and district levels. TJS members are predominantly elders drawn from the community, except for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of Imams and religious leaders. TJS members are mostly elected by community members, but in some cases they are appointed by the chiefs.
With regard to the composition of the Traditional Justice Systems in the communities, the study found that in most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority. Two exceptional TJS exist among *Had Gasa* of the Orma community and the *Kijo* of the Pokomo community, whose TJS is made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male TJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.
The study found that Traditional Justice Systems are employed to resolve particular disputes at certain levels. At the village or locational level, TJS is used to resolve family and neighbourhood disputes while at the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Women-only TJS deal with matters related to women's sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM.
As regards the procedure during the proceedings, once a complaint is made the Respondent is summoned either orally or in writing and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. Thereafter, the TJS members deliberate and either reach a decision on the same day or a decision is communicated at a later date.
If a disputant is dissatisfied with the decision made he/she may appeal to the next level of the TJS. Where a TJS decision is not complied with, the matter may be referred to the chief. Enforcement of decisions by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only *Had Gasa* punishment may be meted out in the form of beating but the Chief has to be notified of such punishments.
The study found that men and women generally consider TJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operates to deny women's claims, for example to land. TJS are also vulnerable to vested interests of the community. Women's lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows.

forms of TJS and ADR using the integrity 'lenses' and elucidates on them. The research makes a concise comparison between the formal and informal justice systems drawing key lessons which can be used to integrate an efficient and responsive justice system in the country. The research also explores the existing efforts to mainstream the use of IJS as an alternative to the court administered justice, the successes, challenges and way forward. It also assessed the adequacy of existing legal, legislative and policy framework on the same and suggests amendments.[37]

The Chartered Institute of Arbitrators also organized a forum for ADR stakeholders in Kenya which was held on 22-23rd October 2014 at the Windsor Golf Hotel. The forum observed that Traditional Dispute Resolution is the oldest system of dispute resolution with clear foundations and acceptance by its users. It therefore does not require legitimization from the state.

The fact that communities have differing practices with regard to traditional dispute resolution, poses a significant challenge in the development of rules and standardization of practice for traditional dispute resolution.

2.4 Alternative Dispute Resolution Mechanisms (ADR)

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. All African communities had their own defined dispute resolution mechanisms. Similarly, each African community had/has a council of elders that oversees the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics /qualifications.

[37] The report finds that many Kenyans are frustrated and dissatisfied with the court process hence the tendency to trust alternative means of accessing justice. TJS are viewed as being accessible, impartial and affordable. It is also incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred.

The TJS hardly differentiates between criminal and civil cases. Land matters, family disputes, domestic violence, theft, marriage and divorce are some of the cases that are dealt with by TJS. Cases which cannot be resolved through the chiefs are often referred to the courts. There is a tendency to confuse 'referral' and 'appeal'. Since the formal justice system does not expressly recognize TJS the cases which are 'appealed' to the law courts have to start afresh.

The report finds that the TJS is trusted by communities because it is close to the people, it exhausts the issues between the parties, it is less expensive and is less time consuming due to the absence of elaborate procedures.

Traditional Justice Systems though widely accepted and used possess some negative traits which include their anarchical nature as a result of the laws and procedures being unwritten, inconsistency with the constitution and rule of law, infrequency and lack of structure, lack of defined jurisdictions, systemic biasness and lack of adequate mechanisms to enforce decisions.

The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication.

a) Negotiation

Negotiation is an informal process and one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.[38] The focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both mutual and individual interests. The aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.[39] The aim of negotiation is to harmonize the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

b) Mediation

It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.[40] In the TDR process through mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a

[38] See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994).
[39] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.
[40] Ibid.

solution. The mediator usually endeavours that peace and harmony reign supreme in the society at whatever level of mediation. In mediation, there is no victor nor vanquished.[41]

Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.

c) **Adjudication**

In adjudication, the elders, Kings or Councils of Elders would summon the disputing parties to appear before them and orders would be made for settlement of the dispute.[42] These were in form of fines or other appropriate remedies. The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.[43]

d) **Reconciliation**

Once a dispute was heard before the Council of Elders, the parties would be bound to undertake certain obligations towards settlement.[44] These were mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there was reconciliation which would result in restoration of harmony and mending relationships of the parties.[45]

e) **Problem-Solving Workshop**

The focus of this method is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. The workshop provides an opportunity for the parties to understand the root causes of the conflict and explore the available options for settlement.[46] For instance, in pastoral communities such as the Somali and Borana,

[41] Stein, D., "Community mediation and social harmony in Nepal," (2013). Available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.1074&rep=rep1&type=pdf

[42] Ajayi, A.T and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit at p. 150.

[43] Ibid, p.150; See generally also, Simiyu, V.G., "The democratic myth in the African traditional societies," *Walter Oyugi et. al* (1988), pp. 49-70.

[44] See generally, Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965).

[45] Ibid.

[46] See generally, Organization for Security and Co-operation in Europe (OSCE), "Perspectives of the UN & Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices," February 2011. Available at

the community leaders would arrange the problem solving meetings in which members drawn from each community come together to brainstorm on the most appropriate ways to resolve disputes over grazing lands and watering points.[47]

3.0 Analysis of the Legal, Policy and Administrative Framework for TDRs and Other Community Based Justice Systems

3.1 Legal Framework

Currently, there is no single statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The customs and traditions are handed down from one generation to the next. In addition, there is no sort of documentation for TDRs in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. To safeguard this, a few communities have introduced record keeping for agreements made at the conclusion of the TDR process. However, the problem persists due to illiteracy among traditional leaders and lack of formal training in record keeping.

3.1.1 The Constitution, 2010

An attempt to bring TDRs within the ambit of formal law has been achieved through the promulgation of the Constitution in 2010. In this regard, Article 159 (2) (c) and (3) envisages the substantive constitutional provisions for TDRs. Article 159 (1) provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of judicial authority courts and tribunals shall be guided by principles, *inter alia*, that:

(a) Justice shall be done to all, irrespective of status;
(b) Justice shall not be delayed;

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http://peacemaker.un.org/sites/peacemaker.un.org/files/PerspectivesonPreventiveandQuietDiplomacy_OSCE2011_0.pdf

[47] See generally, Walton, R.E., "A problem-solving workshop on border conflicts in Eastern Africa," *The Journal of Applied Behavioral Science* Vol.6, No. 4, 1970, pp. 453-489.

