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Investigating the restorative nature of the Traditional Dispute Resolution Methods

A mini dissertation

by

Matome Emmanuel Malatsi

Student number: u25463731

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Supervisor: Prof Rashri Baboolal- Frank

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DECLARATION

I declare that this work with the title

“Investigating the restorative nature of the traditional dispute resolution methods”

is my own work. I have duly acknowledged the work of other scholars that I have relied on in conducting this investigation. Neither I nor anyone else in this University or any other educational institution previously submitted this study for degree purposes.

Signed at Pretoria on the 12th day of October 2024.



Matome Emmanuel Malatsi

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ABSTRACT

Most African countries have adopted a pluralistic legal system which includes the inherited legal system and the customary legal system of the original inhabitants. The inherited legal system took superior status whilst the traditional legal system was relegated to the inferior status. African customary communities found it difficult to access justice through the inherited legal system due to travelling costs to access urban areas where courts are located, hostile courts environment and unfamiliar foreign languages used in courts. Before, during and after colonialism, African traditional communities always had traditional dispute resolution methods. These methods are deeply entrenched in African custom. Their main objective was to reconcile disputants and restore peace and harmony. These methods thrived in flexibility, speed, restoration and reconciliation. The elders are the key actors in implementing the TDRM due to their wealth of knowledge and wisdom regarding customary principles and practices. Most African communities prefer TDRM because they are more accessible. They promote access to justice particularly to the marginalised and remote rural communities in the outskirts. However, the TDRM has strengths as well as weaknesses. Many African countries have adopted legislation that recognise customary law, including the TDRM. This development provides a conducive platform for integration of the TDRM and formal legal system.

Key words: Traditional dispute resolution methods, Restorative justice, Traditional communities,

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION TO THE STUDY.....	1
1. BACKGROUND AND CONTEXT.....	1
2. OVERVIEW OF THE STUDY.....	2
2.1 WHAT CAUSES CONFLICT IN AFRICAN SOCIETIES?.....	2
2.2. ALTERNATIVE DISPUTE RESOLUTION IN AFRICA.....	3
2.3. PROMOTION OF BETTER ACCESS TO JUSTICE THROUGH TDRMs.....	4
3. INTERROGATING INDIGENOUS DISPUTE RESOLUTION METHODS.....	5
3.1 PEACEMAKING SYSTEM.....	6
3.2. RWANDA’S RESPONSE TO GENOCIDE CONFLICT.....	7
3.3 THE INSTITUTION OF ELDERS.....	8
3.4. IDIOMATIC EXPRESSIONS, LESSONS FROM LEKGOTLA.....	9
4. ADVANTAGES AND DISADVANTAGES OF TDRMs COMPARED TO THE FORMAL JUSTICE SYSTEM.....	10
5. THE OBJECTIVES OF THE STUDY.....	10
6. THE IMPORTANCE OF THE STUDY.....	10
7. RESEARCH QUESTIONS.....	11
8. METHODOLOGY.....	11
9. DESCRIPTION OF THE CHAPTERS.....	11
10. EXPECTED OUTCOMES.....	12
11. EXPECTED IMPACTS.....	12
12. CONCLUSION.....	12
13. LIMITATIONS.....	13
14. ETHICAL CONSIDERATIONS.....	13
CHAPTER 2: THE OVERVIEW OF TDRMs.....	13
2.1. INTRODUCTION.....	13
2.2. SYNOPSES OF SCHOLARLY WORK ON CUSTOMARY RESTORATIVE APPROACHES.....	14
2.3. CONCLUSION.....	17
CHAPTER 3. CRITICAL EVALUATION OF THE RESTORATIVE NATURE OF TDRMs.....	18
3.1. INTRODUCTION.....	18
3.2. UNDERSTANDING OF THE TDRM AND RESTORATIVE JUSTICE APPROACHES.....	19
3.3. EXPLORING THE CULTURAL VALUES AND PRINCIPLES UNDERPINNING TDRMs.....	20
3.4. A REFLECTION ON THE ENDURING ROLE OF ELDERS IN RESTORATIVE TDRMs.....	23
3.5. ASSESSMENT OF THE EFFECTIVENESS OF TDRMs THROUGH CASE STUDIES.....	24
3.6. CONCLUSION.....	29

