

## **The Integration of TDRMS into the Formal Justice System in Kenya: An Analysis of the Legal Framework for TDRMS in Kenya.**

Joseph Serгон,<sup>1</sup> Prof. Albert Mumma<sup>2</sup>

<sup>1</sup>Phd Candidate, University of Nairobi, Kenya

<sup>2</sup>Senior Lecturer, University of Nairobi, Kenya

---

**Abstract:** The Constitution of Kenya recognises Traditional Dispute Resolution Mechanisms (TDRMs) as one of the Alternative Dispute Resolution Mechanisms (ADRM) which can be employed to resolve disputes alongside the court system. ADRMs including TDRMs have been characterised as flexible, affordable, and accessible in contrast to the formal justice system which is viewed as rigid, complex, inaccessible to users and expensive. Many disputes are therefore resolved through TDRMs instead of the courts. However, there is little substantive and procedural legal guidance for the users of these mechanisms in Kenya. The study therefore sought to interrogate the adequacy of the existing legal framework for TDRMs in Kenya. The study employed legal pluralism as its theoretical framework to anchor the integration of TDRMs within the formal justice system. The study found that there is no corresponding legal or policy framework for the recognition and integration of TDRMs with the formal justice systems. It also found that the existing legal framework for TDRMs is inadequate for the integration of TDRMs in the formal justice system. The study concludes that the absence of a legal framework hinders the access to justice particularly for those who may not resort to the formal justice system. The study recommends that there should be a specific legal framework to effectively operationalise and regulate TDRMs in Kenya.

**Key words:** TDRMs, legal pluralism, ADRMs, customary law, formal justice system, jurisdiction

---

Date of Submission: 26-09-2019

Date of acceptance: 14-10-2019

---

### **I. INTRODUCTION**

Kenya is a pluralist state where diverse legal and normative systems operate. The formal recognition of TDRMs and customary law legitimises the cultural values that underlie them. TDRMs are based on customary law as they are deeply anchored in the traditions, customs and practices of a particular community. Their success in promoting access to justice, therefore, depends on the recognition of culture, customs and practices as important aspects of the contemporary human rights regimes.

The use of TDRMs in Kenya has become inevitable given the huge case backlog and other challenges affecting the formal justice system.<sup>1</sup> The integration of TDRMs with the judicial system however, depends on the prevailing legal and policy framework. TDRMs are embedded in customary law, but the Constitution and other written laws contain relevant provisions on the same. Countries which have successfully integrated TDRMs with the formal court system started with a legal recognition, which Kenya has met. However, mere recognition is not enough. The link between TDRMs and the formal justice system should be established through an effective legal framework which provides for the operationalization of TDRMs.

### **II. STATEMENT OF THE PROBLEM**

Article 159(2) (c) of the Constitution of Kenya, 2010, recognises TDRMs as one of the ADRMs. However, there is no corresponding legal or policy framework for their recognition and integration with the formal justice system. Importantly, there is no clear legal framework defining the subject-matter and personal jurisdiction of TDRMs, applicable procedure, enforcement of awards, and which (or how) cases should be referred to the formal courts. For instance there is no clear demarcation of the criminal jurisdiction of TDRMs. While it is acknowledged that the recognition of TDRMs in Article 159(2) (c) of the Constitution does not

---

<sup>1</sup>The Judiciary, Republic of Kenya, *Judiciary Case Audit and Institutional Capacity Survey 2014* (Nairobi: Performance Management Directorate, 2014) iii. For instance, in 2013, the case backlog in the formal courts stood at 426,508.

exclude criminal cases, there is no formalised structure on how and to what extent TDRMs should exercise their criminal jurisdiction.

There are many other questions regarding the application of TDRMs which remain unclear, and it is arguable whether the existing legislative framework suffices. It is in this regard that this paper examines the prevailing legal framework with a view of assessing whether it adequately regulates the application of TDRMs in Kenya.