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
(d) Justice shall be administered without undue regard to procedural technicalities; and
(e) The purpose and principles of this Constitution shall be protected and promoted.

By stipulating that Justice shall be done to all, irrespective of status, Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the Constitution. Undoubtedly, access to justice is the overall goal of traditional justice systems in most communities. Article 159 also mirrors the spirit of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 48 envisages the right of access to justice and provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The rationale of the constitutional recognition of TDRs is to validate alternative forums and processes that provide justice to Kenyans. Technically, the Constitution contemplates "access to justice in many rooms" such that people can seek redress for violations of their rights in other forums of their choice rather than the formal courts.

3.1.2 Civil Procedure Act and Rules, Cap 21

The Civil Procedure Act and rules embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. An analysis of the Act and Rules shows that the Act and Rules envisage enabling provisions within which TDRs can be supported.

To start with, *Section 1A (1)* of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[48] Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDRs are definitely part of such options. The wording of Section 1A is as follows:

[48]Section 1A (2). The overriding objective has been viewed as the gate keeper to the just practice of litigation and the cornerstone upon which the Civil Procedure Rules are built.

> *(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*
> *(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*
> *(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective.

Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice; the court can promote the use of TDRs. In this regard, where a matter has been referred to TDRs, the Court ought to have powers to extend limitations set under the Limitation of Actions Act. Section 3A read together with Article 159 of the Constitution ought to be instrumental in extending time limitations on a case by case basis. Similarly, in reliance to the inherent powers, the courts can enforce any agreement, orders or fines imposed in TDR proceedings.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee (MAC). The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators. The Chief Justice has since appointed Members to the Committee and had them gazetted.[49] The *Mediation (Pilot Project) Rules, 2015* have also been gazetted.[50] These rules are

[49] Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.

[50] Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170,* 9th October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.[51] The *Mediation (Pilot Project) Rules, 2015* provide for:

(a) Training of mediators
(b) Accreditation of mediators
(c) Registration of mediators
(d) Conduct of mediators
(e) Confidentiality
(f) Evidence in mediation
(g) Immunity of mediators
(h) Code of Ethics for mediators
(i) Disciplinary action against mediators; and
(j) Court annexed mediation

The pilot project is ongoing on trial basis in Nairobi Milimani Court and its success rate will determine if and how the same will be rolled out to the rest of the stations in the country.
Further, the use of TDRs in resolution of civil disputes can be promoted under *Order 46 rule 20* of the Civil Procedure Rules which provides as follows;

> *"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."*

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR and TDRs or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDRMs and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

Under Order 46 rule 20 (2), a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment

[51] Rule 2: "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

3.1.3 Evidence Act, Cap 80

The application of TDRs in dispute resolution can be promoted under this Act by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses (Part I of the Act), competency of witnesses and rules as to examination of witnesses.

The strict rules of evidence have caused substantial injustice for many litigants. Even lawyers find difficulties in following these rules strictly. There is therefore a need to simplify these evidential rules to cover situations where informal systems of dispute resolution are being used. Indeed, Article 159 (2) (d) of the Constitution puts emphasizes on substantive justice rather than strict adherence to rules of procedure. In Kenya, adherence to the strict rules of evidence under the Act has resulted in substantial injustices to many litigants. Thus, the entire Act should be reviewed with a view of promoting substantive justice.

3.1.4 Judicature Act, 1967

The Judicature Act makes provisions to govern the jurisdiction of the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. Section 3 of the Act provides for the sources of law in Kenya and stipulates that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with;

(a) the Constitution;
(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August,1897, and the procedure and practice observed in courts of justice in England at that date.

Notably, a proviso has been introduced into this section to enable courts consider circumstances of Kenya when applying English Law. The proviso reads that the common law, doctrines of equity and statutes of general application shall apply so far only as the

circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Section 3(2) encapsulates the repugnancy clause and states *that the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.*

In effect, Section 3(2) of the Act ranks African customary law at the bottom of the hierarchy of laws that are to guide courts in civil cases. This Act should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution. The rider in section 3 (2) of the Act on the application of customary law may thus not be applicable in view of Articles 11 on culture and 159 of the Constitution which recognize the use of traditional dispute resolution mechanisms in the interest of enhancing access to justice.

3.1.5 Limitation of Actions Act, Cap 22

This Act sets down the statutory period after the expiry of which a cause of action lapses. For instance, Section 4 of the Act provides that actions based on contract may not be brought after the end of six years from the date on which the cause of action arose and actions founded on tort may not be brought after the end of three years from the date on which the cause of action arose. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. Section 22 which provides for extension of the limitation period in cases of disability should be reviewed to provide other instances where a suit may be brought in the interest of justice notwithstanding the lapse of time.

To promote TDRs in dispute resolution, Parliament should amend this Act such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

3.1.6 Kadhis' Courts Act, Cap 11

The Kadhis' Courts Act provides for the law and procedure to be adhered to in matters before the Kadhi Courts. Section 5 of the Kadhis' Courts Act provides that a Kadhi's Court shall have and exercise jurisdiction in matters involving the determination of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Muslim/Islamic law is derived from the customs and traditions of persons who profess Islamic faith.

There are very few Kadhis' courts and Kadhis to meet the justice needs of the Kenyan Muslim population. Although the Kadhis' Courts Act requires the Chief Justice to make rules of practice and procedure for these courts, this has not been done to date. For these courts to fulfill their mandate, the Chief Justice needs to make these rules so that they can use the correct Islamic law procedures, practice and evidence. The Act needs further review to make provision for the appointment of women kadhis. Rules of procedure of Kadhi Courts should be developed and enacted to standardize the procedures and practices of these courts in line with the constitutional right to enhance access to justice for all.

3.1.7 Appellate Jurisdiction Act, Cap 9

The Appellate Jurisdiction Act governs the procedure for appeals from the High Court to the Court of Appeal. Just like the Civil Procedure Act, Section 3A of the Appellate Jurisdiction Act embodies the overriding objective which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. Pursuant to the overriding objective, the Court of Appeal is enjoined to give effect to the overriding objective during the exercise of its powers under the Act or the interpretation of any of its provisions. In the same way, advocates in an appeal to the Court of Appeal are under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court. The application of TDRs in the appellate process can further the achievement of the overriding objective where the matter in dispute emanates from customary law.

Moreover, section 3B specifies the duty of the Court in furtherance of the overriding objective in appeals. To this end, courts are enjoined to handle all matters presented before them for the purpose of attaining the just determination of the proceedings, the efficient use of the

available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and through the use of suitable technology.