ABBREVIATIONS & ACRONYMS

ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
E	Electronic
MPESA	Money Payment Electronic System utilising Safaricom SIM card
ODR	Online dispute resolution
SA	South Africa
US	United States
4IR	Fourth Industrial Revolution
TRC	Truth and Reconciliation Commission
TDRMs	Traditional Dispute Resolution Methods

CHAPTER 1: INTRODUCTION TO THE STUDY

1. Background and context

In a world where human beings are socialised to interact with one another, it is almost inevitable across all spheres of the society that conflict will occur.¹ The occurrence of conflict equally necessitates the existence of efficient and effective dispute resolution methods to prevent lawlessness becoming the order of the day.² The emergence of such environments is motivated in the main by the failure of formal justice, where the less privileged will not have a sense of equality before the law and access to justice because of lack of financial resources to sustain the prolonged and expensive formal justice processes.³ ADR advent in Africa came as a sigh of relief, more so that traditionally, it had always been practised albeit differently from the Western approaches of dispute resolution⁴. Many scholars suggested integration of indigenous methods of resolving disputes into Western approaches that were adopted post colonialism because traditional methods are deeply rooted in the reconciliatory culture of African societies.⁵ This research will provide an overview of TDRMs within the context of ADR, scrutinise some of the prominent examples of indigenous dispute resolution mechanisms in traditional communities to determine the restorative nature of the indigenous methods of resolving disputes. The investigation will explore the cultural values and norms that underpin the TDRMs used in various customary societies around the globe, examining how effective these methods are in settling conflict, and reconciling disputants. The study will examine advantages and disadvantages of TDRMs compared with that of the retributive formal legal systems to identify the possible benefits of integration of the two systems. This work advocates for the recognition and the inclusion of the TDRMs as part of the formal Justice systems for resolving disputes. The conclusion will affirm that integration of TDRMs and formal justice systems will make justice more accessible to traditional communities and advance societal developmental goals.

¹ FA Kazeem, "Agba (Elder) as Arbitrator: A Yoruba Socio-Political Model for Conflict resolution-A Review of Lawrence O. Bamikole" (2009) 1(3). *Journal of Law and Conflict Resolution*, 60.

² C Price, "Alternative dispute resolution in Africa: Is ADR the bridge between traditional and modern dispute resolution." (2018) 18 (3) *Pepperdine Dispute Resolution Law Journal*, 394.

³ (n 2 above.) 396.

⁴ C Menkel-Meadow, 'The History and Development of ADR (alternative/appropriate dispute resolution)'. (2016). *Volkerrechtsblog*, 1. doi:10.17176/20180220-230945.

⁵ A Aiyedun, & A Ordor, "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa". (2016) 20 *Law, Democracy and Development*, 154-173.

2. Overview of the study

In-order to investigate the restorative nature of the TDRMs, it is necessary to understand the nature of the disputes on the African continent and factors that contribute to the conflicts.⁶ The cultural dimension will provide more clarity on the settings within which the indigenous dispute resolution methods are used to bring peace and harmony in traditional African communities.⁷ Jamison posits that optimal psychology holds that people will prefer what is aligned to their culture and when applied to dispute resolution, it provides the basis for members of traditional communities to have high regards for TDRMs because they are entrenched in their culture.⁸