### **III. JUSTIFICATION OF THE STUDY**

The lack of adequate regulatory guidelines for TDRMs in Kenya stifles effective development and integration of these mechanisms with the formal justice system and further impairs access to justice. Therefore a study into how best TDRMs can be promoted and integrated with the formal justice system provides pragmatic options for improving access to justice in Kenya. Further, the findings generated in this study may inform the creation of a policy, legal and institutional framework for the administration and integration of TDRMs in Kenya's formal justice system which will enhance the access to justice.

### **IV. OBJECTIVES OF THE STUDY**

The objectives of the study were;

1. To analyse the adequacy of the existing legislations which provide for the administration of TDRMs in Kenya
2. To point out the challenges which affect the integration of TDRMs within the formal justice system in Kenya
3. To recommend practical measures to be undertaken to strengthen and integrate TDRMs with the formal justice system in Kenya

### **V. RESEARCH QUESTIONS**

The research questions of the study were;

1. How can the TDRMs be promoted and integrated within the formal justice system as a complementary avenue of access to justice in Kenya
2. Whether the existing legal framework in Kenya on TDRMs is adequate for its implementation
3. Whether a legal framework is necessary to demarcate the jurisdiction and functioning of TDRMs and provide for their inter-section with the formal justice system

### **VI. THEORETICAL FRAMEWORK**

#### **6.1 Theory of Legal Pluralism**

The concept of legal pluralism derives from the living law theory propounded by Eugen Ehrlich. It refers to a situation in which a country's justice system draws the rules and institutions of its laws from two or more legal systems' normative traditions.<sup>2</sup> This is true of most post-colonial African countries, which are grappling with the need to function as a formal legal regime even as they attempt to preserve their cultural heritage embedded in the diverse customary laws and institutions.<sup>3</sup>

According to Griffith, the true opponent of legal pluralism is legal centralism where a State considers "its" justice system as universalistic (or at least superior) and exclusive of others.<sup>4</sup> Griffith identifies two types of legal pluralism: weak and strong. He describes weak pluralism as the "state legal pluralism" in which the living laws have been embraced and subjugated by the formality of state law.<sup>5</sup> In other words, the state is characterised by diversity of legal sources but with a dominant formal law. In contrast, strong legal pluralism means that not all law is state law, nor is all of it administered by a single set of justice system.<sup>6</sup> This is a purely balanced system. The central theme underlying legal pluralism is that there is no single legality, but diverse legalities.

#### **6.2 Relevance of the theory of Legal Pluralism to the Study**

The theory of legal pluralism is relevant to this study as Kenya is a pluralist state with multiple sources of law. The Judicature Act<sup>7</sup> recognises this by envisaging the diverse sources of law which are applicable in

---

<sup>2</sup>OladapoKayodeOpasina, 'Legal Pluralism in Contemporary States: Between Traditional and Formal Justice Mechanisms in Nigeria and Côte D'Ivoire' (2017) 1(6) *Glocalism: Journal of Culture, Politics and Innovation* 4.

<sup>3</sup> David Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) *Yale Human Rights and Development Journal* (14(1) 59.

<sup>4</sup> J Griffith, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1-55.

<sup>5</sup>*ibid.*

<sup>6</sup>*ibid.*

<sup>7</sup>Sec 3 (1) Cap 8 Laws of Kenya.

