The Rejected Stone May Be the Cornerstone: A Case for the Retention of Traditional Justice Systems as the Best Fora for Community Land Disputes in Kenya

*Raphael Ng'etich**

Abstract

The resolution of community land disputes is not catered for adequately in Kenyan policy, law and practice. The Traditional Justice Systems (hereinafter TJS) initially used by communities were phased out with the introduction of laws based on western models of ownership. They were and are still viewed as retrogressive and backward. However, the formal systems introduced do not afford access to justice for all due to the complex procedures and high costs. This is the case even while TJS remain the most appropriate forum for resolving community land disputes. Their informal and community inclusive nature as well as resolution of disputes in the pursuit of restorative justice provide the best forum for resolution of community land disputes. This is owing to the fact that community land ownership is characterized by a web of interests and relationships where land rights are held by different individuals and groups with diverse interests. These relationships, therefore, need to be preserved for the communities to live harmoniously. TJS practices in Ghana and South Sudan are briefly examined in seeking to establish these aspects.

I. Introduction

The communal ownership of land in pre-colonial Africa was not to last for long as the colonialists introduced individual ownership based on English land ownership systems. The Swynnerton Plan,[1] for example, recommended in-

* The author is an LL.B graduate from the Strathmore University Law School in Nairobi, Kenya.

1 See Swynnerton R, *The Swynnerton report: A plan to intensify the development of African agriculture in Kenya*, 1955.

dividual land holding and intended to convert community land to private land to be held in accordance with English laws.[2] The result was a dualist system of law where customary law was subjugated to English law.

After independence, the subjugation continued: statutory law determined the validity and applicability of customary law.[3] However, the individualistic approach to dispute resolution, the pursuit of retributive ends, high costs, complex procedures and inaccessibility in all parts of the country do not allow the formal system to facilitate access to justice for all. It has a preference for rule-oriented disputes.[4] Community land disputes do not always fit in this group.[5] The Njonjo Commission, in pointing out the dissatisfaction with the formal process, stated that,

> 'The public has lost faith and confidence in the existing land dispute settlement mechanisms and institutions...they are characterised by delays...and unnecessary bureaucracy especially when there is a low participation of the local people...'[6]

This contributes to the continued existence of customary law despite the earlier deliberate efforts to eliminate it. It is in this regard that Okoth-Ogendo compares customary law to a dangerous weed that goes underground and continues to grow despite the overlay of statutory law designed to replace it.[7] The traditional justice systems (hereinafter TJS) 'have remained resilient despite the onslaught by the formal legal system.'[8] Community land tenure is neglected due to the overemphasis on private ownership of land.[9] This is a perverse incentive to move away from community land rights to private land rights[10] and is partly as a result of the misconception characterising the pre-2010 approach to com-

2 See Swynnerton, *The Swynnerton report.*

3 See, for example, Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).

4 See Elechi O, *Doing justice without the state: The Afikpo (Ehugbo) model,* Routledge, New York, 2006.

5 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed [2013] eKLR' 2 *Alternative Dispute Resolution Journal*, 1 (2014), 206.

6 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of a national land policy framework constitutional position of land and new institutional framework for land administration*, 2002, 78.

7 See Okoth-Ogendo HW, 'The tragic African commons: A century of expropriation, suppression and subversion' 1 *University of Nairobi Law Journal* (2003).

8 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.

9 See Migai J, *Rescuing indigenous tenure from the ghetto of neglect: Inalienability and protection of customary land rights in Kenya*, African Centre for Technology Studies Press, Nairobi, 2001.

10 United States Agency for International Development, *Kenya secure project: Legal review of the draft legislation enabling recognition of community land rights in Kenya,* 2012, 9.

munity land viewing community land as *res nullis*[11] yet it is *res communis*.[12] However, community land tenure continues to survive: '...the more policy and law sidelined customary tenure systems, the more resilient these systems became...'[13]

The National Land Policy[14] (hereinafter the Policy) and the Constitution of Kenya, 2010 (hereinafter the 2010 Constitution) ushered in a new dawn for community land and TJS. They are now expressly recognised and there are efforts to enact a law on community land.[15] However, the emphasis on the formal justice systems continues to date. Parliament is mandated to enact a statute to establish a court with the status of the High Court to entertain disputes relating to environment and land.[16] In fulfilment of this duty, it has enacted the Environment and Land Court Act, 2011.[17] This continued emphasis on formal mechanisms fails to realize that, 'every society...has its own methods, procedures, or mechanisms for dealing with or resolving disputes'.[18] Traditional African communities have their own unique cultures which have since been central in resolving disputes. The constitutional recognition of TJS has not solved the problem as they have not been adopted in the dispute resolution policy and practice.[19] They are portrayed as backward and retrogressive.

II. Theoretical Underpinnings for Using TJS to Resolve Community Land Disputes

The structural functionalism theory provides a basis for the appropriateness of TJS in resolving community land disputes. The theory has its origins in the works of Emile Durkheim and Herbert Spencer, who set out to investigate

11 *Res nullis* literally means 'nobody's property'. It is used to describe things which do not have an owner.

12 Okoth-Ogendo HW, 'The tragic African commons', 4. *Res communis* literally means 'thing of the (entire) community'. It is used to describe things that belong to an entire community or mankind as a whole.

13 Kameri-Mbote P, Odote C, Musembi C and Kamande M, *Ours by right: Law, politics and realities of community property in Kenya,* Strathmore University Press, Nairobi, 2013, 43.

14 Republic of Kenya, *Sessional paper no. 3 of 2009 on National Land Policy*, 2009.

15 Articles 61, 63(5) and 159(2) (c), *Constitution of Kenya* (2010).

16 Article 162(1), *Constitution of Kenya* (2010).

17 Chapter 12A, Laws of Kenya.

18 Dzivenu S, 'The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana' 2 *Political Perspectives,* 1 (2008), 2.

19 See Pimentel D, 'Can indigenous justice survive? Legal pluralism and the rule of law,' 32 *Harvard International Review*, 2 (2010).

order and stability in society.[20] According to the theory, the way a society is structured determines the way in which various societal functions are ordered.[21] The patterns of social ordering determine the forms of dispute resolutions applicable.[22] For example, conflict resolution mechanisms in a communal society are determined by the shared communal values. This implies that disputes arising from communally held land can best be resolved using communal mechanisms. The suitability of TJS in resolving community land disputes can, therefore, be premised on this theory since the communal nature of African societies necessitates mechanisms which are community inclusive and aim at restoring the relationship between the disputants.

The African commons theory advanced by Okoth-Ogendo explains the communal ownership of land in traditional African societies. He posited that the African commons are organised and managed by a social hierarchy in the form of an inverted pyramid with the family at the tip, the clan at the middle, and the community at the base. Decision making in each of these levels is done in reference to the internalised communal values and principles.[23] This communal aspect, therefore, has implications on land dispute resolution. Furthermore, land in traditional African communities is not merely an economic or political resource: it is a medium binding together the intra and inter-generational social and spiritual relations[24] and belongs to the living, the dead and the unborn.[25] It is in this regard that '[i]ssues about its ownership and control are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods.'[26] It is, therefore, necessary to develop 'socially reconstructive dispute processing mechanisms...'[27] TJS can best fulfil this role since they are anchored on communal values and seek to preserve the relationships between the disputants.

