Chapter 2

Traditional dispute resolution mechanisms in the administration of justice in Kenya

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Abstract

The Constitution of Kenya 2010 recognises customary law and the use of traditional dispute resolution mechanisms (hereinafter 'TDRMs'), which are informal and culturally-appropriate justice systems in resolving disputes. Whereas several African countries have promoted the use of customary law by establishing customary courts, Kenya retains a system where both customary law and state law are subject to interpretation by state courts. The Kenyan Constitution cements this position by stipulating that TDRMs are to be promoted and encouraged by the Judiciary. This chapter examines how Kenyan courts have treated decisions emanating from TDRMs highlighting attributes of citizenship such as urbanisation and equality. It notes that the constitutional position creates doubts as to the future development of customary law and TDRMs in Kenya owing to the divergent and conflicting approaches taken by the judiciary over the years in interpreting customary law.

Keywords: Traditional dispute resolution mechanisms (TDRMs), customary law, access to justice

1 Introduction and background

Before the introduction and establishment of formal judicial institutions by the British colonial administration in Kenya, conflicts and disputes were settled through the machinery of traditional/customary justice structures.[1] The traditional/customary justice structures that exist amongst various communities in Kenya have been described by the Constitution as traditional dispute

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[1] F Kariuki 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems', 3. Available at https://su-plus.strathmore.edu/bitstream/handle/11071/3868/Customary%20law.pdf (Accessed 23-06-2019)

resolution mechanisms (TDRMs)[2] and governed by customary laws of the various ethnic groups. TDRMs are justice processes based on cooperation, communitarianism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.[3] In most cases, TDRMs resolve disputes by the applicable customary law, or other relevant customs, practices or rules, and often on a case by case basis. They generally blend various options that would result in the most restorative outcome.[4] For instance, whenever conflicts arise amongst most African communities, parties often resort to direct negotiations. Where those negotiations fail, parties may resort to having the dispute resolved either at the household level, extended family level, by the council of elders (such as the *Njuri Njeke* among the Meru people), or by elderly men and women who act as third parties in the resolution of disputes. In most of them, decisions are community-oriented with the victims, offenders (wrongdoers) and the entire community being involved and participating in the definition of harm (wrongdoing) and the search for a solution acceptable to all stakeholders.[5]

TDRMs are commonly used in rural areas and within informal settlements where people lack the financial wherewithal to access justice informal justice systems. Within urban areas, TDRMs may not necessarily be governed by African customary law, but also by the prevailing practices and customs, especially where people come from different ethnicities. It is reported for instance that communities living in the informal settlements of Kibera and Mukuru slums in Nairobi have formed their justice mechanisms that are

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[2] For a fuller discussion on the various tags and terminologies used to describe these justice structures, see generally F Kariuki 'Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology' available at http://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/535-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology/file (Accessed 23-06-2019)

[3] See E Sherry & H Myers 'Traditional Environmental Knowledge in Practice' (2002) 15(4) *Society & Natural Resources* 345-358, 351; M Johnston 'Giriama Reconciliation' (1978) 16 *African Legal Studies* 92-131; K Stich 'Customary Justice Systems and Rule of Law' (2014) 221 *Military Law Review* 215-256.

[4] D Ngira 'Re-examining burial disputes in Kenyan courts through the lenses of legal pluralism' (2018) 8 *Ońati Socio-Legal Series* (online) Available at http://ssrn.com/abstract=3165522, (accessed 16 June 2018).

[5] O Elechi 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada. See also H Zehr *The Little Book of Restorative Justice* (PA, Good Books, 2002).

independent of the state's formal justice mechanisms.[6] This means that the concept of TDRMs extends to cases where a group of elders from different ethnic groups within an urban area settles a dispute (either following a customary law or based on common sense).

Some of the advantages of TDRMs are that: the proceedings are conducted in local languages and hence are understood by the people; they are locally acceptable and legitimate; compliance rate is high; they bring justice closer to the people; they apply customary law where panelists have special understanding; encourage participation of people in administration of justice; they are not expensive; and do not impose a heavy burden on the national budget.[7] Also, they promote restorative justice and are informal compared to the formal court system where rules of evidence and procedure are strictly adhered to.

They have remained resilient in most parts of Kenya, and continue to play a key role in the justice sector especially due to challenges faced by people in accessing justice within the formal justice system.[8] Ubink, in a Namibian study,[9] Davies and Dagbanja in a Ghanaian study,[10] and Chopra and Isser[11] in a Somali study, have all concluded that TDRMs are still very prevalent in most parts of Africa. They usually operate outside the domain of the state justice system and handle disputes that would conventionally be addressed by formal courts, hence playing a crucial role in enhancing access to justice. To this end, most African countries, including Kenya have enacted laws recognising traditional justice systems, in large part due to their contribution to enhancing

[6] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008) 4.

[7] E Nwogugu 'Abolition of customary courts – The Nigerian experiment' (1976) 20 *Journal of African Law* 1, 12.

[8] P Onyango *African Customary Law: An Introduction* (LawAfrica, Nairobi 2013) 149.

[9] J Ubink 'Customary Legal Empowerment in Namibia and Ghana? Lessons about Access, Power and Participation in Non-state Justice Systems' (2018) 49 *Development and Change* 930-950.

[10] See JA Davies & D Dagbanja 'The role and future of customary tort law in Ghana: a cross-cultural perspective' (2009) 26 *Arizona Journal of International Law* 303-333.

[11] T Chopra & D Isser 'Women's access to justice, legal pluralism and fragile states' in P Albrecht, H Kyed, D Isser, & E Harper (eds) *Perspectives on involving non-State customary actors in justice and security reform* (International Development Law Organisation 2011) 23-28.

access to justice amongst the poor in rural areas and within informal settlements.[12]

However, unlike other jurisdictions (such as, Nigeria and Ghana) that have customary courts, Kenya recognises the amorphous TDRMs that are to be promoted by the Judiciary[13] thus creating enormous challenges in using them to enhance access to justice as discussed later in this chapter. Moreover, both customary law and state law are subject to interpretation by state courts,[14] and therefore there is a high likelihood of choice of law issues, and jurisdictional dilemmas between customary and statutory law with huge ramifications on the promotion of TDRMs.

Kenyan courts have been faced with choice of law conflicts when dealing with cases touching on customary law disputes. In the specific circumstances of Kenya, such conflicts are viewed as part of the legal problems arising in multi-ethnic societies, in cases where communities live under different laws. These problems may arise when members of different communities enter into legal relationships; where parties to a dispute are subjected to different personal laws and when the parties, whether members of the same community or not, choose to regulate their legal relations following another personal law.[15] In the aftermath of the 2010 Constitution, it is important to determine whether that Constitution has played a role in the resolution of choice of law conflicts.

This chapter is structured as follows. Part 1 offers this general introduction. Part 2 discusses the treatment of customary law in the colonial era by formal courts and native tribunals to lay out some context for TDRMs. Part 3 examines the treatment of customary law by formal courts from independence to 2010 when the Constitution was enacted. In Part 4, the treatment of TDRMs and their decisions by Kenyan courts in the post-2010 era is discussed. Part 5 highlights the challenges TDRMs are facing in Kenya while Part 6 offers a conclusion and way forward.

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[12] J Ubink & B Rooij 'Towards customary legal empowerment: an Introduction' in J Ubink & T McInerney (eds) *Customary justice: Perspectives on legal empowerment* (International Development Law Organisation, 2011) 7-28.