Kenya such as the Constitution, Acts of Parliament, Common law, doctrines of equity, Statutes of general application and Customary law. These sources operate within the same social context involving personal law aspects like land, marriage, divorce and inheritance. TDRMs which are anchored on customary law therefore need to be integrated and legitimized as a source of law alongside the formal justice system to enhance the access to justice

## VII. RESEARCH FINDINGS AND DISCUSSIONS

### 7.1 *The Legitimacy of TDRMs as an avenue for Dispute Resolution*

The legitimacy of TDRMs lies in the principle of self-determination which upholds the right of communities to maintain and develop their own customary law systems of self-governance. In the Kenyan context, this principle derives from the inaugural line, 'We, the people of Kenya' under the preamble of the Constitution 2010, which aptly captures the vision of the people. Article 1 of the Constitution recognises the sovereignty of the people of Kenya, and it is within this premise that the people of Kenya have a right to determine their political and cultural identity and freely pursue their socioeconomic development goals.<sup>8</sup> Customary governance institutions are a core tenet of the peoples' right to self-determination and cultural identity. These institutions are partly embedded in historical patterns of social and political interaction and control—which include customary standards of conduct, dispute resolution and adjudicative mechanisms developed over centuries.<sup>9</sup>

Self-determination is, not only a quest for the sustenance and liberation of a people's traditionally occupied territory but also a legitimate basis for remedial rights under which they seek to revitalise their distinct cultural identity.<sup>10</sup> It drives on five principles: non-discrimination; cultural integrity; control over land and resources; social welfare and development; and self-government.<sup>11</sup> As a standard of governmental legitimacy within the modern day human rights discourse, it constitutes independence and autonomy of control and choice of a people's destinies.<sup>12</sup> This includes full control and enjoyment of distinctive lifestyles, customs, linguistics, and other cultural practices which are a central heritage of a people that should be protected and preserved.<sup>13</sup>

Laws are only effective if, in their formulation, account is taken of society as a whole in terms of governance structures, history, culture, religion, ethnicity, economy, and politics.<sup>14</sup> This is now the case in Kenya with the constitutional recognition of TDRMs. TDRMs as a channel for dispute resolution remains a fundamental tool through which communities continue to exercise self-governance despite the dominance of the formal (Western) legal system. Notably, Article 11 of the Constitution of Kenya recognizes culture as the cornerstone of the nation. Every person in Kenya has a right to enjoy his or her language and culture provided that no one should be compelled to observe or undergo any cultural practice or right.<sup>15</sup> Courts are therefore enjoined to promote and encourage the use of TDRMs to enhance justice and in recognition of the culture and cultural expressions of tribal peoples. Importantly, Article 159(2) of the Constitution 2010 requires courts and tribunals to promote ADRMs including reconciliation, mediation, arbitration and TDRMs. Under international law, the ILO Convention No 169 upholds the right of tribal peoples to retain and develop their own customs and institutions and requires that the mechanisms customarily practiced for dealing with community disputes be respected.<sup>16</sup>

As noted, TDRMs are premised on customary law. This form of law consists of the unwritten norms and practices that define the identity of different communities and mediate their relationships and entitlements.<sup>17</sup> It

<sup>8</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 993 U.N.T.S. 3, article 1(1) (entered into force January 3, 1976); see also International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 999 U.N.T.S. 171, article 1(1) (entered into force March 23, 1976).

<sup>9</sup> S James Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State' (2004) 21(1) *Arizona Journal of International & Comparative Law* 49.

<sup>10</sup> Duncan Ojwang, *Converging Child Identity & Culture with the Tribe's Right to Self Determination: The Native American and Africa Child Identity* (Lambert Academic Publishing, 2015) 21.

<sup>11</sup> *ibid* 21.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid* 29.

<sup>14</sup> Republic of Kenya, *National Land Policy Sessional Paper No.3 of 2009* <<http://www.ardhi.go.ke>> accessed on 16 October 2018.

<sup>15</sup> Constitution of Kenya, 2010, Article 44.

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), 993 U.N.T.S. 3, article 8(2) and 9 (came into force in January 3, 1976).

<sup>17</sup> Winifred Kamau, 'Customary Law and Women's Rights in Kenya' (2014) 2 <<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> accessed 20 February 2016.

may be defined as human law that is embedded in traditional, social and psychological fabrics of the human society.<sup>18</sup> This law is dynamic and constantly evolving, and so are its attendant institutions such as TDRMs.<sup>19</sup> Customary law is recognised as a source of law in Kenya under Article 2(4) of the Constitution 2010. However, there is currently no specific law, policy or guideline on TDRMs in Kenya apart from a few general provisions entrenched in different laws which are explored below.