2.1 What causes conflict in African societies?

African societies experience a variety of challenges in the socio- economic, political, and environmental spheres⁹. These communities are confronted with problems such as poverty, inequality, conflict, underdevelopment, and poor governance riddled with corruption, among others.¹⁰ Conversely, the post-colonial era was characterised by territorial battles for frontiers and resources.¹¹ This was the case despite Africa being regarded as the destination of choice for investors due to its richness in natural resources such as oil, gas, minerals, and agricultural resources¹². These problems are likely to grow given the ever- changing ecosystem in environment and population growth.¹³ The Institute for Security Studies (ISS) has indicated the need for quick reaction by African countries to quell the continued quarrels and political strife on the African continent to bring stability in countries like, among others, Ethiopia, Libya, Central African Republic and South Sudan.¹⁴ Factors such as struggle for governing power between various groups, disputed elections, territorial border disputes, and the failure of governance, including corruption, contribute largely to political conflict.¹⁵ Economic inequality is another source that can give rise to disputes, because the tussle for limited resources

⁶ N Annan, "Violent conflicts and civil strife in West Africa: Causes, Challenges and Prospects" (2014)3 (1) *Stability: International Journal of Security & Development* 1-16

⁷ DF Jamison 'Psychology 'Key Concepts, Theories, and Issues in African/Black. A View from the Bridge' (2018) *Journal of Black Psychology*, 722- 746.

⁸ Jamison (n 7 above) 729.

⁹ IA Elbadawi & N Sambanis 'Why Are There So Many Civil Wars in Africa? Understanding and Preventing Violent Conflict' (2000) *Journal of African Economies*, 1-31.

¹⁰ JO Aremu, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) *An International Multi-Disciplinary Journal, Ethiopia*, 549-560.

¹¹ O Abe & S Ouma, "A re-assessment of the impact and potency of Traditional Dispute Resolution Mechanism in Post- Conflict Africa" (2017) 6 *Ave Maria International Law Journal*, 1-19,

¹² Freehills, HS "Dispute Resolution in Africa: Guide to Dispute Resolution-Multi Jurisdictional Review" (2016) *Legal Guide* 11.

¹³ T Okonkwo, 'Maritime Boundaries Delimitation and dispute resolution in Africa' (2017) 8 *Beijing Law review* 55

¹⁴ ISS Report, 'African Conflict to watch in 2022', 1. 17 Dec 2021,

¹⁵ W Easterly & L Ross, 'Africa's Growth Tragedy: Policies and Ethnic Divisions,' (1997) 112 (4). *Quarterly Journal of Economics*, 1203-1250.

and opportunities put various groups on a collision path.¹⁶ Race and religion are also major contributors to conflict on the African continent in instances where diversity and integration of society still remain a challenge, and certain sections of the communities may feel left out and discriminated against due to their religion or skin colour.¹⁷ The ongoing struggle over access to commodities such as land, water, and minerals can also escalate conflict.¹⁸ African continental problems also involve challenges associated with gender inequality, human rights abuses, human trafficking, armed conflicts, and the lack of sustainable development.¹⁹ These are just a few examples of the key factors that can contribute to conflicts in Africa, the prevalence of which gives a signal that African communities will be embroiled in conflict from time to time. The afore-stated scenarios motivate for embracing customary conflict settlement methods best suited to African culture as they are known for being efficient, informal, quick, less costly and deepen relationships to restore harmony.²⁰

Given the afore-stated problems on the African continent, the conflict settlement methods that will be more appropriate are those that restore relationships and foster social cohesion as these communities still need to co-exist in stable and harmonious environments.²¹ Investigating the restorative nature of customary dispute settlement methods augurs well for the contemporary traditional societies that are caught up in pluralistic justice systems to enable the affected people to choose which dispute resolution mechanism would suit their situations best.²² At the heart of most of the customary conflict settlement mechanisms, is the promotion of social cohesion, healing and ensuring reconciliation.²³

2.2. Alternative Dispute Resolution in Africa

ADR is gaining prominence in Africa and uses methods such as negotiation, mediation, conciliation and arbitration just as in Western ADR systems.²⁴ The restorative nature of indigenous dispute resolution mechanisms manifests itself within the umbrella subject of Alternative Dispute Resolution in Africa, and elsewhere in the world where there are

¹⁶ P Collier & H Anke, 'On economic causes of civil war,' (1998) 50. *Oxford Economic Papers*, 563-573.