[13] Article 159 (2) (c), *Constitution of Kenya* (2010).

[14] Sec 7(3), *Magistrates' Courts Act* (Act 26 of 2015).

[15] A Tier 'Techniques of choice of law in conflict of personal laws' (1986) 30(1) *Journal of African Law* 1-19.

2 African Customary law in Kenya in the colonial era up to 1967

During the colonial period, Kenya had a dual court system which was largely dependent on the race of the inhabitants.[16] The duality of courts was manifest in that, on one hand, there were native tribunals (which later became African courts) that primarily applied African customary law and resolved disputes among Africans.[17] On the other hand, there was the judicial, professional, English-orientated system of courts (Supreme court and subordinate courts) that applied English law and heard all cases involving foreigners and serious criminal cases involving Africans (such offences were heard by a magistrate and not an administrator).[18]

During the colonial period, identifying a court that would handle a case was determinative of the law that would govern the issue. Indeed, the choice of court was often conclusive of the choice of law, since if it was decided that a case was amenable to the jurisdiction of a native court, the result usually was that customary law would be applied to its determination. On the other hand, if a British court exercised jurisdiction, it would automatically apply its law to the resolution of the case.[19] The position was that each type of court had a primary law, by which is meant that in default of any special reason or circumstance, a court of a given type would apply a system of law of a given kind with exceptions. Generally, the primary law in native courts in British colonial territories was the African customary law existing in their respective jurisdictions.[20] However, the laws governing other courts, usually provided that the non-African courts could have the power to apply customary law in cases involving Africans, whilst many of the native or African courts had a limited jurisdiction, at least in the later colonial period, to apply non-customary law.[21] As will be shown shortly, this colonial legacy continued into the independence era and is the position

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[16] B Shadle 'White settlers and the law in early colonial Kenya' (2010) 4(3) *Journal of Eastern African Studies* 510-524, 512.

[17] Hertslet, Treaties, Vol. 20, 74, cited in Allott, n 13, 1970, 130. See also E Cotran 'The Development and Reform of the Law in Kenya' (1983) 27(1) *Journal of African Law* 42.

[18] A Allott 'Customary Law in East Africa' (1969) 4(3) *Africa Spectrum* 12-22, 13-14. See also RL Abel 'Customary Law of Wrongs in Kenya: An Essay in Research Method' (1969) 4013 *Yale Law School faculty Scholarship Series* 584.

[19] A Allott *New Essays in African Law* (Butterworths, London, 1970) 110.

[20] Articles 2(b), 3 & 4 of the Native Courts Regulations of 1897.

[21] Allott (n 19 above) 110.

obtaining in Kenya today, as formal courts can still apply customary law, while TDRMs can only apply relevant customary law, customs or practices.

Treatment of African customary law in native tribunals/courts

According to the Native Tribunals Ordinance of 1930, native tribunals were to apply native law and custom prevailing in the area of jurisdiction of the tribunal so far as it was not repugnant to justice or morality or inconsistent with the provisions of any Order in Council or with any other law in force in the Colony.[22] Appeals from the native tribunals went through the administration, district, and provincial commissioners, with no possibility of appeal to the judiciary.[23] However, the Chief Justice or the Attorney General had the power to review, revise, and/or quash any cases, whether heard in the tribunals or magistrates' courts.[24]

The jurisprudence from native tribunals, councils and courts show that they treated customary law with due regard in both civil and criminal matters. Firstly, native tribunals/courts applied to a distinct group of crimes, customary crimes and wrongs, to their respective ethnic groups. For instance, among the Luo, it was a customary crime to abuse another or to take a woman from her marital home. Additionally, one could successfully sue the accused for wrongfully taking away a woman from her husband's custody without permission contrary to Luo customs.[25] For example, in *Augustino v. Isabella w/o Onyango & Atieno w/o of Onyango,*[26] the plaintiff sued the defendants for defamation under the Luo customs. Secondly, these courts, councils, and tribunals could punish for offences under statutes using African customary laws. In *Kosele African Court Criminal Case no 33 of 1966*, the accused was charged with indecent assault contrary to Section 144 of the Penal Code. The Court found that he was guilty of breaking the virginity of his victim. Instead of imprisoning him, the Court fined him a customary compensation of a heifer. Similarly, in *Bungoma District African Court Criminal Case No. 493 of 1967*, the accused was charged with common assault contrary to section 250 of the then Penal Code. The court found him guilty and imposed a customary fine of a

[22] Section 13(a) *Native Tribunal Ordinance, (*1930*).*

[23] Shadle (n 16 above) 512.

[24] Shadle (n 16 above) 512.

[25] Maseno African Court Criminal Case 454 of 1966.

[26] Kisumu District African Court, Criminal Case No. 299/1966.

sheep. Although section 176 of the current Penal Code provides for compensation, no method for determining the amount exists and this may explain why courts imposed customary compensation.

In the colonial period, it was also common for settlers to sit alongside elderly natives and 'employ some version of customary law, keep farm disputes within the farm, and allow the lord/settler his voice in manorial/community affairs.'[27] Shadle gives accounts of how settlers such as Karen Blixen could preside over intra-African disputes on their farms even though they 'knew nothing about African customary law.'[28] Moreover, Doorly writes that in the municipalities and non-tribal areas mixed tribunals: [29]

> found themselves faced with situations requiring decisions which either are not referable to native law or custom or to which the native law or custom is no longer properly applied in the opinion of the Tribunals. In these circumstances, the Tribunals have not hesitated to give decisions which are tantamount to the recognition of new custom.

Treatment of African customary law in formal courts

The treatment of African customary law in the formal courts was not consistent. Whereas there are judges who appreciated the role of customary law in the resolution of disputes, others treated customary law with utter contempt. For example, in *Benjawa Jembe v Priscilla Nyondo,*[30] Barth J held that African Customary law applied to the estate of an African who had become a Christian and had abandoned African customs. In *Isaka Wainaina v Murito*,[31] the same judge held that all native land rights whatever they were had disappeared upon the enactment of the 1915 Crown Land Ordinance, and that natives in the occupation of Crown land had become tenants at the will of the Crown. In 1917, just 5 years after the *Jembe* case, Hamilton C.J. was faced with the question of the recognition of customary marriages in *R v, Amkeyo.*[32] In this case, the question that arose during the trial was whether a woman married under African

[27] Shadle (n 16 above) 518.

[28] Shadle (n 16 above) 518.

[29] AN Doorly 'Native Tribunals' (1946) 28(3/4) *Journal of Comparative Legislation and International Law* 25-34, 29.

[30] [1912] 4 EALR 160.

[31] [1923] 9(2) KLR 102.

[32] [1917] 7 EALR 14.

customary law could testify against her husband. The common law deemed a husband and wife as one person and neither could be compelled to give evidence against the other. Hamilton C. J. held that a wife married under African customary law was not a legal wife, and consequently compelled her to give evidence against her husband. The decisions in the *Isaka Wainaina and Jembe case* highlights colonial courts' attitude towards customary law where it was either disregarded as not being law or as being inferior to the Crown Ordinances and common law in force at the time.

At times, European judges would rely on the institution of assessors to understand the customs of local tribes when resolving cases and thus ensure that justice was contextualised to indigenous people. However, judges were not bound by the opinion of assessors and they could disregard such opinions with reasons. For instance, Thacker J in *R v Ogende s/o Omungi* [33] stated that he deplored the opinions of assessors because they were based on intertribal prejudice and resulted from pervasiveness and stupidity.