20 Macionis J, *Society: The basics*, 8 ed, Pearson/Prentice Hall, Upper Saddle River, 2006, 12-13.
21 Macionis, *Society*, 12-13.
22 Federation of Women Lawyers (FIDA) Kenya, *Traditional justice systems in Kenya: A study of communities in coast province of Kenya*, 2008, 2.
23 Okoth-Ogendo HW, 'The tragic African commons', 2.
24 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.
25 See Republic of Kenya, *The report of the Mission on land consolidation and registration in Kenya*, 1966.
26 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.
27 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 79.

III. The State of Community Land and TJS

This part undertakes a thematic review of existing literature on community land and TJS in establishing the state of community land and TJS. It seeks to counter the notion in the existing literature that community land ownership and TJS are backward and inferior. The themes covered are:

i. Community land

Land was communally owned in pre-colonial Africa but the setting in of colonization saw a focus by policy and law on private ownership and perception of the African form of land ownership as being inferior. In examining land policies and laws in colonial Kenya, Ghai and McAuslan state that:

> 'For the greater part of the colonial period, *agrarian policy was concerned to create and maintain two separate and unequal systems of administration, the African system existing to serve in a subordinate capacity the European one*...the settlers were in a position to ensure that they played a major part in administering the law applying to them and that the administration of the law applying to Africans should reflect their assumptions about the place of Africans in Kenya...the law and its administration had no inherent values, but derived both values and form from the predilections of the dominant political and economic groups in society.'[28]

The intention of introducing private land ownership was manifested in the commissioning and implementation of the Swynnerton Plan which advocated for land consolidation, adjudication and registration.[29] Parcels of land were registered to individuals with the aim of giving incentives for development.[30] This, however, resulted in land crisis and conflicts: a large portion of communally owned land was converted to individual land through questionable processes.[31]

After independence, land tenure was classified into three categories: customary; government; and private tenure.[32] Customary land was held and managed according to the customary laws and practices of various traditional com-

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28 Ghai Y and McAuslan J, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Nairobi, 1970, 124.

29 See Swynnerton, *The Swynnerton report.*

30 O'Brien E, 'Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon' International Land Coalition (2011), vii.

31 O'Brien E, 'Irregular and illegal land acquisition by Kenya's elites', vii.

32 Republic of Kenya, *Final report of the truth, justice and reconciliation Commission of Kenya,* Volume IIB (3 May 2013 Version), 250.

munities.[33] It was held in form of group ranches and trust lands where individuals were registered as the holders in place of the community. However, they were prone to abuse and in many instances there was illegal and irregular conversion to private land.[34]

The 2010 Constitution has had positive implications on community land. The constitutional recognition of community land is a feature unique to the 2010 Constitution. It states that the people of Kenya can own land as communities[35] and further provides that the classification of land in Kenya includes community land which is to be vested in and be held by communities.[36] It does not provide a definition but only mentions what constitutes community land, for example, ancestral land and land lawfully held, managed or used by communities.[37] It also requires that a law be enacted to cater for community land interests.[38]

ii. TJS and customary law

TJS are founded on the customary practices of various tribal communities. Their functioning and viability is, therefore, greatly determined by the legal status and application of customary law.[39] Kariuki observes that, '...they are embedded in African customary laws. They are anchored on traditional norms and values of Africans...'[40]

Customary laws have been greatly side-lined in the legal process in Kenya. The colonial government set the stage for their relegation by imposing English laws on traditional African communities which had their own systems of law and governance.[41] This led to the emergence of a weak pluralist system of law 'which persists even today under which customary law is seen as being inferior 'law".[42]

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33 Republic of Kenya, *Final report of the truth, justice and reconciliation Commission of Kenya*, 250.
34 Hornsby C, *Kenya: A history since independence*, IB Tauris, London, 2012, 314.
35 Article 61, *Constitution of Kenya* (2010).
36 Article 63(1), *Constitution of Kenya* (2010).
37 Article 63(2), *Constitution of Kenya* (2010).
38 Article 63(5), *Constitution of Kenya* (2010).
39 International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 2011, 32.
40 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.
41 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 89.
42 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 206.

Case law,[43] before and after independence, depicts that this results in relegation of customary law in the legal system. In *R v Amkeyo,*[44] for example, a woman married under customary law was held not to be a legal wife or spouse and was consequently compelled to testify against her husband. This contravened the common law rule of spousal privilege which protects the confidentiality of communications within marriage and prevents a spouse from being forced to testify against the other in criminal or civil cases.[45]

Apart from viewing customary law as inferior, the colonial Judiciary also failed to adapt English laws to the circumstances of the communities living in the colony as required under the proviso to the East Africa Order in Council.[46] They ignored the call by Lord Denning in *Nyali Ltd v Attorney General,*[47] where he stated that:

> 'The next proviso says, however, that the common law is to apply 'subject to such qualification as local circumstances render necessary'. This wise provision...is *a recognition that the common law cannot be applied in a foreign land without considerable qualification...In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications.*'[48]

After independence, the country inherited the formal laws and continued the subjugation of customary law to the formal systems.[49] The Judicature Act[50] provides the evidentiary basis of this claim. It requires that customary law be applied as long as it not repugnant to justice and morality.[51] The application of this provision occasions grave consequences on customary law. The content of the repugnancy clause is not defined but left open for the courts to interpret.[52] Customary law also has to be proven in order to be regarded as law.[53] The result is that '...African customary law has suffered tremendous usurpations on the ju-

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43 See also *Lolkilite ole Ndinoni v Netwala ole Nebele* [1952] 19 EACA, *Kamanza s/o Chiwaya v Manza w/o Tsuma* Unreported High Court Civil Appeal No. 6 of 1970 and *Maria Gisege Angoi v Macella Nyomenda* Civil Appeal No. 1 of 1981.

44 [1917] 7 EALR 14.

45 Mbobu K, *The law and practice of evidence in Kenya*, LawAfrica Publishing, Nairobi, 2011, 155.

46 Cotran E, 'The development and reform of the law in Kenya' 27 *Journal of African Law*, 1 (1983), 44.

47 [1955] 1 AER 646.

48 [1955] 1 AER 646, 653.

49 Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya: The challenges and prospects of customary law in the new constitutional era' 1 *Strathmore Law Journal* 1, (2015), 49.

50 Chapter 8, Laws of Kenya.

51 Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).

52 Kariuki F, 'Customary law jurisprudence from Kenyan courts: Implications for traditional justice systems' http://www.kmco.co.ke/attachments/article/137/TDRM%20and%20Jurisprudence.pdf on 6 March 2015, 7.

53 *Ernest Kinyajui Kimani v Muiru Gikanga and Another* [1965] EA 735.

ridical front.'[54] This has led to the undermining of TJS as they derive their basis from customary law.