¹⁷ P Mauro, 'Corruption and Growth,' (1995) 110. *Quarterly Journal of Economics*, 681-712.

¹⁸ D Rodrik, 'Where Did All the Growth Go? External Shocks, Social Conflict and Growth Collapses,' (1999) 4(4). *Journal of Economic Growth*, 385-412.

¹⁹ Aremu (n. 10 above) 554.

²⁰ JT Barrett, & JA Barrett. *History of Alternative Dispute Resolution. The Story of a Political, Social and Cultural Movement*. (2004) 2.

²¹ M Alberstein, 'The Law of Alternatives: Conflict Resolution as the Art of Reconstruction'. (2016) 70 *Studies in Law, Politics, and Society*, 149.

²² M Mamdani, (1996) *Citizen and subject: contemporary Africa and the legacy of late colonialism*. Princeton: Princeton University Press, 118.

²³ Price (n 2 above) 402.

²⁴ O Abifarin et al. "Dispute Resolution within/ between Religious Organisations in Nigeria: Litigation or Alternative Dispute Resolution?", (2019) 2 *University of The Gambia Law Review*, 6.

traditional communities.²⁵ In many African countries, there are two or more legal systems, that is, the traditional dispute resolution methods and the formal legal systems.²⁶ Aiyedun affirms that notion and indicates that modern African communities have to function within a pluralistic legal environment where customary law, Islamic law, common law and civil law find application.²⁷ In Africa, Western legal system is applied in many countries. There is a very strong view that this Western legal system has failed African communities by not resolving their disputes in a manner that connotes reconciliation for the disputants.²⁸ However, scholars observed that people in Africa no longer have confidence in the court system s' ability to provide quicker outcomes.²⁹ The issues that led to the decline of public trust and confidence in the Western Legal systems among African communities were, among others, high numbers of backlog cases at court, huge caseload, increased delays and suspicion of manipulation.³⁰ Ntuli posit that the long travel to courts locations, foreign languages used in court proceedings, the adversarial nature of courts environments, all make it unlikely for indigenous communities to rely on them as dispute resolution methods of choice.³¹ This makes a strong case for the need of an accessible dispute resolution system that may bring a sense of justice to indigenous communities.³² Transformation of courts did not include traditional justice methods. ³³ ADR, as a concept that is not new in Africa according to many scholars, must be hailed as an alternative that will provide quicker resolution of disputes and improve access to justice for traditional communities.³⁴ ADR provides an outcome that is effective and efficient.³⁵ It will assist various disputants on the continent through quick methods to resolve their differences.³⁶ Linked to this efficiency, will be the impact of indigenous conflict settlement methods that restore relations for sustainable stability in traditional communities as compared with the adversarial justice system that focuses on protecting rights of an individual.³⁷

²⁵ JE Okulski, "Complex adaptive peacemaking. How Systems Theory reveals advantages of Traditional Tribal Dispute resolution Methods." 2016 (5) *AMERICAN INDIAN LAW JOURNAL*, 264.

²⁶ D Pimentel, 'Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique'. (2011) 14(59). *Yale Human Rights and Development Journal*, 3.

²⁷ Aiyedun (n 5 above).

²⁸ E Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and enhancing stability' (2011) 16. *Africa Security Brief*, 3.

²⁹ M Rheault & B Thortora 'Confidence in Institutions' (2011) 4. *Harvard International Review*, 32.

³⁰ Uwazie (n. 28 above)1.

³¹ N Ntuli, 'Alternative dispute resolution in a comparative perspective' (2018) 22(2). *Conflict Studies Quarterly, Journal of International and Comparative Law* 36.