Furthermore, European judges and formal courts treated native tribunals and African courts with opprobrium. In *Lolkilite Ole Ndinoni v. Netwala ole Nebele,*[34] the East African Court of Appeal dealt with two matters relating to the Maasai customary practice of blood money and the ability of Native Tribunals to apply the Limitation Ordinance of 1934. The appellant's father, who was deceased at the time of the case, had allegedly committed homicide and the matter was taken to the Native Tribunal. However, the claim for blood money was made at the native tribunal thirty-five years after the alleged homicide. The Tribunal dismissed the suit but the Supreme Court awarded the claim. The Appellant appealed to the East African Court of Appeal. The East African Court of appeal dismissed the claim on the ground that it was repugnant to justice and morality to bring a matter for hearing after 35 years. It is clear that the East African Court of Appeal considered claims for blood money valid but rejected bringing the matter after a long period. Despite the ruling that indirectly supported the claim for blood money, Sir Edward C.J. (Uganda) held that the Native Tribunals were not courts in the proper sense and therefore the Limitation Ordinance of 1934 did not apply to them. The finding that the Native Tribunals were not proper courts, illustrates the Europeans attitude towards customary dispute resolution methods as inferior to formal courts.

[33] [1914] 19 KLR 25.
[34] [1952] 19 EACA.

3 Treatment of African customary law by courts from 1963 to 2010

After independence, the dual court system was abolished and a unitary court system established.[35] The 1967 Magistrates' Courts Act converted the African Courts into formal Magistrates' courts. However, the limitations imposed on the application of customary law in the colonial era were still sustained. Most of the cases touching on customary law after independence revolved around section 2 of the Magistrates' Court Act[36] and section 3(2) of the Judicature Act. Section 2 of the Magistrates' Court Act limited the customary claims under the law to matters of land, intestacy, family, seduction of unmarried women and girls, enticement of married women to adultery and status of women and children. The High Court in *Kamanza s/o Chiwaya v. Manza w/o Tsuma*, held that the above list of claims under section 2 of the Magistrates' Courts Act was exhaustive, and excluded customary law claims based on tort or contract.[37]

Likewise, section 3(2) of the Judicature Act limited (and still does) the application of customary law by stating that it is only to guide courts in civil cases. One common thing in the treatment of customary law by courts in independence Kenya is the continuation of the colonial inconsistencies and lack of coherence in treating customary law, with the effect that statutory law still ranked higher than customary law. For instance, in *Ernest Kinyanjui Kimani v Muiru Gikanga and Another*[38] it was held that '... where African customary law is neither notorious nor documented it must be established for the court's guidance by the party intending to rely on it'. Compared to the Constitution, statutes, common law and equity, which the courts take judicial notice of, customary law has to be proved. The main reason why common law and equity are not proved in courts is that the courts assume they have attained public notoriety.[39] Since customary law is specific to particular communities, it is rare for it to be taught in schools, and hence difficult for it to gain public notoriety to allow for its usage in dispute resolution. However, in cases where customary

[35] Cotran (n 17 above) 42-44.

[36] Now section 7(3), Magistrates' Courts Act, 2015.

[37] Unreported High Court Civil Appeal No.6 of 1970.

[38] [1965] E.A. 735. See also *Atemo v Imujaro* [2003] KLR 435.

[39] Kariuki (n 1 above).

laws have become notorious, courts have taken judicial notice of those customs.[40]

The application of customary law in civil cases was also limited through the imposition of a repugnancy clause in the Judicature Act which states that: [41]

> '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…'

The provision that the courts are to be 'guided' by customary law is ambiguous as there are several possible interpretations of 'guided'. First, it could mean that courts have an unfettered discretion to apply customary law or not, and, if they decide to apply customary law, the rules to apply and with whatever qualifications they think fit. Second, it could mean that courts have no discretion whether to apply customary law or not (subject to any discretion imported by the word 'applicable'); but in applying customary law they need not apply it in all its rigour and detail. The use of the word 'shall' before 'guided' rather than 'may' is treated as significant. Third, it may also mean that there is no discretion; and courts must apply customary law in cases between Africans, and they must apply it in its full detail, except where excluded by the repugnancy clause.[42] Moreover, and despite the purported application to all cases and all courts, the words 'to which natives are parties' are ambiguous. Do they intend to deal only with cases in which all the parties are Africans, or do they cover also disputes in which at least one of the parties is an African?[43]

Kenyan courts have been confronted with choice of law issues between statutory and customary law several times, especially in burial, land, family and succession disputes. In the cases of *Re Ruenji*[44] and *Re Ogola*[45] estates, the respective testators drew wills that did not cater to their customary law wives and the courts held that these wives were not wives for purposes of succession.

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[40] See generally, *Wambugi w/o Gatimu v Stephen Nyaga Kimani* [1992] 2 KAR 292, where the Court of Appeal held that the Kikuyu custom that a married woman does not inherit her father's land was notorious, and thus took judicial notice of it.

[41] Sec 3(2), *Judicature Act,* Act 16 of 1967.

[42] Hertslet, Treaties, Vol. 20, 74, cited in Allott,, n. 13 132.

[43] Hertslet, Treaties, Vol. 20, 74, cited in Allott, n.13 132.

[44] [1977]KLR.

[45] [1978]KLR.

However, the position of customary law wives in succession was later codified in section 3(5) of the Law of Succession Act which stated that a woman married to a man under a system that allows polygamy is a wife for succession purposes under Sections 26 and 40 of the Act despite the fact that the husband may have procured prior or subsequent monogamous marriage. Consequently, in *Irene Njeri Macharia v. Margaret Wairimu Njomo and Anor*,[46] the Court of Appeal held that a wife married under customary law could claim through section 3(5) of the Law of Succession Act.

In the case of burial disputes, the lack of a legal framework has created a legal conundrum especially in determining who should bury the deceased person. In *James Apeli and Enoka Olasi v Prisca Buluka*[47] it was argued that the will of the deceased cannot be respected if it contravenes customary law. Likewise, in *Pauline Ndete Kinyota Maingi v Rael Kinyota Maingi*,[48] the Court dismissed the provisions of a will of the deceased, which stated the manner of disposal of his body and applied Kamba customary law. The Court held that the wishes in the will could only be given effect to where the executor proved that customary law was repugnant to justice and morality.

The case of *Virginia Wambui Otieno v Joash Ochieng Ougo & Another,*[49] popularly known as the SM Otieno case, gave an authoritative pronouncement on the application of customary law on a personal law matter, where there was a jurisdictional conflict between customary law and statutory law. In the case, the deceased had been born and bred as a Luo, and as such under Luo customary law, his wife (a Kikuyu) on marriage became part and parcel of her husband's household as well as a member of her husband's clan. Their children were also Luo as well as members of their deceased father's clan. On the death of a married Luo man, the customs are that the clan takes charge of his burial as far as taking into account the wishes of the deceased and his family are concerned. However, the wife contested the application of Luo burial customs. Three positions emerged in the case regarding the law applicable to the deceased. First, the wife posited that the husband had evidently distanced himself from the Luo customary laws by embracing a 'Western' life, and therefore the narrative of his life was all that was needed to demonstrate the

[46] Civil Appeal No. 139 of 1994.
[47] Civil Appeal No. 12 of 1979 (Kisumu).
[48] Civil Appeal No. 66 of 1984.
[49] [1987] eKLR.

applicable law.[50] Second, there was the position that an individual cannot choose the law applicable to their matters and that it is only judicial reason that can establish the appropriate law where different laws overlap and contradict each other. In this sense, it is not the lifestyle of a person that determines the governing personal law, but the nature of his laws and their interpretation. And third, that as a Luo, the deceased husband was throughout his entire life subject to the authority of 'customary law' and that no issues other than the manner of his birth and the facts concerning the ritual establishment of his 'name' have any relevance whatsoever.