## **7.2 The existing Legal Framework for TDRMs in Kenya**

### **7.2.1 The Constitution of Kenya, 2010**

The Constitution of Kenya, 2010, is the most significant legal instrument setting the standard for the application of TDRMs in Kenya.<sup>20</sup> It is the highest judicial norm that binds all persons and all State organs.<sup>21</sup> The supremacy of the Constitution in relation to other laws is anchored in Article 2(4), which provides that, ‘any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency.’ This provision is a clear appreciation of customary law as part of the sources of law in Kenya and the fact that the purpose and principles of the Constitution hold supreme and shall be promoted. The effect of the provision is to establish a constitutional test for customary law and other laws in Kenya. Thus, before a court of law applies customary law or any other law in any particular case, the court must be sure that the particular rule or custom is not contrary to any provision of the Constitution. The Constitution therefore offers the most important yardstick against which the relevance and constitutionality of all other laws, customs, religious beliefs and practices are measured. Thus, TDRMs, as an embodiment of customary law, must be applied in a manner that is consistent with the Constitution.

Article 159 (2) of the Constitution provides for the principles of judicial authority, which include the need to promote ADRMs, including TDRMs. Courts and tribunals therefore provide the main avenue for promoting the use of these mechanisms and their integration with the formal court system. Further, in exercising judicial authority, courts and tribunals are required to ensure that justice is done to all irrespective of status and that it is administered without undue regard to procedural technicalities.<sup>22</sup>

These provisions emphasize the right of all persons to access justice as guaranteed by Article 48 of the Constitution. It also echoes the spirit of Article 27(1) under which every person is equal before the law and has the right to equal protection and equal benefit of the law. This right is anchored on the principles of expedition, proportionality, equality of opportunity, fairness of process, party autonomy, cost-effectiveness, party satisfaction and effectiveness of remedies. TDRMs have, as their major advantages, the attributes of cost-effectiveness, accessibility, simple procedures, flexibility, restoration of relationships, mutual problem solving and familiarity to the users. Their use is therefore critical in advancing the right of access to justice as enshrined in Article 48 of the Constitution.

### **7.2.2 The Judicature Act (Cap 8, Laws of Kenya)**

This Act provides for the jurisdiction of the High Court, the Court of Appeal, subordinate courts and related aspects. Section 3(1) envisages the pluralist system of law in Kenya. It comprises different sources of law such as the Constitution, Acts of Parliament, Common law, doctrines of equity, Statutes of general application, and Customary law. These sources may be categorised into formal and customary normative frameworks. Section 3(2) of the Act provides 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.<sup>23</sup>

This provision, read together with Article 2(4) of the Constitution, clearly shows that customary law is one of the sources of law in Kenya. However, this does not mean that customary law should be used in a way that subverts fundamental human rights and freedoms. The provision above overtly limits the application of customary law in a number of ways. First, this provision does not require courts to apply customary law as a binding source of law, but only as a *guide*. While the section does not clearly state where customary law lies in the hierarchy of laws, the word “guided” may be construed to mean customary law is at the bottom of the

---

<sup>18</sup> Peter Onyango, *African Customary Law System: An Introduction* (Nairobi, LawAfrica Publishing (K) Ltd, 2013) 18.

<sup>19</sup> Cuskelly Katrina, *Customary and Constitutions: State recognition of customary law around the world* (IUCN, Bangkok, Thailand 2011) 1.

<sup>20</sup> J OsogoAmbani and OchiengAhaya, “The Wretched African Traditionalists in Kenya: The Challenge and Prospects of Customary Law in the New Constitutional Era” (2015) 1 (1) *Strathmore Law Journal* 49.