³² KC Omeje (2008), 'Understanding Conflict Resolution in Africa', In David J. Francis (ed.), *Peace and Conflict in Africa*, Zed Books, UK: London, p.88.

³³ R Bowd, 'Access to Justice in Africa: Comparison between Sierra Leone, Tanzania and Zambia' (2009) *Policy Brief of the Institute for Security Studies*, 1.

³⁴ Menkel- Meadow (n 4 above)

³⁵ K Muigua, & K Francis, 'Alternative Dispute Resolution: Access to Justice and Development in Kenya', (2015) 1. *Strathmore Law Journal* 1.

³⁶ (n 35 above).

³⁷ C Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation' (2008) 10(1). *Cardozo Journal of Conflict Resolution*, 163.

2.3. Promotion of better access to justice through TDRMs.

In Africa, most countries follow a pluralistic justice system.³⁸ However, a set of unique challenges prevail which adversely affect access to justice by traditional communities.³⁹ Most African communities are frustrated with formal justice systems that are unable to provide speedy closure to their disputes due to case overload, costly legal fees, and inaccessible courts locations.⁴⁰ Issues such as Lack of facilities in rural areas, literacy levels, lack of affordability for legal representation, insufficient legal aid, long distances to reach courts, rigid formal court procedures and the application of retributive justice discourage the customary communities to make use of the formal justice methods to resolve their disputes.⁴¹ African indigenous communities prefer methods that emphasise reconciliation and restoration more than win-lose in formal justice.⁴² However, a challenge remains as the lack of knowledge on ADR methods by court users leads to reluctance in using such methods.⁴³ Interventions such as training of legal practitioners in ADR may bring remarkable change of attitudes.⁴⁴ It is against this background that Aiyedun argues that there is a need for integration of customary dispute resolution methods and formal justice systems to promote better access to justice.⁴⁵ When people 's grievances and conflicts are settled through the accessible dispute resolution mechanisms in place, that will impact positively on developmental goals and the Rule of law will gain more prominence as members of the traditional societies will feel included in the prevailing justice system.⁴⁶

3. Interrogating indigenous dispute resolution methods.

The settlement of conflicts and disagreements is an important element of keeping social cohesion and harmony within any community.⁴⁷ Historically, TDRMs are not new in Africa as they have evolved over centuries.⁴⁸ The traditional African communities have long trusted their distinctive dispute settlement methods, which emphasises restoration,

³⁸ Pimentel (n 26 above)

³⁹ B Sheenway. 'Institutionalising Customary Dispute resolution in Afghanistan: Lessons from the Navajo approach to Harmonising Traditional and formal Justice' (2017) 32. *Ohio State Journal on Dispute Resolution*, 245.

⁴⁰ Uwazie (n. 28 above) 4.

⁴¹ Ntuli (n 31 above) 38.

⁴² IO Albert et al 'Informal Channels for Conflict Resolution in Ibadan, Nigeria' (1995). *Institut franqais de recherche en Afrique Ibadan*, 9.

⁴³ Price (n 23 above) 405.

⁴⁴ J Mashamba (2014) 'Alternative Dispute Resolution in Tanzania, Alternative Dispute Resolution in Tanzania'. Mkuki na Nyota Publishers. eBook:

<https://univofpretoria.on.worldcat.org/search/detail/946705028?queryString=kw%3A%28Traditional%20dispute%20Resolution%20Mechanisms%20in%20Africa%29&databaseList=283%2C638&origPageViewName=pages%2Fadvanced-search>

⁴⁵ Aiyedun (n 27 above) 155.

⁴⁶ Muigua (n 35 above).

⁴⁷ GT Bahta, 'Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects.' (2014) *African Journals Online*, 101.