As with other African communities, the Court observed that an *'*African citizen of Kenya cannot divest himself of the association with the tribe of his father if those customs are patrilineal' and that a 'different formal education and urban life style cannot affect one's adherence to his law.' [51] According to the Court, upon marriage, the wife was bound by Luo custom and had no right to bury her husband, and she did not become the head of the family upon the death of her husband. Thus, the Court of Appeal was of the view that where there was a conflict between a deceased person's wishes and customs, the latter takes precedence. Although the *SM Otieno* decision, may be seen as a victory for African customary law, it failed to deal with the dichotomy between formal law and customary law but rather reified this dichotomy. As such, it is viewed as '…a missed opportunity for the court to demonstrate the potential of customary law as a relevant and dynamic force in the face of changing social circumstances.'[52]

An interesting point emerging from the *SM Otieno* case is what the outcome would have been if there was legislation governing burial disputes in Kenya. Would the matter have been determined using statutory law on burial or customary law? According to Murungi, who has proffered a spirited defence of the Court's decision in SM Otieno, the wife ignored or failed to see that being 'christianised', 'educated' or 'urbanized' in the context of contemporary African history amounts, for the most part, to just being 'Europeanised'.[53] Essentially,

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[50] See generally, *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*, Civil Appeal Number 31 of 1987 [1987] eKLR.

[51] See *Virginia Wambui Otieno v Joash Ochieng Ougo & Another*, Civil Appeal Number 31 of 1987 [1987] eKLR.

[52] W Kamau 'SM Otieno Revisited: A View through Legal Pluralist Lenses' (2009) 5(1) *Law Society of Kenya Journal* 73.

[53] J Murungi 'The question of an African jurisprudence: some hermeneutic reflections' in K Wiredu (ed*) A companion to African philosophy* (Blackwell, Oxford, 2004) 524.

an African by his/her ontological origins remains, radically, the juridical subject of African customary law. As such, if a Kenyan subject to customary law, makes a unilateral and individual decision to detach himself/herself from customary law, this does not say anything about whether a judicial body might exercise African customary law concerning their affairs or not.

A similar finding was reached by Justice Philomena Mwilu in *Salina Soote Rotich v Caroline Cheptoo & 2 Others*[54] where she opined that:

> For the above reasons, I come to the conclusion that the deceased Benard Kiprotich was a Keiyo who subjected himself to the customs of his father and forefathers and who became incapable of divesting himself from the customs of his people. He was for all practical purposes bound by those customs.

Although customary law has been heavily relied upon in determining burial disputes, there are times when courts have applied other tests. For instance, in *Eunice Moraa Mabeche v Grace Akinyi*,[55] the High court allowed the burial of the deceased in a Muslim cemetery according to his expressed wishes and rejected the deceased's mother's attempt to have him buried in Kisii. Similarly, in *Charles Onyango Oduke & Anor v Onindo Wambi*[56] the High Court held that 'courts ought to give effect to the wishes of the deceased as far as possible.' Allowing a deceased testator to be buried according to his expressed intentions, further limits the role of customary law in burial disputes. In other cases, the relationship between the deceased and litigants is also a key indicia in determining the applicable law in burial disputes.[57] For instance, in *Edward Otieno Ombaja v Odera Okumu* [1996], the Court of Appeal pointed out that:

> We wish to observe here that customary law, like all other laws, is dynamic. Because it is not codified, its application is left to the good sense of the judge or judges who are called upon to apply it. That is why, as stated earlier S. 3(2), above, is worded the way it is to allow for the consideration of the individual circumstances of each case. So the conduct of the respondent and his attitude towards the deceased generally, were important considerations in determining the dispute between the parties here.

[54] [2010] eKLR.
[55] High Court Civil Case No.2777 of 1994.
[56] [2010]eKLR.
[57] Ngira (n 4 above).

A similar approach was taken by Justice Jackton Ojwang (then of the High Court) in *Ruth Wanjiru Njoroge v Njeri Njoroge & Anor* [2004] where the second wife sought to stop the first wife and the mother-in-law from burying her husband in their ancestral land and have him buried in their matrimonial home. Although Justice Ojwang allowed the deceased man to be buried in his ancestral land, he introduced a new doctrine in burial disputes; that of *legal proximity*. The doctrine is based on the assumption that the decision as to the determination of the place of burial is based upon proof by the parties in the dispute of their proximity to the deceased. Ngira correctly argues that the fact that a person with whom the deceased had a sour relationship cannot be allowed to bury him/her regardless of the position of customary law, is an attempt by courts to develop customary law rather than interpret it.[58]

4 Treatment of TDRMs and their decisions by Kenyan courts in the post-2010 era

The Constitution of Kenya 2010 requires courts and tribunals to promote the use of TDRMs while exercising judicial authority.[59] However, TDRMs are not to be used in a way that-contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality, or is inconsistent with this Constitution or any written law.[60] However, the Constitution does not limit the application of TDRMs to any area of the law. The 2010 Constitution even allows for the use of TDRMs in the resolution of land and environmental disputes.[61] Besides, the 2010 Constitution has recognised customary law, as a source of law in Kenya.[62]

Other laws provide for the use of TDRMs including the Community Land Act,[63] Environment and Land Court Act,[64] Marriage Act,[65] and the Land Act.[66]

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[58] Ngira (n. 4 above).
[59] Article 159(2)(c), *Constitution of Kenya*, 2010.
[60] Article 159(3), *Constitution of Kenya*, 2010.
[61] Article 159(2)(c), 60(f), 67(2)(f), Constitution of Kenya 2010. See also ss 18 and 20(1) of the Environment and Land Court Act No. 19 of 2011 allowing the Environment and Land Court to adopt and implement Article 159 of the Constitution.
[62] Article 2(4), *Constitution of Kenya*, 2010.
[63] Act 27 of 2016.
[64] Act 19 of 2011.
[65] Act 4 of 2014.
[66] Act 6 of 2012.

For instance, under the Marriage Act, 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 the marriage.[67] The customary dispute resolution process 'shall conform to the principles of the Constitution.'[68] Again, it is noteworthy that divorce proceedings under the Act are to be heard and determined in the state courts and not under TDRMs.[69] Since a customary marriage under the Act is one 'celebrated by the customs of the communities of one or both of the parties to the intended marriage,'[70] it follows that if the parties to the marriage are from different ethnicities, they can choose the customary law that will apply to their marriage. Consequently, if they are to go through a customary dispute resolution process before petitioning for divorce, it appears that that process would be governed by the chosen custom, and the adjudicating body could assume jurisdiction over a spouse who is not from the ethnic group whose customary law is being applied.