3.1.8 Land Act, 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The procedural law on land matters is embodied in the Land Registration Act 2012. Section 4 of the Land Act lays down the guiding values and principles of land management and administration. These include:

(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;
(d) transparent and cost effective administration of land;
(e) conservation and protection of ecologically sensitive areas;
(f) elimination of gender discrimination in law, customs and practices related to land and property in land;
(g) encouragement of communities to settle land disputes through recognized local community initiatives;
(h) participation, accountability and democratic decision making within communities, the public and the Government;
(i) technical and financial sustainability;
(j) affording equal opportunities to members of all ethnic groups;
(k) non-discrimination and protection of the marginalized;
(l) democracy, inclusiveness and participation of the people; and
(m) alternative dispute resolution mechanisms in land dispute handling and management.

This Section promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDRMs can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDRMs.

3.1.9 Marriage Act, 2014

The Marriage Act 2014 is the current marriage regime in Kenya. This Act repealed pre-existing legislation on various types of marriages.[52] Under section 3 of the Act, a marriage is defined as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. All marriages registered under the Act have the same legal status. The Act recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

Part V deals with customary marriages and envisages rules to govern customary marriages. These include rules pertaining to notification of marriage, celebration of marriage and payment of dowry. Part X of the Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. Section 68 provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage. The process of mediation or traditional dispute resolution should conform to the principles of the Constitution.

3.1.10 Matrimonial Property Act, 2013

Section 11 of this Act stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives.

[52] The Marriage Act, cap 150, the African Christian Marriage and Divorce Act. Cap 151, the Matrimonial Causes Act. Cap 152, the Subordinate Court (Separation and Maintenance) Act. Cap 153, the Man Marriage and Divorce Registration Act. Cap 155, the Mohammedan Marriage Divorce and Succession Act. Cap 156, the Hindu Marriage and Divorce Act. Cap 157

3.1.11 Industrial Courts Act, 2011

The Industrial Courts Act governs the procedure to be used in Industrial Courts (now known as the Employment and Labour Relations Court)[53] while adjudicating on labour and employment related disputes. Under section 15, the Act empowers the court to adopt alternative dispute resolution mechanisms in dispensation of justice. Section 15 reads:

> *Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*

To strengthen the utilization of ADR and TDR mechanisms in resolution of labour and employment disputes, this section mandates the court to avoid determining any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement through ADR or TDRs.

Further, the Act empowers the courts to refer a dispute to conciliation at any stage of the proceedings if it becomes apparent that the dispute ought to have been referred for conciliation or mediation. In this case, the Court is required to stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

The Industrial Courts Act also embodies the concept of access to justice as envisaged in section 29. This section states that the Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties. Pursuant to the need for access to justice, the Chief Justice is empowered to designate a Judge in a county as a Judge to determine labour or employment disputes in the particular county. This may be done by notice in the *Gazette* pursuant to which the CJ appoints certain magistrates to preside over cases involving employment and labour relations for a particular area.

[53] Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.

3.1.12 Commission on Administrative Justice Act, 2011

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions. Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration. In the last five years, the Commission on Administrative Justice has received complaints with the numbers increasing annually since the promulgation of the Constitution in 2010.[54] The largest percentage of these complaints emanates from Police service, Judiciary land related issues, to mention but a few.[55] In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.[56]

3.1.13 The National Land Commission Act, 2012

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya. It also provides for the operation, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250(2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.

Under section 5 (f)[57] the Commission is mandated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

[54] The Commission on Administrative Justice (The Office of The Ombudsman), *Annual Report 2015*, No. 29/2016, ISBN: 978-9966-1735-5-3, pp. 8-10.
[55] Ibid, p.10.
[56] See Amollo, O., "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," *Alternative Dispute Resolution*, Vol. 2, No.1, 2014, pp. 92-105 at pp.101-105.
[57] National Land Commission Act, No. 5 of 2012, Laws of Kenya.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Section 18 provides for the establishment of County Land Management Boards tasked with managing public land. It is imperative that the section be amended in terms of the composition of the Boards so as to include community leaders.

3.1.14 National Cohesion and Integration Act, 2008

Section 49 provides for conciliation to be conducted by the National Cohesion and Integration Commission in appropriate cases**.** Under this section, if the Commission considers it reasonably possible that a complaint may be conciliated successfully, the Commission shall refer the complaint to the Secretary. Section 50 provides for the procedure to be used in cases where conciliation is inappropriate. In accordance to this section, if the Commission does not consider it reasonably possible that a complaint may be conciliated successfully, it shall notify the complainant and the respondent in writing. Within sixty days after receiving the Commission's notice under subsection (1), the complainant, by written notice, may require the Commission to set the complaint down for hearing and the Commission shall comply with such notice.

Section 51 mandates the Commission to conduct conciliation. It provides that the Commission shall make all reasonable endeavours to conciliate a complaint referred to it under section 49 and may, by written notice, require any person to attend before the Commission for the purpose of discussing the subject matter of the complaint or produce any documents specified in the notice.

Section 52 provides for conciliation agreements where the parties to the complaint reach an agreement with respect to the subject matter of the complaint. The Secretary is required to record the agreement and the parties to be bound to comply with such agreement as if it were an order of the Commission.

3.1.15 Supreme Court Act No.7 of 2011

This Act provides for the jurisdiction of the Supreme Court of Kenya and provides the procedure to be followed by the court. Section 3 stipulates the objects of the Act which include:

(a) asserting the supremacy of the Constitution and the sovereignty of the people of Kenya;

(*b*) provide authoritative and impartial interpretation of the Constitution;

(*c*) ***develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth*;**
(*d*) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
(*e*) improve access to justice; and
(*f*) provide for the administration of the Supreme Court and related matters.

Rule 54 of the Supreme Court Rules 2012 provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters**.** It states:

The Court may;
(a) in any matter allow an amicus curiae;
(b) appoint a legal expert to assist the Court in legal submissions; or
(c) at the request of a party or on its own initiative, appoint an independent expert to assist the Court on any technical matter.

This section should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

3.1.16 Environment and Land Court Act, 2011

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

Section 4 establishes the Environment and Land court which is a superior court of record with the status of the High Court. Section 13 specifies the jurisdiction of the Court and states that:

> The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land.

Pursuant to subsection 2, the court is empowered to hear and determine disputes relating to environment and land including disputes:

1. Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources;
2. Relating to compulsory acquisition of land;
3. Relating to land administration and management;

4. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
5. Any other dispute relating to environment and land.