However, the promulgation of the 2010 Constitution saw customary law expressly recognised as a source of law.[55] The first implication of this provision on customary law is that the express mention of customary law by the supreme law means that it is a legitimate source of law and now has a position in the country's legal system. Secondly, the requirement that customary law be applied in a manner consistent with the 2010 Constitution provides a safeguard against any customary law and practice that does not adhere to the constitutional and human rights principles. The 2010 Constitution further recognises the crucial role of culture 'as the foundation of the nation'.[56] On the principles of land policy, it provides that there should be 'encouragement of communities to settle land disputes through recognised local community initiatives'.[57] Furthermore, the exercise of judicial authority is to be guided by principles including the use of alternative forms of dispute resolution and traditional dispute resolution mechanisms.[58] It can, therefore, be reasonably stated that the legal status of customary law and TJS has been elevated.

iii. TJS and access to justice

The 2010 Constitution requires the state to guarantee access to justice for all.[59] Access to justice may refer to: a situation where individuals are able to obtain affordable, accessible, comprehensible, just, efficient and expeditious solutions from the legal system;[60] the removal of the barriers hindering access to the formal systems and structures so that every member of society can access legal services;[61] or the use of informal dispute resolution mechanisms to ensure access to justice.[62] The last reference is the perspective taken in this paper.

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54 Ambani J and Ahaya O, 'The wretched African traditionalists in Kenya', 49.

55 Article 2 (4), *Constitution of Kenya* (2010).

56 Article 11(1), *Constitution of Kenya* (2010).

57 Article 60(1), *Constitution of Kenya* (2010).

58 Article 159(2), *Constitution of Kenya* (2010).

59 Article 48, *Constitution of Kenya* (2010).

60 Ladan M, "Access to justice as a human right under the ECOWAS community law" Commonwealth Regional Conference, Abuja, April 2010.

61 Global Alliance Against Traffic in Women (GAATW) http://www.gaatw.org/atj/ on 5 February 2015.

62 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 210.

TJS can better guarantee access to justice in Kenya since they do not bar individuals and communities through webs of procedural rules, legal principles and justice professionals. It instead allows them to have a direct contact with the dispute resolution system.[63] And as noted by the Njonjo Commission, it is necessary to develop an efficient and cost effective land dispute resolution mechanism devoid of delays.[64]

IV. Legal and Policy Manifestations of TJS in Kenya

This part examines the manifestations of TJS in Kenya. It seeks to interrogate whether the policies, laws and practices, both past and present, promote TJS.

i. Past manifestations

a. Native Courts Regulations

The Regulations[65] established a court system for native Africans and recognised the existing power of councils of elders and local chiefs to adjudicate disputes in the native communities.[66] They applied customary law in resolving disputes relating to natives.[67]

b. East African Native Courts (Amendment) Ordinance

The Ordinance[68] introduced special courts with full civil and criminal jurisdiction over natives in districts. The courts applied laws prevailing in the Protectorate including customary law. Section 20 of the Ordinance contained the repugnancy clause and became one of the major steps in subjecting the validity and application of customary law to statutory provisions.[69] The substance of this provision was later reproduced in Article 7 of the Kenya Colony Order in Council of 1921 and continues to be part of Kenyan law as reflected in Section 3(2) of the Judicature Act.[70]

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63 Christie N, 'Conflicts as property' 17 *British Journal of Criminology,* 1 (1977).

64 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 89.

65 No. 15 of 1897.

66 Article 2(b), *Native Courts Regulations* (No. 15 of 1897).

67 Kariuki F, 'Customary law jurisprudence from Kenyan courts', 2.

68 No. 31 of 1902.

69 Ochich G, 'The withering province of customary law in Kenya: A case of design or indifference?' in Fenrich J, Galizzi P and Higgins T (eds), *The future of African customary law*, Cambridge University Press, Cambridge, 2011, 106.

70 Chapter 8, Laws of Kenya.

c. Native Lands Registration Ordinance

During the 1950s, more attention was directed towards customary laws on land.[71] The aim of the Ordinance[72] was to effect registration of individual ownership of land previously held under customary tenure. It established a committee to hear and determine land claims in line with customary law. The provision was framed as recognition of customary land rights but the true intention was to mount '...another form of assault on customary law as it sought to transform customary land rights into an entirely different crop of rights, namely modern land tenure based on principles of English property ownership.'[73]

ii. Present manifestations

a. The Constitution of Kenya, 2010

The promulgation of the 2010 Constitution appears to have ushered in a new dawn for TJS in Kenya. The repealed Constitution did not deal with TJS. The recognition, therefore, by the supreme law seems to assert the place of customary law in the legal system and, consequently, that of TJS in dispute resolution. Article 2(4) provides for the supremacy of the 2010 Constitution over all other laws. The 2010 Constitution is the most important part of the basic law of a state.[74] This Article goes ahead to recognise customary law as a source of law. However, the recognition is in a negative perspective.[75] The Article only mentions it in an exclusionary manner in that where it is inconsistent with the 2010 Constitution, it is rendered void to the extent of the inconsistency. This therefore does not significantly uplift the place of customary law in the juridical system.

There has been an attempt in the constitution making process to ensure respect for ethnic and regional diversity and the right of communities to manifest their cultural identities.[76] This was realized in the inclusion of Article 11 which 'recognises culture as the foundation of the nation...' This approach seeks to encourage cultural diversity and to protect and promote culture.[77] The repealed Constitution did not have specific provisions dedicated to culture. Article 11 is

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71 Ochich G, 'The withering province of customary law in Kenya', 106.

72 No. 2 of 1959.

73 Ochich P, 'The withering province of customary law in Kenya', 106.

74 Lumumba P and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 66.

75 Lumumba and Franceschi, *The Constitution of Kenya,* 2010, 71.

76 Republic of Kenya, *Final draft of the Constitution of Kenya review Commission*, 2005, 55-56.

77 Republic of Kenya, *Final draft of the Constitution of Kenya review Commission*, 92.

an attempt to depart from the notion, originating in the colonial period, which views traditional African cultures as backward, primitive and immoral. It imposes a positive duty on the state to promote all forms of national and cultural expressions and requires enactment of a law to ensure that communities are compensated for the use of their cultures. The promotion, therefore, of the traditional cultural practices has a positive impact on TJS since they are embedded in the customs, norms and values of traditional African cultures.[78]

Access to justice is provided for under Article 48 and TJS can be used to realize it by ensuring that communities especially in rural areas are able to get an affordable, easily available and comprehensible forum for dispute resolution. TJS apply the customs and traditions of various communities and it is, therefore, not alien to the communities. Furthermore, TJS processes are conducted in the local languages. This makes it very easy for the parties to easily comprehend the proceedings, respond appropriately and not require legal representation.

The principles on land policy guide the manner in which land administration and management is conducted.[79] These principles can best be realized using TJS. TJS provide an easily available, cost effective and easily comprehensible forum for resolution of community land disputes. The transparent administration of land is realized as communities are given the opportunity to settle disputes over land using their own customs, traditions and local community initiatives in line with the 2010 Constitution. This is also in line with the objects of devolution of giving powers of self-governance to communities and recognising and promoting their right to manage their own affairs and to further their own development.[80]

The National Land Commission (hereinafter NLC) is established in order to prevent abuses of the land management and administration processes. One of the mandates of NLC is to encourage the application of traditional dispute resolution mechanisms in land conflicts.[81] NLC is, therefore, one of the bodies charged, by the 2010 Constitution, with ensuring that TJS are applied in the land dispute resolution process.

Judicial authority has previously been exercised by the courts and tribunals but no law had alluded to the fact that it is derived from the people. The 2010

78 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya', 203.