The Magistrates' Courts Act contains a specific provision on jurisdiction exercisable by the courts concerning African customary law. Under Section 7(3), Magistrates' courts have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law:[71] land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of, or adultery with a married person; matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as they are not governed by any written law. Magistrates' courts may call for and hear evidence of the customary law applicable to any case before it.[72] The Act confers jurisdiction that would ordinarily vest on TDRMs under customary law on magistrates' courts, a clear effort towards the suffocation of TDRMs in Kenya. The said jurisdiction was previously exercised by native courts before the introduction of magistrates' courts in Kenya.[73] The Act does not contain specific provisions on the exercise of the attendant customary law jurisdiction.

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[67] A customary marriage under the Act is one that is 'celebrated by the customs of the communities of one or both of the parties to the intended marriage'- Section 43(1), *Marriage Act.*

[68] Sec 68, *Marriage Act*.

[69] See sec 69, *Marriage Act*.

[70] Sec 43(1), *Marriage Act.*

[71] Sec7 (3), *Magistrates' Courts Act*, 26 of 2015.

[72] Sec 16, *Magistrates' Courts Act.*

[73] Ngira (n 4 above).

For example, customary law issues have to go through the technical court procedures and rules of evidence as applied in non-customary law matters thus presenting difficulties to parties relying on customs, which are not codified. The uncodified nature of customary law poses a challenge to magistrates in deciding cases as they are not experts in customary law. Since TDRMs are not bound by such technical procedures and rules of evidence, they would be most appropriate in handling customary law disputes. Additionally, the Act does not offer guidance on how to deal with jurisdictional conflicts in customary law matters, for example, where parties are subject to different personal laws or where conflicts exist between customary law and statutory law. The following section discusses how Kenyan courts have handled several cases dealing with TDRMs.

The constitutional and repugnancy tests

Whereas in the previous constitutional dispensation, the application of African customary law was subjected to the repugnancy clause only, the use of TDRMs under the 2010 Constitution is subject to a more extensive constitutional test. The constitutional test requires TDRMs to be used in a way that-does not contravene the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.[74]

TDRMs are facing other human rights-related concerns, for instance regarding gender discrimination, inhumane treatment, and violation of the right to a fair hearing. Since most TDRMs are male dominated, and they may be biased against women in inheritance, children disputes, sexual offences such as defilement and property disputes. Moreover, TDRMs have been accused of occasioning inhumane treatment, for instance, where the process takes the form of a trial by ordeal or trial based on evidence derived from spiritual rituals or other types of inherently unreliable evidence such as dipping a hand in boiling water or putting hot metal against the skin.[75] Additionally, where parties have unequal bargaining power, TDRMS may undermine fairness in the process, and reinforce preexisting social inequalities, especially along gender lines. While retention of the repugnancy clause is on the basis that TDRMs are at times offensive to human rights, it is contended that this thinking is premised on a

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

[75] United Nations 'Human rights and traditional justice systems in Africa' (2016), 47-55.

wrong assumption that pre-colonial Kenya did not have a concept of human rights.[76] he retention of the repugnancy clause in article 159(2)(c) of the 2010 Constitution is also seen as a backdoor attempt at curtailing the promotion of TDRMs in a legal pluralistic society,[77] yet as correctly observed by Elechi, there are greater opportunities for the achievement of justice within TDRMs than with the African state criminal justice systems because the former aims at the restoration of rights, dignity, interests, and wellbeing of victims, offenders, and the entire community.[78]

Courts will play a critical supervisory role over TDRMs to ensure compliance with the constitutional and repugnancy tests. A more extensive constitutional test for the application of TDRMs seems to have been informed by the need to ensure conformity with the constitutional requirement for stronger protection of human rights. While, this is an interesting development, seeing that the application of customary law, which is the normative framework within most TDRMs, is subject to the Constitution only.[79] Additionally, whereas TDRMs are subject to the double test, there are other constitutional provisions under the principles of the land policy requiring communities to be encouraged to settle land disputes through 'local community initiatives consistent with this Constitution'[80] suggesting that the local community justice processes might be different from TDRMs.

In the Kenyan context, one can argue that if TDRMs comply with Article 159(3) of the Constitution and written laws, there should be no bar to their applicability in matters where the parties have consented to their use because judicial authority emanates from the people of Kenya. This position had received judicial imprimatur earlier in *Ndeto Kimomo v Kavoi Musumba* Law V.P stated as follows: [81]

> In my view, when the parties agreed to have their case decided by taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking another jurisdiction, involving procedures such as slaughtering a goat, beyond the control of the High Court. The parties

[76] F Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR' (2014) 2(1) *Alternative Dispute Resolution* 217.
[77] Ibid.
[78] Elechi (n 5 above).
[79] Article 2(4), *Constitution of Kenya*, 2010.
[80] Article 60(1)(g), *Constitution of Kenya*, 2010.
[81] [1977] KLR 170.

> were of course entitled to have their case decided in any lawful way they wished, by consent.

The court went on to give an example of what would happen in such an instance:

> '…For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the Judge "we have decided that this appeal is to be decided by the toss of a coin." The Judge would surely say: "In that case, you must either withdraw this appeal or come before me in due course with a consent order that the appeal is allowed or dismissed." It would be wrong in principle, in my view, for the Judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis.'

Therefore, if the court is satisfied that the process and decision of the TDRMs have met the constitutional test, the decision is adopted as a court order. However, it is doubtful as to whether court orders based on TDRMs' decisions have precedential value in determining similar disputes in court in the future. For example, in the case of *Lubaru M'imanyara v Daniel Murungi,*[82] parties filed a consent seeking to have the dispute referred to the *Njuri Ncheke* Council of Laare Division, Meru County for resolution. Citing Articles 60(1) (g) and 159(2) (c) of the Constitution, the court referred the dispute to the *Njuri Ncheke* noting that it was consistent with the Constitution. The consent reached by the parties was adopted as an order of the court.

However, in *Dancan Ouma Ojenge v P.N. Mashru Limited*[83] the Employment and Labour Relations Court in Mombasa noted that although superstition played a great role in dispute resolution especially in seeking and finding the truth, the use of TDRMs was repugnant to justice and morality, inconsistent with the Constitution and the Law. In this case, the Respondent Company alleged the Claimant had stolen a computer box and resorted to terminate his contract unfairly and unlawfully upon receiving the opinion of a witchdoctor about the employee's guilt. The Respondent conducted an investigation and disciplinary proceedings by ordeal which was conducted as follows: [84]

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[82] Miscellaneous Application No. 77 of 2012. [2013] eKLR.
[83] Cause No. 167 of 2015 [2017] eKLR.
[84] Per James Rika J in Cause No. 167 of 2015 [2017] eKLR.

> '…The witchdoctor carried some sticks. He held the sticks on one end, while the General Manager held the other end. The Employees were asked in turns, to place their hands between the sticks. If the witchdoctor declared the grip on the particular hand of an Employee, in between the sticks was strong, it was concluded the individual was guilty of stealing Respondent's computer box. The grip of the witchdoctor's sticks, on the hands of the Claimant, and on the hands of 3 other Employees, was declared to be strong. Consequently, the Respondent found them guilty of an employment offence.'