Section 18 embodies the guiding principles to guide the court and they include the principle of sustainable development including the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law. Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court stays proceedings until such condition is fulfilled.

Section 26 provides for the right of access to justice and provides that the court shall ensure reasonable and equitable access to justice to its services in all counties.

3.1.17 The Legal Aid Act, 2016

The Legal Aid Act is meant to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. The Act is relevant in the mainstreaming of TDR and ADR mechanisms as it defines "legal aid" to include:[58]

(a) legal advice;
(b) legal representation;
(c) assistance in —
    (i) resolving disputes by alternative dispute resolution;
    (ii) drafting of relevant documents and effecting service incidental to any legal proceedings; and
    (iii) reaching or giving effect to any out-of-court settlement;

[58] S.2., The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

(d) creating awareness through the provision of legal information and law-related education; and

(e) recommending law reform and undertaking advocacy work on behalf of the community.

Section 3 thereof provides that the object of the Act is to establish a legal and institutional framework to promote access to justice by —

(a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;
(b) providing a legal aid scheme to assist indigent persons to access legal aid;
(c) promoting legal awareness;
(d) supporting community legal services by funding justice advisory centers, education, and research; and
(e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

Section 5 (1) establishes the National Legal Aid Service, whose one of the functions include to, inter alia: establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; encourage and facilitate the settlement of disputes through alternative dispute resolution; undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; promote the use of alternative dispute resolution methods; and take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable sections of the society on their rights and duties under the Constitution and other laws.[59]

3.1.18 Community Land Act, 2016

The Community Land Act, 2016[60] encourages the use of TDR and ADR in management of community land disputes. Section 39(1) provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Section 40(l) provides that where a dispute

[59] S.7 (1), The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

[60] Community Land Act, 2016, No. 27 of 2016, Laws of Kenya.

relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation. Section 41(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

3.1.19 The High Court (Organization and Administration) Act, 2015

The High Court (Organization and Administration) Act[61] was enacted to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.

Section 3(1) provides that in exercise of its judicial authority, the Court shall —

(a) be guided by the national values and principles set out in Article 10 of the Constitution;

(b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;

(c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;

(d) be independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice; and

(e) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.

With regard to ADR, section 26(1) provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute.'

Section 26(2) provides that 'the Court shall, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.'

Section 26(3) provides that 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation,

[61] The High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.

mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.'

Section 26 (4) provides that 'where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.'

3.1.20 The Court of Appeal (Organization and Administration) Act, 2015

The Court of Appeal (Organization and Administration) Act, 2015[62] was enacted to give effect to Article 164 (1) (a) and (b) of the Constitution; to provide for the organization and administration of the Court of Appeal and for connected purposes. Section 3(1) provides that in exercise of its judicial authority, the Court shall —

(a) be guided by the national values and principles set out in Article 10 of the Constitution;
(b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
(c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
(d) be independent and subject only to the Constitution and the law, which it shall apply impartially without fear, favour or prejudice;
(e) not be subject to any person or authority; and
(f) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs.

Section 36(1) provides that the Court shall ensure reasonable access to its services in all parts of the Republic.

[62] The Court of Appeal (Organization and Administration) Act, No. 28 of 2015, Laws of Kenya.

3.2 Policy Framework

Currently there is no policy on TDRs and other community based justice systems in Kenya. Thus, dispute resolution through TDRs and other community justice systems is communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDRs. The lack of a TDRs policy is an unfortunate situation since TDRs are widely used to resolve both interpersonal and inter-communal conflicts hence restoring peace and harmony amongst communities. The aim of a TDRs policy framework should be to recognize and affirm the importance of TDRs in the administration of justice and establish a clear interface between TDRs and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

3.2.1 Objectives of the policy framework

1. To harmonize and align TDRMs with the Constitution.
2. To establish a basis for an overarching legislation to align TDRMs with the Constitution.
3. To strengthen TDRMs as alternative justice framework in Kenya.
4. To determine/define the jurisdiction of TDRMs.
5. To recognize, protect and perpetuate positive cultures and traditions of the people of Kenya.
6. To establish/provide for a clear interface between TDRMs and formal justice systems.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDRs promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are referred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. National policy on ADR and TDRs should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community

leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

3.2.2 Policy Proposals

i. Provide minimum qualifications of TDRMs practitioners

Just like the Constitution provides for qualifications of judges for various courts, there is need to have a policy framework setting out the qualifications or designations of persons to preside over dispute resolution through TDRMs. For instance, the policy may require that the council of elders, traditional leaders or community leaders be knowledgeable and respected in the community, possess high integrity and impartiality.

ii. Accountability of TDRMs practitioners

Mechanisms should be put in place to ensure that TDRMs practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

iii. Continuous training of TDRMs practitioners

In order to link TDRMs to formal justice systems, there is a need to train TDRMs practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDRMs. Such curriculum should include themes such as human rights, restorative justice and social cohesion. Further, an enactment on TDRMs is necessary to provide for training programmes designed to promote efficient functioning of TDRMs.

iv. Defining the jurisdiction of TDRMs

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to

court. In defining jurisdiction, matters that emanate from customary law such as disputes involving land, marriage and inheritance, succession and property can be better resolved through TDRs. Similarly, some criminal matters such as petty thefts and trespass can be resolved through TDRs while felony offences like murder, robbery with violence, etc should be subjected to the court process.

v. Defining sanctions/remedies to be imposed in TDRs

The sanctions imposed in TDR processes should not contravene the Bill of Rights. For instance, the sanctions should not be discriminatory or of such a nature as to infringe on fundamental rights of the individuals. For instance, sanctions such as corporal punishment, banishment from the community and cursing are unconstitutional. It is highly recommended that remedies in TDRs be of a restorative nature.

The essence of restorative sanctions is expressed as follows: If a person realizes that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. It is an expression of an admission of guilt and an indication to the court of the sincerity of repentance. The sanctions may be individual sanctions or communal sanctions depending on the nature of the dispute.

vi. Provision for procedure in TDR processes

The policy framework should outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

vii. Provisions for Review and Appeal

The policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice. These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

viii. A clear referral system

There should be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

ix. Provision for record keeping

It is fundamentally prudent to keep records in a dispute resolution process whether formal or informal. The framework should provide for record keeping in TDR processes for instance through notes taking, videos, filming etc. To achieve this, there is need to embrace information technology in TDR processes. The government should provide resources to equip these processes with record keeping equipment and skills.

x. Entrenchment of the Bill of Rights

The practice of TDRs should adhere to human rights standard. In this regard, the mechanisms used and the proceedings should be conducted in a way that does not violate fundamental rights and freedoms stipulated in the Bill of Rights. This can be achieved through sensitizing TDR practitioners about human rights such as gender equality and non-discrimination, fair hearing, public participation, access to justice, etc.