79 Article 60, *Constitution of Kenya* (2010).

80 Article 174 (c) and (d), *Constitution of Kenya* (2010).

81 Article 67(2) (f), *Constitution of Kenya* (2010).

Constitution mentions this in order to emphasize the important point that all sovereign power comes from the people of Kenya and that the 2010 Constitution is the medium through which this power is transmitted to those charged with governance.[82] The use of traditional dispute resolution mechanisms is one of the principles guiding the exercise of judicial authority.[83] This goes a long way in bolstering the overall objective of recognising that sovereign power comes from the people. It also contributes to the realization of the other principles, for example, that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

However, traditional dispute resolution mechanisms may not be applied in a manner that contravenes the Bill of Rights, is repugnant to justice and morality or inconsistent with the 2010 Constitution or any written law.[84] The restriction as to repugnancy to justice and morality is vague. This is because neither the 2010 Constitution nor statutes define what constitutes 'repugnant to justice and morality'. This is left for the courts to determine and, as shown above, provides room for undue restriction of traditional dispute resolution mechanisms.

Furthermore, the mandate of promoting traditional dispute resolution mechanisms is placed on the judiciary.[85] This reduces their viability in guaranteeing access to justice.[86] The 2010 Constitution requires the state to ensure that fee requirements do not impede access to justice.[87] The courts are slow, expensive, do not go into the root cause of the conflict and the parties have no control. The judiciary is, therefore, not in a position to ensure an effective implementation and promotion of traditional dispute resolution mechanisms in guaranteeing access to justice.

b. National Land Commission Act

The 2010 Constitution establishes NLC in order to prevent abuses of land administration powers. The National Land Commission Act[88] seeks to further the provisions of Article 67(2). It provides for additional functions of NLC as stipulated in the 2010 Constitution.[89] One of the functions is the encouragement

82 Article 1(1), *Constitution of Kenya* (2010).
83 Article 159(2) (c), *Constitution of Kenya* (2010).
84 Article 159(3), *Constitution of Kenya* (2010).
85 Article 159, *Constitution of Kenya* (2010).
86 Republic of Kenya, *Judiciary transformation framework, 2012 – 2016,* 20.
87 Article 48, *Constitution of Kenya* (2010).
88 Chapter 5D, Laws of Kenya.
89 Section 5, *National Land Commission Act* (Chapter 5D, Laws of Kenya).

of the application of traditional dispute resolution mechanisms in resolving land conflicts. NLC should, therefore, take up this mandate and ensure that TJS is promoted.

c. Environment and Land Court Act

The creation of the specialized courts, for example the Environment and Land Court (hereinafter the Court), is a feature unique to the 2010 Constitution. The Environment and Land Court Act[90] has been enacted pursuant to Article 162(2)(b). It empowers the Court to apply traditional dispute resolution mechanisms on its own motion, with the agreement or at the request of the parties.[91] Where the application of TJS is a condition precedent to any proceedings, the Court must stay proceedings until the condition is met.[92] The objective of the Act is to enable the Court to facilitate just, expeditious, proportionate and accessible resolution of disputes.[93] This objective will not be realized if TJS are placed under the Court. TJS will end up like the litigation process which has, in an attempt to guarantee access to justice, led to delay and even denial of justice.[94]

d. Land Act

The Act outlines the land management and administration values and principles.[95] The values bind all state organs and officers, public officers and all persons engaged in the enactment, application or interpretation of the provisions of the Act or making or implementing public policy decisions. One of the principles is that communities are to be encouraged to settle land disputes through local community initiatives. The proper implementation of this principle by applying TJS will help realize the other principles, for example, security of land rights, transparent and cost effective administration of land, democracy, inclusiveness and participation of the people. Any disputes under the Act may be referred to the Court.[96]

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90 Chapter 12A, Laws of Kenya.
91 Section 20(1), *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).
92 Section 20(2), *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).
93 Section 3, *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).
94 Republic of Kenya, *Judiciary transformation framework, 2012 – 2016,* 20.
95 Section 4, *Land Act* (Chapter 280, Laws of Kenya).
96 Section 128, *Land Act* (Chapter 280, Laws of Kenya).

e. Judicature Act

The Act states that customary law is to be applied as long as it *'is not repugnant to justice and morality…'*[97] This provision is what has long hindered the application of customary law and TJS. The Act does not define what constitutes repugnancy to justice and morality. The vagueness must have been intended to weaken the position of customary law, and consequently TJS, in the legal system due to their perception of TJS as backward and retrogressive.

f. Magistrates' Court Act

The Act vests jurisdiction on magistrates to entertain claims under customary law.[98] It defines a 'claim under customary law' to include those concerning land held under customary tenure.[99]

g. Commission on Administrative Justice Act

The Act mandates the Commission to work with different public institutions to promote alternative dispute resolution in handling complaints on public administration.[100] This empowers the Commission to employ TJS in resolving disputes relating to the administration of community land.

h. National Land Policy

The National Land Policy[101] recognises the need to ensure that there is access to timely, efficient, affordable dispute resolution mechanisms in order to facilitate efficient land markets, tenure security and investment stability in land.[102] On community land, the Policy states that one of the effects of individualization of tenure was to undermine traditional resource management institutions.[103] The Policy recognizes that TJS has a role to play in guaranteeing access to justice in the land sector.

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97 Section 3(2), *Judicature Act* (Chapter 8, Laws of Kenya).
98 Section 9, *Magistrates' Court Act* (Chapter 10, Law of Kenya).
99 Section 2, *Magistrates' Court Act* (Chapter 10, Law of Kenya).
100 Section 8, *Commission on Administrative Justice Act* (No. 23 of 2011).
101 Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy.*
102 Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, section 169.
103 Republic of Kenya, *Sessional paper No. 3 of 2009 on National Land Policy*, section 64.

iii. Challenges faced in resolving community land disputes

The resolution of community land disputes using the formal justice system has posed various challenges. Community land is held and managed according to the cultures of traditional African communities. However, it must be noted that cultures vary across communities and, therefore, the phrase 'African customary law' does not imply the existence of a single custom applicable to all the communities.[104] Each community '...has its own methods, procedures, or mechanisms for dealing with or resolving disputes.'[105] Applying a form of justice system that does not recognise the diversity in culture fails to appropriately resolve the dispute in question. Diversity in culture necessitates diversity in dispute resolution,[106] a principle the drafters of the 2010 Constitution realized in drafting Article 159(2)(c).[107]

The resolution of community land disputes using the formal justice system has not borne fruit since it represents powers of self-governance taken from communities. The communities are not able to decide on matters affecting them. The 2010 Constitution recognizes this and provides that some of the objects of devolution of government are to give powers of self-governance to the people and 'to recognise the right of communities to manage their own affairs and to further their development'.[108]

Another challenge derives from the lack of community land legislation. Community land is held according to the customs of the various communities. Customary law is not documented and this has the effect that the rights and obligations over land are not documented as well.[109] The formal justice system is, unable to appropriately resolve disputes relating to such land since courts require proof of ownership of land and yet communities do not possess title deeds.[110] The communities can, therefore, be disposed due to their inability to obtain the documents required in the process.