Subjecting TDRMs to the repugnancy clause shows that even in this post-democratisation Constitution, where the status of customary law is constitutionally protected, TDRMs and customary law are inferior to the formal justice mechanisms and statutory law respectively. The repugnancy clause has not only relegated customary law to an inferior status but has also provided a firm basis for its disqualification.[85] Courts have relied heavily on the repugnancy clause to declare African customary law as repugnant to justice and morality, with one glaring deficiency in this application being that Kenyan law is yet to define exactly what is meant by 'repugnant'. In exercising their discretion to discern its meaning, judges have even relied on foreign laws to determine what actions are repugnant to justice and morality, which are invariably out of context.[86] For example, in *Katet Nchoe and Nalangu Sekut v. R,*[87] the High Court held that the Maasai custom of circumcising females was repugnant to justice and morality. The court disregarded the customs and practices of the Maasai and adopted the definition of repugnancy to justice and morality under the Ghanaian Constitution that defines a repugnant custom as that which is harmful to both the social and physical well-being of a citizen. The Court held that since female genital mutilation caused pain, it was repugnant to justice and morality based on the Ghanaian definition. The Judicature Act states that, [88]

> 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

[85] Kariuki (n 1 above) 13.

[86] Most notably the stance adopted in *Katet Nchoe and Nalagu Sekut v R* (Criminal Appeal No. 115 of 2010).

[87] Criminal Appeal No. 115 of 2010 consolidated with Criminal Appeal No. 117 of 2010.

[88] Sec 3(2), Judicature Act, Cap. 8, Laws of Kenya.

> shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.

TDRMs in criminal matters

The 2010 Constitution is not explicit on whether TDRMs apply to criminal matters. Whereas some judges have recognised the role of TDRMs in enhancing access to criminal justice, others have asserted that TDRMs are not applicable in criminal cases. One of the reasons why TDRMs are said to be inappropriate to criminal cases is the difficulty they present in the fulfillment of the right to a fair hearing. Whereas the right to a fair hearing affords every person the right to have any dispute 'decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body',[89] at times the application of TDRMs may be at variance with this constitutional guarantee. Moreover, there are concerns as to whether TDRMs can engender impartiality and independence (from the State and from traditional leaders who may play a key role in dispute resolution) owing to lack of legal training and lack of understanding of written law.[90] In addition, TDRMs may violate the following rights which are components of the right to a fair hearing: the right to have adequate time and facilities to prepare a defence; to a public trial before a court established under this Constitution (since TDRMs are not courts); to legal representation; to adduce and challenge evidence; to be tried without undue delay; protection against being tried again for an offence for which a person has been finally convicted or acquitted; or to appeal to, or apply for review by, a higher court.

Some of the sentences meted out under TDRMs are offensive to a fair criminal trial such as curses, oaths, beatings, being exorcised, etc. currently, Kenyan courts have tended to apply the double test discussed above, the constitutionality and repugnancy tests, in evaluating whether the application of TDRMs offends the bill of rights, that for that matter the right to a fair hearing.

Due to the ambiguity surrounding the application of TDRMs in criminal matters, courts have treated the decisions of TDRMs differently, occasioning jurisprudential confusion in terms of whether they are applicable, when, how and under what circumstances.[91] For instance, in *Republic v Mohamed Abdow*

[89] Article 50, *Constitution of Kenya*, 2010.
[90] United Nations 'Human rights and traditional justice systems in Africa' (2016), 47-55.
[91] Kariuki (n 76 above) 223.

Mohamed[92] the High Court in Kenya upheld the application of TDRMs following Islamic law and customs) and discharged an accused person who had been charged with murder. This was after the families of the accused and the deceased person had met and agreed on some form of compensation 'wherein camels, goats and other traditional ornaments were paid to the aggrieved family' including a ritual that was performed to pay for the blood of the deceased to his family as provided for under the Islamic Law and customs.[93] The deceased's family informed the prosecution by a letter that they did not wish to pursue the matter. Consequently, the prosecution made an oral application to have the matter marked as settled citing Article 159 of the 2010 Constitution and the Affidavit of the deceased's father. Subsequently, the court allowed the application for withdrawal, citing the powers of the Director of Public Prosecutions to discontinue proceedings. However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[94] Lesiit J disagreed with how the matter was determined stating that '…the parties ought to have reduced the settlement into a plea agreement and presented to the court.'

Likewise, in *Republic v Juliana Mwikali Kiteme & 3 others*,[95] the High Court sought to promote reconciliation as envisaged in Article 159(2)(c) of the Constitution in a murder case. From the affidavits filed by the mother and brother of the deceased person, traditional compensation in the form of livestock had been paid in line with Kamba customs and traditions. Therefore, the prosecution on behalf of the Director of Public Prosecutions requested the court to discontinue the criminal proceedings since the concerned families had been reconciled. The request for discontinuation of the proceedings was not opposed by the defence counsel and as a consequence, the court discontinued the criminal proceedings and discharged all the accused persons under Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecutions Act 2013. The decisions in the two cases depict the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.

In *Republic v Musili Ivia & another*[96] the High Court was informed by the Principal Prosecuting Counsel that clan members of the deceased and the accused had pursued an amicable resolution on the issue of the death and

[92] Per Lagat-Korir J in Criminal Case No. 86 of 2011 [2013] eKLR.
[93] Ibid.
[94] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[95] Criminal Case No. 10 of 2015 [2017]eKLR.
[96] [2017] eKLR.

requested the termination of the criminal proceedings. Written minutes of inter-clan discussions held and agreements signed between relatives of the deceased and relatives of the accused persons were tendered to court evidencing agreement for payment for blood money under customs of the Kamba community, in the form of cows and bulls. The prosecution counsel informed the court that in the circumstances it would be impossible to get relevant witnesses to come to court to testify in support of the prosecution case. In upholding the settlement reached through TDRMs, the Judge outlined the following guidelines,

> 'A court has to consider the provisions of the Constitution, the written law and international conventions. If any of these prohibit such a settlement then the request has to be declined. Secondly, the court has to consider the effect such a proposed settlement will have on the interests of the victim, relatives of the victim, local community and the public at large. In the circumstances of this case, I do not find the settlement agreement to be inconsistent with the spirit and purpose of Article 159(2) (c) and (3) of the Constitution of Kenya 2010…'

However, in *Republic v Abdulahi Noor Mohamed (alias Arab)*[97] the accused was charged with murder but the court urged that the charge against the accused was a felony and 'as such reconciliation as a form of settling the proceedings is prohibited.' This was after the accused's advocate submission that the two families had signed an agreement out of court following the Somali culture, law, and religion and reconciled their minds and felt that the agreement ensured justice for them and the community. In reaching its finding, the court opined that:[98] "The Judicature Act only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that are subject to the particular customary law."

Moreover, the court in the *Abdulahi* case opined that the application of TDRMs in criminal cases was intended to be 'very limited' to civil cases according to section 3(2) of the Judicature Act[99] and to misdemeanors only as per section 176 of the Criminal Procedure Code.[100] Also, the court rejected the

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[97] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[98] Per Lesiit J in Criminal Case No. 90 of 2013 [2016] eKLR.
[99] Sec 3(2), Judicature Act.
[100] Sec 176, Criminal Procedure Code provides that: *'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony,*

adoption of reconciliation, since the request was 'being made too late in the day when the case has been heard to its conclusion.' This restrictive approach to the remit of TDRMs in criminal cases had been adopted earlier by Maraga J in *Juma Faraji Serenge alias Juma Hamisi v R*[101] where he opined as follows:

> To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176…. of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case, the real complainant in all criminal cases, and especially felonies is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code or enter a *nolle prosequi* when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn. To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.