3.3 Administrative /Institutional Framework

3.3.1 Courts and Tribunals

Article 159 (2) (c) of the Constitutions requires courts and tribunals in the exercise of judicial authority promote the application of TDRs and ADR. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect

to the overriding objective.[63] Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives.

3.3.2 Independent Commissions

The Constitution 2010 created Independent Commissions to exercise oversight over other public bodies and mode of service delivery in various sectors. Some of the Commissions are involved in access to justice programmes for example human rights, land matters, public complaints and investigations, etc. Each Commission has an establishing Act which also provides for their constitution, mandate and powers. From the foregoing discussion on the legal framework for TDRs, it will be noted that some of the Acts establishing the Independent Commissions envisage provisions for promoting ADR and other appropriate dispute resolution mechanisms such as TDRs. These include the National Land Commission Act 2012, the National Integration and Cohesion Act 2008, Commission on Administrative Justice Act 2011 and the Kenya National Human Rights Act 2011.

3.3.3 Rules Committee of the Judiciary

The Rules Committee is established under section 81 of the Civil Procedure Act and tasked with enacting rules of practice for efficient dispensation of justice by the civil courts. Section 81(2) enlists matters for which such rules may be enacted. Paragraph (ff) provides for enactment of rules for the selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation under the Act.

3.3.4 County Governments

Kenya has 47 counties each with a county government formed under Chapter Eleven of the Constitution which Article 176 provides that there shall be a county government for each county consisting of a county assembly and a county executive. Although most government services have been devolved, the justice system is not devolved. However, there are courts of law in most counties in Kenya. Article 174 envisages the objects of devolution which include, inter alia, to foster national unity by recognizing diversity, promoting public participation in decision making and to recognize the rights of communities to manage their own affairs and further

[63]Section 1A (2)

development. Notably, county governments are proximate to the communities and are best placed to promote dispute resolution by TDRs and ADR.

3.3.5 Civil Society Organizations

Kenya has many civil society organizations which undertake advocacy and community programmes on areas of public interest such as human rights, land and environment. Most civil society organizations conduct peaceful campaigns and encourage communities to resolve dispute through mediation and reconciliation.

The leading civil society organizations in Kenya are religious based organizations such as National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK). Others include Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, etc.

3.3.6 Councils of Elders

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes such as assaults as well as inter-community disputes such as conflicts over pastures and water points. These include the *Kaya* elders among the Digo community, the *Njuri Ncheke* of Meru, the *Kiama* of the Kikuyu community and *Ker* among the Luo community.

3.3.7 Local Administration

The local authority plays a fundamental role in the justice system. The local chiefs and headmen resolve minor personal and community based disputes. Chiefs have statutory powers to summon people within their jurisdiction and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. The chief works closely with community leaders and elders to promote peace and harmony in the community.

4.0 A Survey of TDRMs from Other Jurisdictions

In traditional African societies, the emergence of conflict was inevitable as long as people interacted in various activities for instance in market places, cultural festivals, livestock grazing/watering, etc. In most communities, conflict resolution was conducted by council of elders, king's courts, chiefs and other open place assemblies and through use of other intermediaries.[64] The disputes were diverse and would differ from community to community. Thus, there is no uniform definition of a dispute in an African perspective. Some of the disputes in traditional African societies manifested themselves in the form of disagreements, family and market brawls, skirmishes and wars.

Once a conflict emerged, each community had its own approaches towards the resolution of the same. The essence of dispute settlement and conflict resolution in traditional African societies include: to remove the root-causes of the conflict; reconcile the conflicting parties genuinely; to preserve and ensure harmony, make each disputant happy and be at peace with each other again which required getting at the truth; to set the right atmosphere for societal production and development; to promote good governance, law and order, to provide security of lives and property and to achieve collective well-being.[65]

In this section, the paper discusses the traditional dispute resolution in selected countries in Africa and beyond. These countries include Nigeria, South Africa, Rwanda, Botswana, Ghana, Malawi and Australia.

a) Nigeria-Yoruba Community

The Yoruba community derives their traditional justice rules from customs and traditions which have been practised over a long period of time.[66] The Yoruba traditions, like in most

[64] See generally, Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict* Resolution, Vol. 6, No. 2, 2006, pp.9-33; See also Aredo, D. and Yigremew, A., "Indigenous institutions and good governance in Ethiopia: Case studies," *Good Governance and Civil Society Participation in Africa* (2008), p.141.

[65] See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *Perspectives on Traditional African & Chines Methods of Conflict Resolution* (2013), pp. 14-43.

[66] Idowu, W., "Law, morality and the African cultural heritage: the jurisprudential significance of the Ogboni institution," *Nordic Journal of African Studies*, Vol.14, No. 2, 2005, pp.175-192; see also Ademowo, A.J. and Adekunle, A., "Law in Traditional Yoruba Philosophy: A Critical Appraisal," *Caribbean Journal of Philosophy*, Vol. 2, No. 1, 2013, pp.345-354.

African communities were unwritten.[67] Memory and verbal art were paramount since the veracity of a tradition largely depended on the memory and knowledge of the forbearers who were regarded as wise men and women.[68] To maintain the traditions and safeguard them against distortion, the Yoruba people would arrange performances in which the traditions were dramatised and any inconsistency would be pointed out and rectified.[69] Whenever a dispute arose, the disputant would submit it to a council of elders who would sit under a tree and ventilate the dispute and explore the most appropriate option to address the matter.[70] The talks were conducted with absolute decorum and solemnity. The principle of truth reigned in the dispute resolution process especially because the elders invoked the spirits of their ancestors and would warn parties of the aftermath of failure to tell the truth.[71] Oaths were administered at the commencement of the conflict resolution talks to subject the parties to the jurisdiction of the elders and commit them to tell the truth.[72]