⁴⁸ M Mutisi, (2011, November 1). The Abunzi Mediation in Rwanda: Opportunities for Engaging with Traditional Institutions of Conflict Resolution. Durban: ACCORD.

healing, and forgiveness.⁴⁹ Most scholars agree regarding their benefits and commend them for being flexible, efficient, and effective in promoting harmony, peace and stability in customary societies as compared to the stiff inherited formal justice system that was imposed by colonial rule.⁵⁰ These benefits provide the bases for which traditional communities like the Afar people in Ethiopia prefer the *Madáa* customary dispute resolution method that evolved from one generation to the next from time immemorial.⁵¹ The *Madáa* system is entrenched in the Afar community customs.⁵² They differ immensely from the imposed adversarial formal legal system.⁵³ Huyse and Salter posit that the TDRMs espouse the principles of truth-telling, reconciliation, and restoration which resonate with the cultures of traditional communities.⁵⁴ The scrutiny of some of the key principles relating to the indigenous dispute resolution methods, namely, restoration, community involvement, openness and transparency, holistic approach, and cultural sensitivity, will reveal that all these principles contribute to the restorative nature of the indigenous methods of resolving disputes as opposed to the Western legal systems of justice. The comparison between the Indigenous dispute resolution methods and the western legal systems will further support the argument that the traditional methods restore relationships and promote peace and harmony in traditional communities.

3.1 Peacemaking System

Okulski indicates that people in traditional Indian American societies in the US have two types of dispute resolution methods anchored in two different justice systems and use different procedures, for example, the Indian Tribal Courts which use western adversarial systems and peacemaking systems that use non- adversarial methods.⁵⁵ Sheenwary reflected that the Afghanistan people can draw valuable lessons from the customary Navajo Peace-making system in resolving their disputes in a manner that brings reconciliation and healing.⁵⁶ The peacemaking method can be implemented in Afghanistan to replace some of the customary methods which are known to violate international human rights and degrade other people like female groups while the formal justice system is considered too expensive, corrupt

⁴⁹ M Findlay, 'Decolonising Restoration and Justice: Restoration in Transitional Cultures'. (2000) 39(4). *Howard Journal of Criminal Justice* 398.

⁵⁰ LR Singer, 'Nonjudicial dispute resolution mechanisms: the effects on justice for the poor'. (1979) 13(8). *Clearinghouse Review*, 569-583.

⁵¹ KA Gebre-Egziabher, 'Dispute resolution mechanisms among the Afar People of Ethiopia and their contribution to the Development Process. (2014) 10 (3). *The Journal for Transdisciplinary Research in Southern Africa*, 152-164.

⁵² Gebre-Egziabher (n 51 above) 153.

⁵³ SF Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy'. (2001) 39(4). *Journal of Modern African Studies*, 571-596.

⁵⁴ L Huyse, & M Salter, 'Traditional Justice and Reconciliation After Violent Conflict. Learning from African Experiences'. *Stockholm: International Institute for Democracy and Electoral Assistance*.

⁵⁵ Okulski (n 25 above) 264.

⁵⁶ B Sheenwary, "Institutionalising Customary Dispute resolution in Afghanistan: Lessons from the Navajo approach to Harmonising Traditional and formal Justice" (2017) 32 *Ohio State Journal on Dispute Resolution*, 245.