In *R v Lenaas Lenchura*[102] Emukule J sentenced Lenaas Lenchura using customary laws on conviction of manslaughter. Lenchura, a World War II veteran, stabbed the deceased, Lotiyan Lekapana, at a Lerata trading center after a dispute arose between the two on who would fetch water first. The deceased was 55 years while the accused was 89 years at the time of the fight and stabbing. After a plea bargain, the accused charge of murder was reduced to manslaughter and he pleaded guilty. As such, the only question that remained was on sentencing. The prosecution argued that the court should take into account the fact that the accused was a first offender and the circumstances under which he killed the deceased. The accused counsel submitted that water was a scarce resource in Samburu, a resource that carried the importance of life and death, and that the court should consider this. Due to the accused's advanced age and the inability of the government to provide water, a duty imposed on it by the Constitution, Emukule J resorted to the customary laws of

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and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'

[101] [2007] eKLR.

[102] Criminal Case No. 19 of 2011.

the accused. He sentenced the accused to five years suspended sentence and required him to pay compensation of one female camel to the family of the deceased according to their customs.

Apart from diverting cases from the criminal justice system by the use of TDRMs, an emerging jurisprudence from the court entails awarding compensation for offences based on customary law. Promoting TDRMs would imply that courts adopt the decisions made by traditional dispute systems while in customary compensation; the court itself applies the customs of a community, clan or tribe in punishing those found guilty under the criminal justice system. Customary compensation may be based on section 176 of the Criminal Procedure Code that allows for compensation of victims, although customary laws are not expressly provided for in the text of the Code.

In *Stephen Kipruto Cheboi & 2 others v R*[103] five (5) appellants were convicted of offences emanating from their conduct when they assaulted three (3) complainants over a land dispute. However, the conviction of two of the appellants was quashed on 10th May 2012 on the basis that TDRMs applied to misdemeanors and not felonies. This is why it is only 3 Appellants who appealed against conviction in the present case. One of the complainants filed an affidavit detailing the circumstances that necessitated the resolution. In the affidavit, the complainant deponed, amongst other things that, one of the complainants had since died and that he was filing the affidavit on behalf of the surviving complainant. He also deponed that all the appellants and complainants were brothers and that they had attended family meetings (attended by 89 persons from *Nerkwo-Katee* village) that culminated in a resolution that the brothers should reconcile, in an endeavour to voluntarily enhance family cohesion and reconciliation. Further, the affidavit indicated that the appellants, the complainants, the other members of their family and all those who attended the meeting had unanimously resolved to withdraw the case. The minutes of the meeting were presented to the High Court. Based on the resolutions passed at the meeting, the appellants asked the court to allow the appeal, so that the convictions could be quashed. In light of the appellants' request, the Respondent conceded the appeal. While upholding the conviction of the appellants, the High Court observed that:

> '…whereas a complainant and the person who had committed an offence against him can reconcile even after there had been a conviction, such a

[103] [2014] eKLR.

> reconciliation cannot, of itself, have any effect on the conviction. The conviction would stand even though there had been a reconciliation. A conviction can only be upset through either an appeal or a revision. In this case, the appellants did not advance any arguments to challenge the legitimacy of the convictions against them.'

Regarding the sentence, the judge directed that a probation officer's report be filed in court to enable it to make an informed decision as to whether or not to sustain the custodial sentence on the basis that if the "reconciliation within the family was real, the court may well play its role in cementing it, through an appropriate sentence."

TDRMs in civil matters

Apart from criminal matters, most of the disputes that have come before Kenyan courts on the application of TDRMs touch on land and environmental matters. In *Joseph Kalenyan Cheboi & Others v William Suter & another*[104] the Environment and Land Court had referred a community land dispute to a panel of traditional elders known as the Osis (or Asis) for resolution. One of the issues that the elders were to determine was a boundary between the Kamitei and Kalenyang clans. The Judge relied on the decision of the Osis that the boundary between the two clans was a seasonal stream. Justice Munyao Sila observed as follows: [105]

> I see no problem with the determination of the Osis elders. I think they thought through the matter before arriving at their decision. I will borrow from their wisdom. I have seen that the Kamitei family has now settled well on the western side of the seasonal stream. I see no reason why I should disturb their occupation and have the Kalenyang have this side as well.

He further stated that: [106]

> My judgment, therefore, is that the Kalenyang ought to remain on the western side of the seasonal stream and the Kamitei to remain and occupy the eastern side of the seasonal stream. The boundary between the two shall be the

[104] [2014] eKLR.
[105] Para 24.
[106] Para 25.

> seasonal stream. No person from the one clan should interfere with the occupation or use of the other's clan land unless with their permission.

Similarly in *Seth Michael Kaseme v Selina K. Ade,*[107] the High Court recognised the role of the *Gasa* Council of Elders of Northern Kenya in dealing with land disputes.

In *Lubaru M'Imanyara v Daniel Murungi,*[108] the High Court at Meru referred a land dispute to the *Njuri Ncheke* for resolution based on Article 159(2)(c) of the Constitution. In *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others,*[109] a man of Christian faith was summoned before the Maua Division of *Njuri Ncheke*. He was threatened with curses and forced to pay a certain fee for the adjudication of a dispute regarding his parcel of land in Maua division. The Court ruled in his favour claiming that the Council only had jurisdiction over those who submitted to it, regardless of the territory.

Courts have also recognised that TDRMs can be used in the resolution of other civil disputes such as succession[110] and employment and labour.[111] The law also provides for the use of TDRMs the dissolution of customary law marriages.[112] Although the law allows for the use of TDRMs in the dissolution of customary marriages, there are no reported cases before the courts dealing with TDRMs in that regard. In view of rising urbanisation and inter-ethnic marriages, it will be interesting to see how TDRMs and courts will deal with such matters.

Currently, there is no guidance either in law or from courts regarding who can appear before a particular TDRMs. Moreover, there is lack of clarity as to whether a TDRM such as the *Njuri Ncheke,* constituted following Meru customary law, can only adjudicate on matters within counties where the Ameru people are found (i.e. Meru and Tharaka-Nithi); between Meru people in another county or by strangers. As things stand, the various TDRMs guided by the relevant customary laws and practices, seem to be determining who can appear before them. Additionally, it also appears that anyone willing to submit to the jurisdiction of the *Njuri Ncheke* may do so. But where one party is unwilling, the council may refer the complainant to the formal courts. This is an area that

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[107] [2013]eKLR,
[108] [2013] eKLR.
[109] [2012] eKLR.
[110] *Re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR.
[111] See in *Dancan Ouma Ojenge v P.N. Mashru Limited,* Cause No. 167 of 2015 [2017] eKLR.
[112] Sec 68, Marriage Act 2014.

requires policy and legal direction. Owing to the challenges that Kenyans are currently experiencing in accessing justice within the formal justice system, an open jurisdiction where citizens can go before the relevant TDRMs in appropriate cases, could help reduce the huge backlog of cases in courts and significantly enhance access to justice since most disputes will be resolved locally.