Among the Yoruba, conflict resolution process had a hierarchy. Dispute resolution would be done at the family level (*Idile*-nuclear family), extended family level *(Ebi)* and village or town level. These levels comprised the political organisation of the Yoruba.[73] Disputes resolved at the family level were mainly family disputes such as conflicts between co-wives and sibling disagreements. These disputes would be easily resolved by scolding and warning the guilty party and appeasing the victim.[74]

[67] Asiwaju, A. I., "Political Motivation and Oral Historical Traditions in Africa: The Case of Yoruba Crowns, 1900-1960," *Africa: Journal of the International African Institute*, Vol. 46, No. 2, 1976, pp. 113-127; See also Law, R., "How Truly Traditional Is Our Traditional History? The Case of Samuel Johnson and the Recording of Yoruba Oral Tradition," *History in Africa*, Vol.11, 1984, pp.195-221.
[68] See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *op cit*.
[69] See Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47 at p.44.
[70] See generally, Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* 3, No. 2, 2013, p.144.
[71] Ibid, p.147.
[72] See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *op cit*.
[73] Ibid, p.148; See also Ojigbo, A.O., "Conflict Resolution in the Traditional Yoruba Political System (La résolution des conflits dans le système politique traditionnel des Yoruba)," *Cahiers d'études africaines* (1973), pp. 275-292.
[74] Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.*8*, No.2, 2014, pp.138-157, at pp.143-144.

During the hearings, women were supposed to be on their knees unless the Chief or King asked them to stand or sit. In criminal cases, the Chief-in -Council had jurisdiction to hear criminal cases and even pass a death sentence.[75]

In terms of remedies available to the innocent party, the Yoruba mediators rarely awarded damages in civil matters. To them, restoration of peace and harmony was of paramount importance than awarding damages.[76] This notwithstanding, the mediators would award damages in some cases as a way of deterring the re-occurrence of a particular anti-social behaviour.[77]

b) South Africa

In South Africa, there are traditional courts which operate parallel to the formal courts system.[78] The traditional courts have jurisdiction on matters emanating from the customary laws of the various communities.[79] In addition, some communities have their own internal dispute resolution structures. For instance, in the Pondo community, there were institutions of *Mat association* which presided over the distribution of foods at social gatherings.[80] Disputes would be heard at a higher level involving at least two *Mat associations*. The Mats applied mediation and reconciliation in dispute settlement. The court of headmen had powers to compel parties to comply with orders made for resolution of the dispute**.** Appeals from the lower courts (Mat associations) would go to the higher court, the chief's court.[81] The proceedings before the chief's court were formal and examined the decisions of the headman in light of the proven testimony and the sanctions imposed.[82]

[75] Ibid, p.144.
[76] Ibid, p.148; See also generally, Oko E.O., et al, "Restoring justice (ubuntu): an African perspective," *International Criminal Justice Review*, Vol.20, No. 1, 2010, pp.73-85.
[77] Ibid, pp.144-145; See also generally, Gbenda, J.S., "Age-long land conflicts in Nigeria: a case for traditional peacemaking mechanisms," *Ubuntu: Journal of Conflict Transformation* Vol.1, No. 1_2 (2012), pp. 156-176.
[78] Chirayath, L., et al, M., "Customary law and policy reform: Engaging with the plurality of justice systems," *Background paper for the WDR*, 2006, at pp.20-25. Available at http://documents.worldbank.org/curated/en/675681468178176738/pdf/336550Customary1Law01WDR060bkgd0paper1.pdf [Accessed on 22/04/2017].
[79] Ibid, pp.20-25.
[80] Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society, op cit, at p.148.
[81] Ibid, p.149.
[82] Ibid, p.149.

c) Botswana

Botswana is a country well known for preservation of its cultural heritage.[83] In Botswana, there is a well-organized system of traditional courts. The Botswanan justice system is dualistic comprising of formal courts and customary courts.[84] The customary courts are established by the Minister pursuant to the Customary Courts Act of 1974. The customary court structure comprises of the Customary Court Commissioner, Customary Court of Appeal and the Customary Courts.[85]

The dispute resolution process commences at the family level where the father as the head of the family presides over disputes between family members.[86] The next level is the family group level which comprises of a number of families which are closely related. After the family group level, there is the ward level which comprises of many family groups. The wards are headed by a headman in some tribes as well as headman and sub-chiefs in other tribes.[87]

The customary courts are headed by presidents appointed by a Minister.[88] Customary courts handle minor disputes mostly involving land matters, marriage and property disputes.[89] Notably, there is no legal representation in customary courts and the rules of evidence are relaxed. Judges are tribal, appointed by a community or tribal leader.[90] The sentences passed by judges may be appealed in a formal court system. The jurisdiction of customary courts is stipulated under the Customary Courts Act in respect of the causes of action as well as the geographical limits. The

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[83] See generally, Mnjama, N., "Preservation and Management of Audiovisual Archives in Botswana," *African Journal of Library, Archives & Information Science* Vol.20, No. 2 (2010); See also Denbow, J.R. and Thebe, P.C., *Culture and customs of Botswana* (Greenwood Publishing Group, 2006).

[84] Sharma, K.C., "Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana," (*Washington DC: World Bank*, 2005); See also Sklar, R.L., *The significance of mixed government in Southern African Studies: A preliminary assessment*, (University of the Witwatersrand, 1994); See also generally, Sanders, A.J.G.M., "The Internal Conflict of Laws in Botswana," *Botswana Notes and Records*, Vol.17, 1985, pp.77-88.

[85] Fombad, C.M., "Customary courts and traditional justice in Botswana: present challenges and future perspectives," *Stellenbosch Law Review= Stellenbosch Regstydskrif*, Vol.15, No. 1, 2004, p-166.

[86] See generally, Moumakwa, P.C., *The Botswana Kgotla system: a mechanism for traditional conflict resolution in modern Botswana: case study of the Kanye Kgotla* (Master's thesis, Universitetet i Tromsø, 2011); See also Adamolekun, L. and Morgan, P., "Pragmatic institutional design in Botswana--Salient features and an assessment," *International Journal of Public Sector Management*, Vol. 12, No. 7, 1999, pp.584-603.

[87] See generally, Nyati-Ramahobo, L., *Minority tribes in Botswana: The politics of recognition*, (London, Minority Rights Group International, 2008); See also Proctor, J.H., "The House of Chiefs and the political development of Botswana," *The Journal of Modern African Studies*, Vol.6, No. 01, 1968, pp.59-79.

[88] S.41 (3), Customary Courts Act of 1974, Laws of Botswana.

[89] Ss 11, 12 &13, Customary Courts Act of 1974, Laws of Botswana.