<sup>21</sup> Constitution of Kenya 2010, Article 2(1).

<sup>22</sup> Constitution of Kenya, 2010, Article 159(2).

<sup>23</sup> Judicature Act Cap 8 Laws of Kenya, s. 3(2).

ladder. This uncertainty has been addressed under Article 2(4) of the 2010 Constitution, which states that, any law, including customary law that is inconsistent with the Constitution of Kenya is void to the extent of the inconsistency. Customary law however still falls below the ladder of common law and principles of equity which are taken judicial notice of under section 60 of the Evidence Act.<sup>24</sup> It only ranks above common law after codification, for example under section 3(5) of the Law of Succession Act<sup>25</sup> and the customary law marriage provisions under the Marriage Act 2014.

Secondly, section 3(2) of the Judicature Act restricts the application of customary law where the court is of the opinion that it is repugnant to justice and morality. Any customary law practice, such as widow inheritance and cleansing, which offend justice and morality, fall within the purview of section 3(2). This provision is also replicated in Article 159(3), which states that TDRMs should not be applied in a way that contravenes the Bill of rights, is repugnant to justice and morality, or is inconsistent with the Constitution or any other written law.<sup>26</sup>

However, it should be noted that the application of repugnancy test is dependent on judicial discretion as to what constitutes justice and morality. This is may be based on personal models and the perceived deficiencies of TDRMs, such as bias, discrimination, abuse and non-compliance with natural justice principles.

#### 7.2.3 The Small Claims Court Act 2016

This Act provides for the establishment of Small Claims Courts with the jurisdiction to hear matters relating to contracts, liability in tort, and compensation for personal injuries.<sup>27</sup> In discharging their mandate, the Courts may adopt and implement any other appropriate means of dispute resolution, including TDRMs.<sup>28</sup> Section 18(2) allows the Courts to adopt ADR mechanisms and make orders necessary to facilitate such means of dispute resolution. Any agreement reached by means of the ADR mechanism is considered as binding upon the parties.

#### 7.2.4 The Community Land Act 2016

The Act was enacted pursuant to Article 63 (5) of the Constitution, to provide for the recognition, protection and registration of community land rights, the tenure systems under which such lands may be held, and the management and administration of the lands. Section 39(1) of the Act encourages communities to settle community land disputes at the first instance using ADRMs. These mechanisms include TDRMs. Where the dispute is between members of a registered community or a registered community and another registered community, the parties shall, at the first instance, use any of the internal dispute resolution mechanisms outlined in the respective community by-laws.<sup>29</sup> This provision gives effect to Article 60(1)(g) of the 2010 Constitution, which encourages communities to settle land disputes through recognised local community initiatives.

Where the community is unable to resolve the dispute, the complainant shall refer it to the land adjudication officer.<sup>30</sup> The Cabinet Secretary in charge of land shall appoint an ad hoc committee to hear and determine this dispute.<sup>31</sup> In the hearing and determination of the dispute, the committee may consider ADR mechanisms including TDRMs in its resolution.<sup>32</sup>

#### 7.2.5 The Environment and Land Court Act 2011

The Act was enacted pursuant to Article 162(2)(b) of the Constitution, which establishes the Environment and Land Court (ELC) with the same status of the High Court. The ELC has jurisdiction on matters relating to the environment and land. Section 3(1) of the Act provides for the overriding objective, which is to enable the ELC to facilitate the just, expeditious, proportionate and accessible resolution of environment and land disputes. In line with this, the ELC is required to adopt and implement appropriate resolution mechanisms such as mediation, conciliation and TDRMs in accordance with Article 159(2) (c) of the Constitution.<sup>33</sup> In cases where the use of such mechanisms is a condition precedent, the court must stay the proceedings until such condition is fulfilled. The ELC must also be guided by the relevant cultural and social principles traditionally used by communities for the management of the environment or natural resources provided the same are not inconsistent with any written law.<sup>34</sup>

---

<sup>24</sup> Cap 80 Laws of Kenya.