and inaccessible.⁵⁷ The advantages of traditional peacemaking methods is that they are flexible, less costly and efficient.⁵⁸ The TDRMs place emphasis on peace and harmony to realise its main objective of reconciliation.⁵⁹ Peacemaking processes are informal procedures that seek to promote tribal values and restoration of relationships amongst individuals involved in a conflict.⁶⁰ Scholars argue that communities should utilise less of western inclined ADR that promotes individual values that rips community fabric systems apart and weakens tribal autonomy.⁶¹ Traditional communities are encouraged to utilise more of traditional dispute resolution methods which aim at reconciliation and restoration of social balance.⁶² In instances where the traditional methods may result with travesty of justice, for example, as in the case where a family of the deceased victim would accept \$600,00 as compensation to restore relationships for a murder case, the Federal government would still ensure that justice is served for the victim by handing a capital punishment to the perpetrator.⁶³ Whilst restoration is important for the traditional communities, it is equally important that justice must be seen to be served in cases of more serious violations like murder, where punitive measures such as capital punishment may be imposed to protect individual rights.⁶⁴ This demonstrates the punitive nature of the western adversarial justice system that focuses on protecting the individual rights rather than the collective wellbeing of the community at large.⁶⁵ Looking at how the peacemaking process functions and its objectives, It can be concluded that the TDRMs are restorative in nature and focus on reconciliation and restoring relationships.⁶⁶

3.2. Rwanda's response to genocide conflict.

The Rwandan response to the 1994 genocide provides valuable lessons on how traditional dispute resolution methods can make a meaningful contribution to large scale conflict which involved the two main ethnic groups in Rwanda, namely, the Tutsi and the Hutu.⁶⁷ Raper reflected on traditional gacaca, as "justice under the tree", referring to the way

⁵⁷ Sheenwary (n 56 above) 247.

⁵⁸ R Yazzie, 'Life comes from it: Navajo Justice Concepts'. (1994) 24. *N.M. L.REV.* 175.

⁵⁹ HL Brown, 'The Navajo Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum', (2002) 57. *JUL DISP. RESOL. J.* 44.

⁶⁰ RB Porter, 'Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies', (1997) 28. *COLUM. HUM. RTS. L. REV.* 235.

⁶¹ RD Austin, 'American Indian Customary Law in the Modern Courts of American Indian Nations', (2011) 11. *WYO. L. REV.* 351.

⁶² PE Bernard, 'Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking', (1996) 27. *U. TOL. L. REV.* 821.

⁶³ Yazzie (n 55 above) 267.

⁶⁴ C Menkel-Meadow, 'The Trouble with the Adversary System in a Post- Modern, Multicultural World'. (1996) 38. *WM. & MARY L. REV. J. INST. FOR STUDY LEGAL ETHICS*, 49.

⁶⁵ Menkel-Meadow (n 64 above) 50.

⁶⁶ Bernard (n 62 above).

⁶⁷ J Raper, 'The Gacaca Experiment: Rwanda's Restorative Dispute Resolution: Response to the 1994 Genocide' (2005) 5 (1) *PEPPS. Disp. Resol. L.J.*, 30.

it was conducted, listening to disputes while sitting under the tree.⁶⁸ Gacaca had restorative features as those who were found guilty were required to pay civil damages to the victims as opposed to jail term.⁶⁹ The sanctions caused the perpetrators to realise the gravity of the harm and to allow them a mechanism for reintegration into the community.⁷⁰ The two objectives were pivotal in view of using Gacaca to deal with genocides offences and reconcile the different ethnic groups in Rwanda.⁷¹

The key lesson is that the Rwandan authorities formalised traditional Gacaca into modern justice stream by bestowing full legal authority to resolve genocide cases, focusing on retribution, reconciliation and healing.⁷² While Gacaca was granted full legal authority in its new form, its reconciliation and healing phenomena originate from its traditional outlook and are deeply rooted in the culture and customs of the Rwandan people.⁷³ Gacaca could summons persons to appear and provide testimony, issue search and seizure warrants, attach assets and individual goods as well as adjudicate on all genocide related matters.⁷⁴ Gacaca 's footprint extended to all communities for easy accessibility by community members.⁷⁵ Gacaca courts classified all offences based on the degree of participation in the genocide, for instance, listed offences according to planners, leaders, murderers, protesters who destroyed properties, etc.⁷⁶ This was important so that the most severe punishment was meted for human rights violations while lesser crimes attracted lenient sentences.⁷⁷ By granting legal authority to this traditional institution, enabled Gacaca to process the most heinous atrocities of the genocide while also focusing on reconciling the Rwandan communities of the Hutus and the Tutsis.⁷⁸ While many scholars hailed Gacaca for resolving many genocide cases speedily, others observed that in its contemporary form, it lacked the traditional justice characteristics called '*utabera*', meaning social reconstruct because of its punitive features.⁷⁹ Gacaca received criticism from many scholars.⁸⁰ Some of the issues raised related to, among others, buy-in and acceptance, human rights abuses, impartiality and fair trial standards.⁸¹ However, the Hutus viewed