[90] U.S. Department of State, *Botswana Human Rights Practices*, 1995, Available at http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Botswana.html [Accessed on 23/2017].

Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.

d) Ghana

The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992.[91] The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs.[92] The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.[93] Despite the recognition of chieftaincy, traditional courts ceased to exist after independence.[94] The institution of chieftaincy does not have any legislative, administrative or judicial functions.[95] Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfill quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property matters, including divorce, child custody and land disputes.[96] The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.[97]

Moreover, the use of TDR in conflict resolution was successfully applied in Ghana to resolve a long-standing conflict between the Alavanyo and Nkonya communities who occupy the Volta region of Ghana. These communities lived as neighbours in the 19th century but there was a perpetual conflict over the decades. In 2006, a peace initiative was commenced involving a

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[91] See Constitution of the Republic of Ghana, Chapter Twenty-Two: Chieftaincy http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst22.html [Accessed on 21/04/2017].

[92] Ghana Legal, http://laws.ghanalegal.com/acts/id/81/chieftaincy-act[Accessed on 21/04/2017].

[93] S.1., *Chieftaincy Act of 1970* (Act 370), Laws of Ghana.

[94] See generally, Rathbone, R., "Native courts, local courts, chieftaincy and the CPP in Ghana in the 1950s," *Journal of African Cultural Studies* Vol.13, No. 1, 2000, pp. 125-139; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18,1990, p.194.

[95] See generally, Dzivenu, S., "The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana," *Political Perspectives*, Vol.2, No. 1, 2008, pp.1-30; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18, 1990, p.194.

[96] See generally, Ray, D.I., "Chiefs in their millennium sandals: traditional authority in Ghana—relevance, challenges and prospects," *Critical Perspectives in Political and Socioeconomic Development in Ghana. African Social Studies Series*, Vol. 6, 2003, pp. 241-271.

[97] See generally, Woodman, G., "Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria," *People's Law and the State* (1985), pp. 143-163; See also Sutton, I., "Law, Chieftaincy and Conflict in Colonial Ghana:The Ada Case." *African Affairs*, Vol.83, No. 330, 1984, pp. 41-62.

mediation committee, consultative committee and community pacesetters from the two communities.[98]

e) Australia

Australia is the home of the famous indigenous Aboriginal community. In South Australia, the Aboriginal Courts were established as pilots in 1999 and conferred with jurisdiction over matters involving the Aboriginal community.[99] However, the Aboriginal people felt that as litigants they had limited input into the trial process and in sentencing.[100] In their view, the courts were culturally alienating, isolative, and unwelcoming to them and their families.[101] To address these concerns, reforms were introduced to address the fears raised by the Aboriginal community. These reforms include the magistrates sitting at the same level and in close proximity to each other to facilitate direct communication and inclusion of a member of the Aboriginal community to sit with magistrates to advise the court on issues involving the Aboriginal customs and traditions.[102]

f) Rwanda

There are other cultures around Africa where TDR based systems have worked relatively well. The establishment of the Gacaca courts was meant to transform Rwanda from the colonial ideology of power dominance and redefine relations between the state and the society.[103] They would also re-unite the Rwandan people by eradicating the disunity ideology and encouraging reconciliation.[104] Through the framework of the Gacaca courts, home-grown traditions derived from Rwandan society replaced the divisive foreign ideologies.[105] The Gacaca are meant to build

[98] Perpertua, F.M. and Imoro, R.J., "Assessing the Effectiveness of the Alternative Dispute Resolution Mechanism in the Alavanyo-Nkonya Conflict in the Volta region of Ghana" *Institute of Development Studies; Department of Sociology University of Cape Coast, Ghana*, 2011.

[99] See generally, Harris, M., "From Australian courts to aboriginal courts in Australia-bridging the gap," *Current Issues Crim. Just.* Vol.16, 2004, p.26; Freiberg, A., "Problem-oriented courts: Innovative solutions to intractable problems?" *Journal of judicial administration*, Vol.11, No. 1, 2001, pp.8-27.

[100] See generally, Burgess, S., "Aboriginals in the courtroom: recognising cultural differences," *Bulletin (Law Society of South Australia)* Vol. 32, No. 11, 2010, p.12; See also Marchetti, E. and Kathleen, D., "Indigenous sentencing courts: towards a theoretical and jurisprudential model," *Sydney Law Review, The*, Vol.29, No. 3, 2007, p. 415.

[101] Ibid.

[102] Ibid.

[103] See generally, Meyerstein, A., "Between law and culture: Rwanda's Gacaca and postcolonial legality," *Law & social inquiry*, Vol.32, No. 2, 2007, pp.467-508.

[104] Raper, J., "The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide," *Pepperdine Dispute Resolution Law Journal*, Vol.5, No., 2012, p.1.

[105] Ibid, pp.5-7; Rettig, M., "Gacaca: truth, justice, and reconciliation in post conflict Rwanda?" *African Studies Review*, Vol.51, No. 03, 2008, pp.25-50.

a democratic culture and provide a policy of creating a true post-colonial state and restoring unity.[106]

The choice and installation of the Gacaca courts fit perfectly into this vision. They are a home-grown, almost pre-colonial resource. The courts are meant to fight genocide and eradicate the culture of impunity and have a mandate of reconciling Rwandans by re-enforcing unity.[107]

g) Malawi

The Malawian justice system has undergone remarkable reforms over the last decade and now has justice forums described as customary justice forums.[108] The forums operate under approximately 217 court centers presided over by magistrates.[109] They are estimated to handle about 90% of disputes in Malawi. They have jurisdiction over matters whose subject matter involves land, marriage, inheritance and property.[110]

5.0 Summary of Recommendations

5.1 General Recommendations

1. It is critical to identify the aspects of Traditional Dispute Resolution Mechanisms that contravene morality and are repugnant to the constitution and the law with a view to modifying them or have them eliminated.

2. There is a need to raise awareness on customary and religious laws and how they impact on women's rights. In particular, any customary practices that encourage or promote gender discrimination ought to be abandoned.

3. In order to eliminate the perception of bias and discrimination, Traditional Dispute Resolution Mechanisms ought to be restructured to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.

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[106] Ibid.

[107] International Institute for Democracy and Electoral Assistance, "the Gacaca Courts in Rwanda", 2008, extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 32.

[108] See generally, Schärf, W., et al., "Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums." (2011). Available at http://www.eldis.org/vfile/upload/1/document/1110/Access%20to%20justice%20for%20the%20poor%20of%20Malawi.pdf [Accessed on 22/04/2017].