Some challenges for TDRMs in Kenya

Like countries such as Nigeria and Ghana with customary courts, Kenya retains a unified system where both customary law and statutory law are subject to interpretation by state courts. The 2010 Constitution cements this unified approach as it confers on the judiciary the mandate to promote and encourage TDRMs. Mandating state courts with the role of promoting TDRMs, presents jurisprudential and practical challenges, and casts doubts into the future development of customary law and TDRMs in Kenya. This is so because the methodological approaches of the formal justice systems are generally unsuitable for interpreting customary law whose success and enforcement in dispute resolution is largely based on moral, psychological and social-cultural validity as opposed to state coercion.[113] Moreover, since judges are not experts in customary law (which is unwritten), there is jurisprudential confusion in the treatment of TDRMs by Kenyan courts reminiscent of the divergent and conflicting approaches taken by courts over the years in interpreting customary law. This casts doubts on the ability of state courts to promote TDRMs and customary law, especially if the latter is applied unfairly or unevenly by judges.

Moreover, unlike customary courts that are established in law, with *inter alia*, clear jurisdiction, appeal avenues, and composition, Kenyan law recognises the amorphous TDRMs creating enormous uncertainty as to their remit in enhancing access to justice. Whereas some judicial officers have upheld the decisions arrived at vide TDRMs, others have held that they are not applicable in criminal cases. As a result, there is confusion, in terms of whether they are applicable, when, how and under what circumstances, which will ultimately undermine the development and growth of customary law in Kenya.

As illustrated above, TDRMs present numerous jurisdictional challenges forcing courts to render conflicting decisions regarding their jurisdiction. First, the precise jurisdiction of TDRMs is not clear from the law. On the one hand,

[113] Onyango (n 8 above).

the 2010 Constitution and laws enacted thereunder expressly vest TDRMs with substantive jurisdiction on diverse matters. On the other hand, the Magistrates' Courts Act vests magistrates' courts with jurisdiction on customary law matters that are ordinarily within the competence of TDRMs in most communities. Second, there is ambiguity as to whether TDRMs can be used in all civil and criminal matters. Whereas within state law, there is a clear distinction between criminal and civil matters, within traditional governance systems, such a distinction is lacking as there are overlaps between civil and criminal matters.[114] Third, with rising urbanisation and increased cases of inter-communal marriages, inter-tribal conflicts of law are bound to arise. Moreover, it is unclear whether TDRMs have jurisdiction over a party who hails from an area outside the territory governed by a particular traditional authority. Therefore, the recognition of TDRMs presents a practical challenge in determining their personal, and territorial jurisdiction, especially in inter-communal legal relationships. The jurisdictional confusion attending TDRMs, is likely to also occasion conflicts between formal courts and TDRMs and thus create ambiguities to parties in identifying appropriate forum for dispute resolution and impede access to justice.

TDRMs are regarded as inferior in comparison to formal justice systems. This inferiority is as a result of the subjugation of African customary law, the undergirding normative framework providing the norms, values, and beliefs that underlie TDRMs. Just like other African countries, in Kenya laws proscribe certain traditional African practices despite their complementary role in dispute resolution.[115] However, there is a need to ensure that the application of those cultural practices does not occasion human rights violations.

As mentioned earlier, TDRMs are also facing human rights related criticisms, for instance regarding gender discrimination, inhuman treatment, and violation of the right to a fair trial.

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[114] R Clarke 'Customary Legal Empowerment: Towards a More Critical Approach' in J Ubink & T Mclnerney (eds.) *Customary Justice: Perspectives on Legal Empowerment* (IDLO 2011) 53.

[115] F Kariuki 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' (2015) 3(2) *Alternative Dispute Resolution* 30-53, 50. See also F Kariuki, 'African Traditional Justice Systems' Available at *kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf* (Accessed 23-06-2019)

6 Conclusions and way forward

This chapter sought to examine how Kenyan courts have treated decisions emanating from TDRMs and incorporated attributes of citizenship such as urbanisation and equality. By looking at how courts have dealt with customary law issues before, the chapter sought to evaluate the approaches being taken by courts in promoting and encouraging the use of TDRMs.

This chapter has established that unlike other jurisdictions with customary courts, in Kenya TDRMs are integrated within the court system. Effectively, courts are playing a major role in promoting TDRMs, which is yielding immense jurisprudential and practical dilemmas. As shown, in the work, the application of customary law by Kenyan courts has not been consistent and has largely not helped in the development of a relevant customary law jurisprudence. From the cases that have been analyzed, the fate that has befallen customary law before Kenyan courts is likely to encumber the promotion of TDRMs.

This chapter shows that there ambiguity in the law regarding the place of TDRMs in the judicial architecture in Kenya, which has created practical and legal challenges. One of the challenges relates to the ambiguity surrounding the jurisdiction of TDRMs. There is a need to clearly define the jurisdiction of TDRMs, and when they can be seised of the jurisdiction in different scenarios. This way there will be certainty and claimants will know where to seek justice, ensure oversight and monitoring and thus avoid abuse of power.[116] Section 7 of the Magistrates' Courts Act which vests extensive substantive jurisdiction on customary law matters on Magistrates' Courts, and review it so that it can recognise the place and jurisdiction of TDRMs in customary law matters. Crucial to the effective integration of TDRMs into formal legal systems are clearly and simply defined Jurisdiction. This is a key requirement for effective oversight and prevention of abuses of power. Where uncertainty exists, inefficiency has been instituted, claimants may be unclear where to seek justice services, record-keeping issues are exacerbated, and monitoring becomes more complicated.[117]

Most importantly, there is a need to recognise the plurality of TDRMs, and their evolution including the possibility of mixed TDRMs. Fortunately, progress in this regard has been made and a Taskforce on Traditional, Informal and other Mechanisms used to Access Justice in Kenya (Alternative Justice

[116] Clarke (n 116 above) 53.

[117] Clarke (n 116 above).

Systems)gazetted by retired Chief Justice Dr. Willy Mutunga in 2016.[118] The terms of reference of the Taskforce are to *inter alia*: map out and understand the prevalence of use of Alternative Justice System, its intersection with the Judicial System and the progress made in infusing it with national and constitutional values; undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming Alternative Justice System; pilot and bench-mark existing models of Court-Annexed Alternative Justice System, to capacitate them, observing them and document their functioning to glean best practices to be used to develop potential national model; highlight challenges and effects of inter-linkage between traditional justice systems and the formal justice system; develop a strategic plan to implement the policy; and develop a National Model for Court-annexed traditional justice resolution mechanism for possible adoption. Unfortunately, from the composition of the Taskforce, and the consultants were engaged in the process, there is very minimal participation of customary law and TDRMs scholars and non-state actors who can infuse enormous contribution in the development of an appropriate policy and legal framework on TDRMs.

Lastly, with rising urbanisation and increased cases of inter-communal marriages, inter-tribal conflicts of law are bound to arise in the application of TDRMs. Some policy directions in this regard will be required to govern the remit of TDRMs to wit:

(a) the need to develop an enforcement mechanism for traditional dispute resolution mechanisms by elders;
(b) The need to define and clarify the jurisdiction (that is personal, territorial, substantive or pecuniary) of TDRMs in law vis-à-vis formal courts;
(c) The need to have a framework for appeal, revision or review of the decisions emanating from TDRMs;
(d) Evaluation as to whether there is need for dispute resolvers within TDRMs to be remunerated to prevent chances and opportunity for corruption;
(e) The need to emphasize TDRMs as the first port of call in all cases where they are applicable and relevant; and,

[118] Gazette Notice No. 1339 dated 29 February 2016 available at http://kenyalaw.org/kenya_gazette/gazette/volume/MTI5MQ--/Vol.CXVIII-No.21.

(f) The need to sensitise and educate TDRMs practitioners on due process requirements, and the importance of upholding human rights standards in their processes.

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