<sup>25</sup> Cap 160 Laws of Kenya.

<sup>26</sup> Constitution of Kenya, 2010, Article 159(3).

<sup>27</sup> Small Claims Court Act 2016, s. 12(1).

<sup>28</sup> Small Claims Court Act 2016, s. 18(1).

<sup>29</sup> Community Land Act 2016, s. 39(2).

<sup>30</sup> Community Land Regulations 2017, r. 25(1).

<sup>31</sup> Community Land Regulations 2017, r. 25(4).

<sup>32</sup> Community Land Regulations 2017, r. 25(10).

<sup>33</sup> Environment and Land Court Act 2011, s. 20.

<sup>34</sup> Environment and Land Court Act 2011, s. 18.

#### 7.2.6 Land Act 2012

Section 4 of this Act envisages the guiding values and principles of land management and administration which include: elimination of gender discrimination in law, customs and practices related to land and property in land; 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; and the use of ADR mechanisms in the management of land disputes. This provision promotes the active utilisation of ADRMs including TDRMs in the management of land disputes in Kenya.

#### 7.2.7 The Legal Aid Act, 2016

The purpose of this Act is to enhance access to justice pursuant to Articles 19(2), 48, 50(2) (g) and (h) of the Constitution. Section 2 of the Act defines 'legal aid' to include, inter alia, provision of assistance in resolving disputes by ADR, and reaching or giving effect to any out-of-court settlement; and creating awareness through the provision of legal information and law-related education. Further, under section 3, the object of the Act is to promote access to justice by providing affordable, sustainable, creditable and accountable legal aid services to indigent persons; promoting legal awareness; and promoting ADR methods that enhance access to justice in accordance with the Constitution.

Section 5(1) establishes the National Legal Aid Services and mandates it to, inter alia, encourage and facilitate the settlement of disputes through ADR; promote the use of ADR; 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. This provision essentially advances the use of TDRMs and provides a legal framework for the training of elders on relevant aspects of law, especially human rights and the principles of natural justice.

#### 7.2.8 Civil Procedure Act and Rules (Cap 21 Laws of Kenya)

The Civil Procedure Act and rules embodies the procedural law for civil courts in Kenya. They provide an enabling framework that can be relied upon to promote the use of TDRMs in advancing the overriding objective. Under section 1A (1), the overriding objective of the Act and rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The overriding objective, therefore, provides a basis for courts to explore other forms of dispute resolution, including TDRMs, as complementary avenues towards enhancing access to justice.

Moreover, under section 3A of the Civil Procedure Act, courts have the mandate to make orders that may be necessary for the ends of justice. This encompasses the mandate to promote the use of TDRMs in furtherance of the overriding objective principle under section 1A and 1B of the Act. Order 11 of the Civil Procedure Rules provide for pre-trial rules, for instance regarding the use of ADR, which should be observed by courts before setting a case for hearing. Order 46 rule 20 requires the court to employ any other appropriate means of dispute resolution such as TDRMs to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Under Order 46 rule 20 (2), a court may adopt any ADR mechanisms (including TDRMs) for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism.

### 7.3 Commentary

From the above analysis, despite the various laws that provide for the use of TDRMs in Kenya, there is no specific law which operationalizes the administration of TDRMs. As a result, there is no regulatory guidance on components which are fundamental to the proper functioning of TDRMs as an institution for dispute resolution. These include; the scope of TDRMs both on the subject matter and personal jurisdiction. Indeed, TDRMs must resolve the disputes that are legitimately brought before them if they are to be effective.<sup>35</sup> This requires them to define their powers to exercise jurisdiction over both the dispute (subject matter jurisdiction) and the parties before them (subject matter jurisdiction).<sup>36</sup> Other components which are not adequately addressed by the existing legal framework include; appeal mechanisms, issues of bias, issues of conflict of customary laws of the relevant parties, referral mechanisms and the interaction between TDRMs and the courts.