[109] See generally, Forsyth, M., "A typology of relationships between state and non-state justice systems," *The Journal of Legal Pluralism and Unofficial Law*, Vol. 39, No. 56, 2007, pp.67-112.

[110] See DeGabriele, J., and Jeff, H., "Justice for the people: strengthening primary justice in Malawi," *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp.148-170.

4. More effort is needed in creating awareness to the public and the formal justice system on the existence, role and effectiveness of Traditional Dispute Resolution Mechanisms. This can be achieved through having clear provisions in law that promote the use of Traditional Dispute Resolution Mechanisms.

5. There is a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.

6. Introduction of technology in TDRs practice would greatly help in documentation and record keeping in TDR processes.

5.2 Legal and Policy Framework Recommendations

5.2.1 Policy Framework Recommendations

1. There is need to formulate an enabling Policy framework for ADR and TDRs. The framework to be enacted ought to address the following issues:

   i) Define and clarify the jurisdiction of TDRs and ADR. The matters that can be dealt with through TDRs and those which ought to be subjected to the formal court process need to be clearly prescribed;

   ii) Provide a framework for development of programmes, plans and actions for creation of awareness and the establishment of institutional mechanisms for promotion of TDR practice in all the applicable sectors of society;

   iii) The operationalization of Article 159 (2)(c) and (3)(a)-(c) of the Constitution and the development of a comprehensive regulatory and institutional framework to govern TDRMs;

   iv) Regulation and training of the various players involved in TDRMs;

   v) Restructuring of the TDRMs to ensure inclusiveness in the composition of TDRs;

   vi) Documentation of TDR proceedings;

   vii) Maintain informality in the TDR proceedings;

   viii) Identification of the most suitable system to be employed with respect to TDRMs in the formal legal systems;

ix) Mapping of TDR and stakeholders Remuneration of TDRMs practitioners;

x) Enforcement of outcomes of TDR processes;

xi) Development of a multi-sectoral policy implementation forum comprising of key stakeholders drawn from the justice sector;

xii) Ethical framework for TDRM and ADR practitioners;

xiii) Setting ethical standards for TDR practice; and

xiv) Protection of TDRMs and ADR consumers from unconstitutional or unlawful outcomes.

2. In formulating the policy framework for TDRMs the following guidelines should be taken into account:

I. TDRMs need to meet the constitutional threshold set out under Article 159 of the constitution;

II. The composition of TDRs needs to be all inclusive;

III. The outcomes of TDRMs and their enforcement need to be streamlined with constitutional requirements;

IV. TDRMs need to be kept as informal as possible;

V. Introduction of record-keeping and clear references for purposes of accountability and pursuit of justice through TDRs appeal mechanisms and the formal justice system;

VI. Remuneration of TDRMs practitioners and the necessary resources to run TDRs;

VII. Creation of awareness about TDRMs and their effectiveness in resolving disputes; and

VIII. Uniformity of TDRs procedures throughout the country to ensure that the process of arriving at outcomes is fair.

3. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the policy framework on TDRMs.

5.2.2 Legal Framework Recommendations

1. In order to foster an effective working relationship between the formal justice system and TDRMs, there is need to introduce court-annexed TDRMs and ADR. This would tackle the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower costs of accessing justice;

2. In order to ensure a smooth interaction between TDRMS and the formal justice systems, laws providing for strict and convoluted procedures need to be reviewed with a view to simplifying the rules and procedures. In particular, the following laws need to be reviewed and amended in order to accommodate TDRMs in their application:

   (i) The Civil Procedure Act and Rules, Cap 21- Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases;

   (ii) The Evidence Act, Cap 80 should be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d);

   (iii) The Judicature Act, 1967 should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution (Articles 11 and 44).

   (iv) Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

   (v) Kadhis' Courts Act, Cap 11 should be reviewed to make provision for the appointment of women Kadhis.

   (vi) The Appellate Jurisdiction Act should be amended to provide for application of TDRs in the appellate process where the matter in dispute involves customary law.

   (vii) Land Act, 2012, should be reviewed to ensure clear and substantive provisions that ensure: elimination of gender discrimination in law, customs and practices related to land and property in land especially in conflict management; encouragement of communities to settle land disputes through recognized local

community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.

(viii) Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution mechanisms provided for in the Act conform to the principles of the Constitution.

(ix) Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.

(x) Section 17 of the National Land Commission Act should be amended with a view to incorporating a requirement on the part of the Commission to consult or seek assistance from community leaders on matters pertaining to land. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders.

(xi) Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

3. There is need to formulate an enabling legal framework for ADR and TDRMs.

4. It is proposed to have a law to be known as ADR and TDR Mechanisms Act enacted to provide for the operationalization of Article 159 (2)(c) and (3)(a)-(c) of the constitution and to provide for the regulatory and institutional framework to govern the practice of

ADR and TDRMs. The formulation of the said legislation should be informed by the following guidelines:

a. The need to ensure that TDRMs meet the Constitutional threshold under Article 159(3) of the Constitution and the Bill of Rights;

b. The need to establish an efficient referral system for matters from courts of law to TDRs and vice versa depending on the nature of the dispute and steps taken by the disputants;

c. Provide for a clear review and appeal system in TDR and ADR;

d. Legal mechanisms for the formal recognition and enforcement of decisions made in TDR and ADR processes ought to be set up to make TDRMs more efficient;

e. The legislation should maintain informality of TDRMs;

f. Defining the jurisdiction of TDRMs;

g. Establishment of an efficient institutional framework for implementation and enforcement framework of TDRM Policies ;

h. Provide for enforcement mechanisms of TDRMs outcomes;

i. Abolish unconstitutional and/or unlawful TDRs and their outcomes; and

j. Establish collaboration between the National Government and the Devolved Governments to ensure that TDRMs are promoted and accessible to every person.

k. Collaboration between the National Government and the devolved units of governance to ensure that TDRMs are promoted in the counties and that every person has access to the mechanisms.

5. Kenya needs to adopt tested best practices in comparable jurisdictions with regard to TDRMs.

6.0 Conclusion

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal

processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation, despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

From the findings of the research and study conducted, there is a need for enactment of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study revealed that TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the TDRs be anchored in the legal and policy framework. The framework should harness the recommendations made in this paper for effective incorporation of TDRs and other community based process into the justice system. Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems is an idea that calls for attention, and effective implementation.

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