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104 Ndulo M, 'African customary law, customs and women's rights' *Cornell Law Faculty Publications*, Paper 187 (2011), 87.

105 Dzivenu S, 'The politics of inclusion and exclusion of traditional authorities in Africa', 2.

106 Kinama E, 'Traditional justice systems as alternative dispute resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' 1 *Strathmore Law Journal,* 1 (2015), 23.

107 Kinama E, 'Traditional justice systems as alternative dispute resolution under Article 159(2) (c) of the Constitution of Kenya, 2010', 23.

108 Article 174(d), *Constitution of Kenya* (2010).

109 Knight R, 'Statutory recognition of customary land rights in Africa: An investigation into best practices for law making and implementation' *FAO Legislative Study* 105, (2010), vii.

110 Knight R, 'Statutory recognition of customary land rights in Africa', vii.

TJS terminology also poses a challenge. The law deals with community, customary and traditional justice systems as if they are similar.[111] Community justice systems refer to those practices adopted by a group of people who live together by virtue of their ethnicity, culture or interest.[112] Customary justice systems are those mechanisms that have developed based on the customs of a group of people.[113] Traditional dispute resolution mechanisms are those that have been used by communities over a long period of time.[114] The legal framework uses these terms interchangeably.[115] Furthermore, there are overlaps, differences and similarities between these terminologies.[116] The implementation of TJS laws is, therefore, bound to face terminological difficulties since the use of different terms implies that the mechanisms are different.

The past manifestations of TJS in policy and law show that the applicability of customary law in juridical system has been subjugated to statutory provisions. This has not, however, been resolved in the present manifestations as the application of customary law is still subjected to the repugnancy clause. One can only take comfort in the fact that the place of culture, customary law and TJS in the nation has been constitutionally acknowledged.

V. Comparative Study on TJS Practices

TJS practices in other jurisdictions are examined with the aim of determining the lessons that Kenya can draw in harnessing TJS to resolve community land disputes. Ghana and South Sudan are examined. They have been picked due to the approach they have taken in implementing TJS. They recognise TJS institutions without interfering with their function. This is due to the fact that merging traditional and formal systems lead to dilution or undermining of the traditional ones.[117]

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111 Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology', 1 http://kmco.co.ke/index.php/publications/148-community-customary-and-traditional-justice-systems-in-kenya-reflecting-on-and-exploring-the-appropriate-terminology on 2 March 2015.

112 Kariuki F, 'Community, customary and traditional justice systems in Kenya', 5.

113 Henrysson E and Joireman SF, 'On the edge of the law: Women's property rights and dispute resolution in Kisii, Kenya,' 43 *Law and Society Review,* 1 (2009), 39-41.

114 Kariuki F, 'Community, customary and traditional justice systems in Kenya', 12.

115 See, for example, *Constitution of Kenya* (2010) and *Environment and Land Court Act* (Chapter 12A, Laws of Kenya).

116 Kariuki F, 'Community, customary and traditional justice systems in Kenya', 13.

117 Zehr H, *Changes lenses: A new focus for crime and justice*, Herald Press, Scottsdale, 1990, 97-105.

i. Ghana

The land tenure system in Ghana is dualistic in nature – consisting of customary and state tenure systems.[118] The social and religious beliefs characterising traditional ownership have profound implications on land tenure norms and practices. For example, the Akan tribe regard land as a supernatural feminine spirit.[119] Land is treated as a heritage given to the community to use and preserve for future generations.[120] It is held in trust by the head of the community.[121] This is because land belongs to the entire family, village or community and not to the individual.[122] The Constitution of Ghana has recognized this fiduciary duty which is performed in line with customary law and usage.[123]

Land is classified into public and customary land. Customary land falls under the 'stool,' 'skin,' 'clan' and 'family' heads, all characterized by communal ownership.[124] Communally held land in Ghana is about 80 percent.[125] Below is the dispute resolution channel.

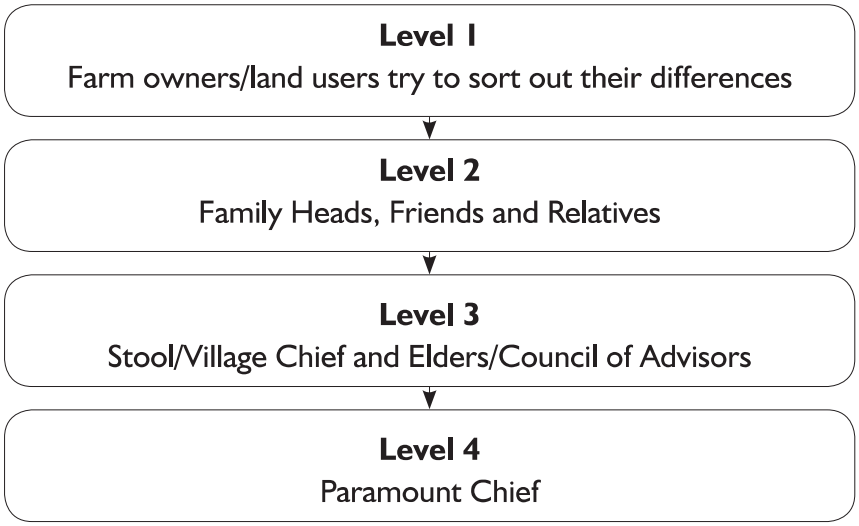

Figure 1: Channels of Traditional Dispute Resolution[126]

[118] Danso E, 'Peri-urban land tenure in Ghana (Accra): Case study of *Bortianor*' Masters of Geomatics Engineering Thesis, University of Calgary, January 2013, ii.

[119] Elias T, *The nature of African customary law*, Manchester University Press, Manchester, 1956, 62.

[120] See Danso E, 'Peri-urban land tenure in Ghana (Accra)'.

[121] Ollenu N, *Principles of customary land law in Ghana*, Sweet and Maxwell, London, 1962, 16.

[122] Bentsi-Enchil K, 'The traditional legal systems of Africa' in Lawson F (ed), *Property and trust*, International Encyclopedia of Comparative Law VI, (1975), chapter 2, The Hague, 68-101.

[123] Article 276(1), *Constitution of Ghana* (1992).

[124] Ministry of Lands and Forestry, *Emerging land tenure issues*, Ghana, 2003.

[125] Antwi A and Adams J, 'Rent seeking behaviour and its economic costs in urban land transactions in Accra, Ghana' 40 *Urban Studies*, 10 (2003), 2083-2098.

[126] Alhassan O and Manuh T, 'Land registration in eastern and western regions, Ghana' International

The various levels of land holding, as shown in Figure 1, also serve as dispute resolution structures. Dispute resolution begins from the land owners/users through the community, to the paramount chief. Level 2 to level 4 also serve an appellate function. The disputes that cannot be resolved in level 1 are dealt with in the next level, all through to level 4. The institutions at the various levels serve a dispute resolution function. The disputing parties come together to negotiate or voluntarily submit the dispute to the heads of the family, the village chief or the paramount chief.127

The head of the family, the village chiefs and paramount chiefs employ mechanisms such as rituals, negotiation, reconciliation and mediation in resolving the matter.[128] The rituals used vary from community to community but have the same significations due to the belief that land is a spiritual entity and, therefore, the *Earthgod* is the ultimate decider of land disputes.[129] Negotiations are used by the disputants themselves and at other times under the recommendation of those in charge of dispute resolution.[130] Reconciliation and mediation are employed where the parties are not able to resolve the dispute themselves or when rituals are not used.[131]

ii. South Sudan

Traditional African communities in South Sudan hold land in common. Individuals have the right to use – usufruct,[132] passed down generations and chiefs regulate land use for the common good.[133] Land disputes are resolved by customary courts.[134] Disputes are resolved at the different levels: those at the

Institute for Environment and Development, Research Report 5, (2005), 29.