## VIII. CONCLUSION AND RECOMMENDATIONS

Kenya has made progress in legitimising TDRMs. The Constitution has recognised TDRMs as one of the ADRMs that should guide the courts. However, the lack of a specific legal framework to regulate and operationalize TDRMs in Kenya is a hindrance to their effective implementation. Consequently, pertinent issues relating to the jurisdiction of TDRMs, the extent of limitation under the law, clarity on what the repugnancy clause constitutes among others have not been adequately provided for under the legal framework for TDRMs.

---

<sup>35</sup> David A Castleman, 'Personal Jurisdiction in Tribal Courts' (2006) 154 University of Pennsylvania Law Review 1253, 1254.

<sup>36</sup> *ibid.*

Court Act 2016. This works as a hindrance for the integration of TDRMs into the formal justice system and its effective use to resolve disputes and dispense justice.

The study therefore recommends that;

- i. There is need for a policy framework to provide for guidelines for the proper implementation of TDRMs in Kenya.
- ii. There is need for a specific legislation passed by Parliament to fully operationalise and integrate TDRMs in Kenya's justice system. This law should provide for the jurisdiction of TDRMs, the parties subject to it, the scope of its application, conflict of customary laws, further define the repugnancy clause by providing the standards of justice and morality which TDRMs should uphold, appeal mechanisms and other relevant aspects necessary for its effectiveness as an institution of dispute resolution.

## REFERENCES

- [1]. The Judiciary, Republic of Kenya, Judiciary Case Audit and Institutional Capacity Survey (Nairobi: Performance Management Directorate, 2014)
- [2]. OladapoKayodeOpasina, Legal Pluralism in Contemporary States: Between Traditional and Formal Justice Mechanisms in Nigeria and Côte D'Ivoire, *Glocalism: Journal of Culture, Politics and Innovation* 1 (6) 2017.
- [3]. David Pimentel, Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique, *Yale Human Rights and Development Journal* 14(1) 2011.
- [4]. J Griffith, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1-55.
- [5]. S James Anaya, International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State, *Arizona Journal of International & Comparative Law*, 21(1), 2004 49.
- [6]. Duncan Ojwang, *Converging Child Identity & Culture with the Tribe's Right to Self Determination: The Native American and Africa Child Identity* (Lambert Academic Publishing, 2015) 21.
- [7]. Republic of Kenya, *National Land Policy Sessional Paper No.3 of 2009* <<http://www.ardhi.go.ke>> accessed on 16 October 2018.
- [8]. Winifred Kamau, Customary Law and Women's Rights in Kenya, 2014 2 <<http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>> accessed 20 February 2016.
- [9]. Peter Onyango, *African Customary Law System: An Introduction* (Nairobi, LawAfrica Publishing (K) Ltd, 2013) 18.
- [10]. Cuskelly Katrina, Customary and Constitutions: State recognition of customary law around the world (IUCN, Bangkok, Thailand 2011) 1.
- [11]. J OsogoAmbani and OchiengAhaya, The Wretched African Traditionalists in Kenya: The Challenge and Prospects of Customary Law in the New Constitutional Era, *Strathmore Law Journal*, 1 (1), 2015, 49.
- [12]. David A Castleman, Personal Jurisdiction in Tribal Courts, *University of Pennsylvania Law Review* 154, 2006, 1253-1254.

IOSR Journal Of Humanities And Social Science (IOSR-JHSS) is UGC approved Journal with Sl. No. 5070, Journal no. 49323.

Joseph Sergon. " The Integration of TDRMS into the Formal Justice System in Kenya: An Analysis of the Legal Framework for TDRMS in Kenya." IOSR Journal of Humanities and Social Science (IOSR-JHSS). vol. 24 no. 10, 2019, pp. 59-65.