127 Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management: Cases from the upper west region' 4 *Developing Country Studies*, 11 (2014), 4.

128 Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.

129 Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.

130 Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 5.

131 Paaga D and Dandeebo G, 'Assessing the appeal of traditional dispute resolution methods in land dispute management', 3.

132 Usufruct is an interest that permits one to use a thing and at the same time pay respect to the substance of the property as they have no right to dispose of it. See Bermann GA and Picard E, *Introduction to French law*, Kluwer Law International, Alphen aan den Rijn, 2008, 162.

133 Mennen T, 'Customary law and land rights in South Sudan' Norwegian Refugee Council Report (2012), 11.

134 Mennen T, 'Customary law and land rights in South Sudan', 11.

meta-family level are handled by elders; those at the *boma*[135] by sub-chiefs; those at the *payam*[136] by executive chiefs; and those at the county by paramount chiefs.[137] Disputes not resolved at one level are taken to the next.[138] The resolution of disputes by customary courts is a practice that thrives in rural areas where the state mechanisms are not present.[139]

The operation of customary courts is recognised under the Local Government Act.[140] Each county has a Customary Law Council as the highest customary law authority charged with the protection, promotion and preservation of the traditions, customs, cultures, values and norms of the communities within that county.[141] It also has the responsibility of administering customary law and training the customary court staff in the county. It derives its authority from the customs and traditions of the people.

There are four levels of customary courts: "C" Courts; "B" Courts or Regional Courts; "A" Courts or Executive Chief's Courts; and Town Bench Courts.[142] These courts have the competence to entertain customary disputes, including customary land disputes,[143] in accordance with traditions, customs and norms of the communities.[144] The levels also serve an appellate function.[145]

iii. Lessons from the comparative study

The case studies reveal that indigenous TJS institutions are able to deliver justice and are accessible, affordable and comprehensible especially in rural areas. Land is also more than an economic asset to traditional African communities so other aspects, for example, social and religious implications inform the land holding and consequently dispute resolution. It is also evident that the state can recognise TJS without interfering with them. This enables the indigenous TJS institutions to work and remain true to their objectives, for example, the pursuit of restorative justice.

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135 An administrative unit in South Sudan under Payam administration.
136 An administrative unit in South Sudan under County administration.
137 Mennen T, 'Customary law and land rights in South Sudan', 10.
138 Mennen T, 'Customary law and land rights in South Sudan', 10.
139 Mennen T, 'Customary law and land rights in South Sudan', 13.
140 Section 12, *Local Government Act* (South Sudan).
141 Chapter X, *Local Government Act* (South Sudan).
142 Section 97, *Local Government Act* (South Sudan).
143 Section 100, *Local Government Act* (South Sudan).
144 Section 98, *Local Government Act* (South Sudan).
145 Sections 99, 100, 101 and 102, *Local Government Act* (South Sudan).

VI. Suitability of TJS in Resolving Community Land Disputes

Communal property rights, for example, community land rights, are likened to a 'web of interests'[146] as they incorporate different parties with various rights. Various rights attach to community land, for instance, the right to graze, right to fetch water, right to harvest forest resources like honey or right to regulate or manage the resources.[147] The resolution of disputes relating to the ownership and use of such resources, therefore, requires mechanisms that take into account and preserve these relationships. This role is best fulfilled by TJS due to the following attributes:

i. Communitarian nature

TJS are community inclusive as they involve the disputants as well as the community at large in resolving the dispute at hand. They are not solely concerned with the offender and the victim as does the formal dispute resolution process.[148] This is because in African traditional communities, the members are tied in varying degrees to the disputants and, therefore, each member of the community feels wronged or responsible depending on the extent of the ties with the disputants.[149] A dispute is '...not merely... a matter of curiosity regarding the affairs of one's neighbour, but in a very real sense a conflict that belongs to the community itself.'[150] This is founded on the traditional African principle that rights and duties primarily attach to a community or group rather than to an individual and, therefore '...a disputing individual transforms his group into a disputing group...'[151] It is in this regard that a dispute afflicts the entire community and, therefore, the disputants as well as the community at large must be involved, in the process and outcomes, in order for harmony to be restored.[152] In addition

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146 Kariuki F, 'Securing land rights in community forests: Assessment of article 63(2) (d) of the Constitution' LL.M Thesis, University of Nairobi, 2013, 34.

147 Meinzen-Dick R and Mwangi E, 'Cutting the web of interests: Pitfalls of formalizing property rights' 26 *Land Use Policy*, 1 (2007), 36-43.

148 See Elechi O, "Human rights and the African indigenous justice system" 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, August 2004.

149 Penal Reform International, *Access to justice in sub-Saharan Africa: The role of traditional and informal justice systems*, 2000, 22.

150 Holleman J, 'An anthropological approach to Bantu law: With special reference to Shona law" 10 *Rhodes-Livingstone Journal* (1950), 53.

151 Igbokwe V, 'Socio-cultural dimensions of dispute resolution: Informal justice processes among the Ibo-speaking peoples of eastern Nigeria and their implications for community/neighbouring justice system in north America' 10 *African Journal of International and Comparative Law* (1998), 449-450.

152 Penal Reform International, *Access to justice in sub-Saharan Africa,* 26.

to the fact that the processes and outcomes of TJS are community oriented,[153] public consensus is a necessary ingredient since social pressure is required to enforce the decisions.[154]

TJS processes afford the community members the opportunity to tender evidence and voice their opinions[155] in order '...to settle the disputes once and for all so that the society [can] thereafter continue to function harmoniously.'[156] This feature is further depicted in the observation of the late Nelson Mandela in outlining the democratic aspects in the traditional decision making in his ethnic group in South Africa. He stated that, 'Democracy meant all men were to be heard, and a decision was taken together as a people.'[157]

This makes TJS suitable for resolving community land disputes since community land is held and managed communally.[158] All the concerned individuals and groups are involved and catered for in the resolution of disputes with the main aim being preservation of the relationships between the community members.

The formal system takes away self-governance from the hands of communities and vests them in state machinery which seeks different ends from those of communities, for example, the state pursues retributive justice while communities seek restorative justice.[159] The formal system also marginalizes and intimidates communities. Communities have, therefore, opted to maintain TJS in order to '...retain control over dispute resolution within their own cultural, familial and sometimes religious norms.'[160]

Apart from being an economic and political resource, land, to traditional African communities, is also a cultural and spiritual asset. It is a medium that defines and binds social relations in both an intra-generational and inter-genera-

153 Zehr H, *The little book of restorative justice*, Good Books, Pennsylvania, 2002.

154 Penal Reform International, *Access to justice in sub-Saharan Africa,* 26.

155 Allott A, 'African law' in Derrett D, *An introduction to legal systems*, Sweet & Maxwell, London, 1968, 146.

156 Chimango L, 'Tradition and the traditional courts of Malawi' 10 *Comparative and International Law Journal of Southern Africa* (1977), 40.

157 De Villiers**,** F,1998 'Democratic aspects of traditional conflict management' in D'Engelbronner-Kolff M, Hinz M and Sindano J (eds), *Traditional authority and democracy in Southern Africa, proceedings from the workshop, traditional authorities in the Nineties – democratic aspects of traditional government in Southern Africa, 15-16 November 1995*, New Namibia Books, Windhoek, 1998, 105-106 (Citing Nelson Mandela).

158 Okoth-Ogendo HW, 'The tragic African commons', 2.

159 The differences are examined later in the paper.

160 Macfarlane J, 'Working towards restorative justice in Ethiopia: Integrating traditional conflict resolution systems with formal legal system' *Cardozo Journal of Conflict Resolution* (2006-2007), 495.

tional aspect.[161] TJS are, therefore, appropriate as they are able to fully take into account the varied aspects of land in traditional African communities. The fact that they are anchored on communal values allows communities to perform their religious obligations and retain and enhance their cultural identity.[162]

ii. Resolution of disputes as opposed to settlement

On the one hand, resolution identifies and addresses the underlying issues in a dispute.[163] It goes beyond the positions held by the parties and looks into the underlying values and feelings. Settlement, on the other hand, is centered on the assertion by the parties of upholding established social norms of right and wrong without delving into the core issues underlying the dispute between the parties.[164] The focus is on the allocation of legal rights and duties with the objective being to end the dispute as quickly and amicably as possible.[165] It therefore has the implication that a related or similar dispute may arise since the core issues have not been fully addressed.[166]

In resolution, the disputants are not compromising or bargaining away their interests. On the contrary, '...they engage in a process of information-sharing, relationship-building, joint analysis and cooperation.'[167] This is due to the understanding that 'the roots of conflict lie in the subjective relationships between the disputants.'[168] A settlement process, however, approaches disputes from an objective or realistic perspective and does not take into account the underlying values and feelings of the parties. Settlement of disputes is superficial: the core issues are not addressed and 'remain to flare up again, either when strength of feeling produces new issues or renewed dissatisfactions over old ones, or when the third party's guarantee runs out.'[169] Such an approach is not permanent as it is premised on 'a temporary settlement or control of a crisis, without tackling the

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161 Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya*, 19.

162 Macfarlane J, 'Working towards restorative justice in Ethiopia', 495.

163 Burton J and Dukes F, *Conflict: Practices in management, settlement & resolution*, St. Martin's Press, New York, 1990, 83-87.

164 Burton and Dukes, *Conflict*, 83-87.

165 See Spangler B, 'Settlement, resolution, management, and transformation: An explanation of terms' in Guy B and Heidi B (eds) *Beyond intractability*, University of Colorado, Boulder, 2003.

166 Burton J, *Conflict: Resolution & prevention*, St. Martin's Press, New York, 1990, 5.

167 Bloomfield D, 'Towards complementarity in conflict management: Resolution and settlement in Northern Ireland' 32 *Journal of Peace Research*, 2 (1995), 151-164, 152.

168 Bloomfield D, 'Towards complementarity in conflict management', 152.

169 Bloomfield D, 'Towards complementarity in conflict management', 152.

deeper structural roots underlying the crisis.... There are no 'quick fix' solutions to these problems.'[170]

TJS handle disputes with the underlying theme being the resolution of the issues at the core of the dispute with the aim of restoration of relationships, peace-building and parties' interests. They are not concerned with the allocation of rights between disputants[171] and in this regard therefore seek to promote restorative justice as opposed to retributive justice.[172] This is reinforced by the fact that TJS are premised on 'the notion of reconciliation or the restoration of harmony.'[173] TJS make use of restorative and transformative principles in dispute resolution due to the involvement of the community at large in the search for a solution to the problem at hand. It is not solely about the individual offender and the individual victim.[174] The outcomes 'are community oriented with little damage and nobody is excluded.'[175]

iii. Informality

Formal justice mechanisms are established and endorsed by the state while informal mechanisms run outside the ambit of the state.[176] Formalisation is the act of legally recognising informal activities, those involved and the respective institutions.[177] This has focused mainly on land for close to a century.[178] The conception underlying this process has been that property rights means private rights and that private land rights are superior to communal land rights.[179] This is one of the reasons as to why indigenous property systems are viewed as being retrogressive. It has informed the move from informal to the formal in East Africa up to date.[180]

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170 Azar E and Moon C, 'Managing protracted social conflicts in the third world: Facilitation and development in diplomacy' 15 *Millennium Journal of International Studies*, 3 (1986), 393-406, 401.

171 International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 32.

172 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' 204.

173 Allott A, 'African law', 131.

174 See Elechi O, 'Human rights and the African indigenous justice system'.

175 See Zehr, *The little book of restorative justice*.

176 Forsyth M, 'A typology of relationships between state and non-state justice systems,' *Journal of Legal Pluralism & Unofficial Law*, (2007), 67.

177 Okoth-Ogendo HW, 'Formalising informal property rights: The problem of informal land rights reform in Africa' Background paper prepared for the Commission for the Legal Empowerment of the Poor, Nairobi, 2006, 5.

178 Okoth-Ogendo HW, 'Formalising informal property rights', 6.

179 See Denman D, *Land use and the constitution of property: An inaugural lecture*, Cambridge University Press, Cambridge, 1969.

180 See Government of the United Kingdom, *Report of the East African royal commission*, 1955.

Informal justice systems guarantee access to justice especially in rural areas and informal settlements because the people in such areas are not able to afford the formal systems and live in remote areas. In Ethiopia, for example, informal justice systems are more influential and affect the lives of the individuals and groups living in areas far from regional centres.[181]

TJS in Kenya have been under the informal mechanisms as they have not been adequately recognised and protected.[182] Today, they are recognised by the 2010 Constitution.[183] This is due to the realisation that they can dispense justice better in resolving conflicts[184] since they are affordable and not alien to the traditional communities[185] and have inclusive processes.[186] One question that arises is whether TJS can now be referred to as formal mechanisms due to the constitutional recognition. The answer to this can be found in clearly establishing the position of TJS in relation to traditional state mechanisms. It has to be determined whether they are still subjugated to statutory mechanisms or whether they are actually promoted by the state.[187] The state must actively participate as they do not become formal systems due to mere recognition.[188]

Can the formal and the informal justice systems work together? Can the informal be incorporated into the formal? There have been various attempts to address these issues. Those advocating for the informal justice systems due to their ability to achieve restorative justice have argued that merging the informal and formal will dilute or undermine informal systems.[189] According to them, merging the two means restorative justice is undermined.[190]

iv. The Pursuit of restorative as opposed to retributive justice

Restorative justice is '...a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.'[191] Retributive justice has been used in describing the conventional criminal justice sys-

181 Macfarlane J, 'Working towards restorative justice in Ethiopia', 488.
182 Kariuki F, 'Community, customary and traditional justice systems in Kenya', 1.
183 Article 159(2), *Constitution of Kenya* (2010).
184 Forsyth M, 'A typology of relationships between state and non-state justice systems', 69.
185 Pimentel D, 'Can indigenous justice survive? Legal pluralism and the rule of law', 32-36.
186 Hunter E, 'Access to justice: To dream the impossible dream?' 44 *The Comparative and International Law Journal of Southern Africa*, 3 (2011), 408-427.
187 Macfarlane J, 'Working towards restorative justice in Ethiopia', 491.
188 Kariuki F, 'Community, customary and traditional justice systems in Kenya', 4.
189 Zehr, *Changes lenses,* 97-105.
190 Zehr, *Changes lenses*, 97-105.
191 Zehr, *The little book of restorative justice*, 37.

tem with special regard to offenders being punished.[192] The two forms of justice share the desire to vindicate a wrongful act through reciprocal action but differ in the manner of realizing their objectives.[193] Retributive justice imposes pain in order to vindicate while restorative justice is of the opinion that acknowledging the victims and encouraging offenders to take responsibility addresses the root cause of the problem.[194]

To restorative justice, the primary stakeholders in a dispute are individual victims, their families, victimized communities, offenders and their families. The state also has an interest but is seen as more removed since it has not suffered a direct impact.[195]

TJS seek restorative ends[196] due to their basis in reconciliation and restoration of harmony:[197]

> 'At the heart of [traditional] African adjudication lies the notion of reconciliation or the restoration of harmony. The job of a court or an arbitrator is...to set right a wrong in such a way as to restore harmony within the disturbed community.'[198]

They seek to restore relationships, build peace and protect the interests of parties without allocating formal rights between them.[199] Their involvement of the whole community in resolving the dispute at hand also contributes to restoration and transformation.[200] The outcomes are also community oriented and little damage is involved as nobody is excluded.[201] Archbishop Desmond Tutu describes the concept of 'Ubuntu' – which roughly translates to 'restoring a balance that has been lost', as being at the centre of traditional concepts of African justice. He states that, 'Retributive justice is largely Western. The African understanding is far more restorative - not so much to punish as to restore a balance that has been knocked askew. The justice we hope for is restorative of the dignity of the people.'[202]

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192 Umbreit M, Coates R and Kalanj B, *Victim meets offender: The impact of restorative justice and mediation,* Criminal Justice Press, Monsey, 1994, 2-4.

193 Zehr, *The little book of restorative justice*, 58.

194 Zehr, *The little book of restorative justice*, 59.

195 Umbreit M, Vos B, Coates R and Lightfoot E, 'Restorative justice: An empirically grounded movement facing many opportunities and pitfalls' 8 *Cardozo Journal of Conflict Resolution,* 511 (2007), 516.

196 Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya' 204.

197 Allott A, 'African law', 131.

198 Allott A, 'African law', 145.

199 International Commission of Jurists Kenya, *Interface between formal and informal justice systems in Kenya*, 32.

200 See Elechi O, 'Human rights and the African indigenous justice system'.

201 See Zehr, *The little book of restorative justice.*

202 Bell R, *Understanding African philosophy: A cross-cultural approach to classical and contemporary issues*, Routledge, New York, 2002, 90 (Citing Desmond Tutu).

TJS place a higher premium on reconciliation due to the realization that in most disputes,

> '...no party is totally at fault or completely blameless. As such, a high value is placed on reconciliation and everything is done to avoid the severance of social relationships. Where men must live together in a communalistic environment, they must be prepared for give and take relationships and the zero-sum, winner-take-all model of justice is inappropriate in their circumstances.'[203]

Furthermore, TJS avoids adversarial approaches in order to preserve the web of relationships in the multiplex societies. Adversarial approaches raise the tension and estrangement between the disputants and their supporters and, therefore, threaten the moral cohesion of the community or group.[204]

The sanctions imposed in TJS also reflect the underlying principle of restoration of social harmony and reconciliation of the disputants and the community. Compensation and restitution are emphasized in order to restore the status quo rather than imposing punishment.[205] Traditional African societies do not need to employ the punitive measures used by the formal systems since for them, 'enforcement lies within the complex of relationships...'[206] The social pressure founded on the web of relationships play a powerful role in securing compliance.[207] Failure to comply with a finding arrived through a highly public participatory process is commensurate with disobeying the entire community and attracts social ostracism.[208] The members of the community withdraw social contact and economic cooperation[209] leading to separation of the individual from the community, a condition likened to a 'living death'.[210] In some instances, restitution of more than the damage occasioned is ordered 'especially when the offender has been caught in *flagrante delicto*.'[211]

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203 Igbokwe V, 'Socio-cultural dimensions of dispute resolution', 449-450, 457.

204 Igbokwe V, 'Socio-cultural dimensions of dispute resolution', 449-450, 451-452.

205 Merry S, 'The social organisation of mediation in non-industrialised societies: Implications for informal community justice in America' in Abel R (ed), *The politics of informal justice: Comparative experiences,* Academic Press, New York, 1982, 17-45, 20.

206 Roberts S, *Order and dispute: An introduction to legal anthropology*, St. Martin's Press, New York, 1979, 51.

207 Igbokwe V, 'Socio-cultural dimensions of dispute resolution', 449-450, 469.

208 Igbokwe V, 'Socio-cultural dimensions of dispute resolution', 449-450, 459.

209 Roberts, *Order and dispute*, 27, 39, 65.

210 Oputa C, 'Crime and the Nigerian society' in Elias T, Nwabara S and Akpamgbo C (eds), *African indigenous laws*, Nigerian Government Printer, Enugu, 1975, 8**.**

211 Elias T, 'Traditional forms of public participation in social defence' 27 *International Review of Criminal Policy* (1968), 18-24, 20.

VII. Conclusion and the Way Forward

Community land is recognised by the 2010 Constitution but is not well protected and a community land law is yet to be enacted. This poses a challenge since the individualisation of land ownership destroys the web of interests that TJS practices are greatly reliant on. Customary law is also viewed as being inferior law. This treatment originates from the colonial administration and has continued in independent Kenya.

The community inclusive approach inherent in TJS is able to cater for the different parties exercising the various rights over community land. TJS are also able to preserve the diversity in the lives of traditional communities since each community has its own mechanisms. The informal nature of TJS enables them to reach every community even those in remote areas in an accessible, comprehensible and affordable manner. The pursuit of restorative justice preserves and strengthens the webs of relationships by the various right holders in community land. The resolution of disputes as opposed to settlement facilitates reconciliation by tackling the underlying issues in order to restore harmony among the various users of community land and related resources.

In light of the above, this paper recommends that policies and laws need to ensure better protection of community land. The absence of community land legislation increases the tenure insecurity. The communities are likely to lose their land to private individuals through questionable processes as there is no law governing the holding and conversion of land from community to private tenure. There is also a need to ensure that the policy and legal barriers hindering the application of customary law are removed.

The indigenous TJS institutions need to be recognised and encouraged as they are the custodians of the customs and values of the various traditional communities. Side-lining them results in the decline of cultural activity and consequently the demise of TJS. The formal justice systems should not interfere with TJS mechanisms. Combining the two justice systems undermines the objectives of informal justice systems, for example, the pursuit of restorative justice. It is also necessary to formulate a TJS Policy to guide the relationship between the formal and the informal justice systems, address the human rights and terminology concerns.