⁶⁸ Raper (n 67 above).

⁶⁹ G Hankel, "Rwanda's Gacaca Courts. Between Retribution and Reparation" (2012) 23:4. *Eur J Int'l L*, 1192.

⁷⁰ Hankel (n 59 above) 1193.

⁷¹ G Gahima, "Accountability for Atrocity: Lessons from Rwanda" (2007) 8(2). *Geo J Int'l Aff*, 107.

⁷² A Des Forges, (1999). '*Leave none to tell the story: genocide in Rwanda*'. New York: Human Rights Watch/International Federation for Human Rights.

⁷³ Gahima (n 71 above).

⁷⁴ G Prunier, (1995) '*The Rwanda Crisis, History of a Genocide*' Kampala, Uganda: Fountain Publishers Ltd.

⁷⁵ L Haberstock: 'An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda' (2014) 8(4). *Global Tides*, 7.

⁷⁶ Haberstock (n 75 above).

⁷⁷ HM. Hintjens, 'Explaining the 1994 Genocide in Rwanda'. (1999) 37(2). *The Journal of Modern African Studies* 37.2 (1999): 246.

⁷⁸ M Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Post conflict Rwanda?'. (2008) 51(3). *African Studies Review*, 29.

⁷⁹ T Longman, 'Trying Times for Rwanda,' (2010) 32(2). *Harvard International Review*, 48. See also P Sullo, (2018) '*Beyond genocide: transitional justice and gacaca courts in Rwanda, the search for truth, justice and reconciliation*.' Asser Press, Heidelberg Platz 3, 14197 Berlin, Germany.

⁸⁰ T Longman, "An Assessment of Rwanda's Gacaca Courts," (2009) 21(3). *Peace Review: A Journal of Social Justice*, 306.

⁸¹ Longman (n 79 above) 52.

Gacaca as a victor s' revenge because it focussed only on atrocities they have committed against the Tutsis.⁸² Overall, many scholars regard Gacaca as a step in the right direction in spite of all its shortcomings.⁸³

3.3 The Institution of Elders

The role of elders in resolving disputes in traditional communities using customary methods warrants appraisal. Kariuki investigated the role of the elders in assisting the African traditional communities with conflict resolution through the application of TDRMs.⁸⁴ The traditional African communities are socialised to respect their values, culture and traditions that bind them to coexist in a mutual setting.⁸⁵ Elders in the community are highly regarded as experts who understand the existing special bonds and have ancestral wisdom to use customary ADR methods like negotiation, conciliation and arbitration to resolve disputes within their communities to restore social cohesion.⁸⁶ The members of the traditional communities comply with the decisions of the elders because the reconciliatory approaches they use have strong ties with their custom.⁸⁷ The traditional communities are sceptic about the western justice system that is adversarial, costly and takes long to conclude disputes.⁸⁸ Kenyatta captures the role of the elders in African communities as that of ensuring harmony between the different formations and as a result, the elder deserves respect for his seniority and wisdom whilst he in turn respects the seniority and the spirit of the ancestors.⁸⁹

In the traditional communities of Karamojong and the Teso in Uganda, disputes are resolved by a council of elders who are equipped with skills to ensure restoration.⁹⁰ In Ethiopia, the resolution of disputes adopted a religious posture because of the influence of Christianity, Judaism and Islam religions.⁹¹ The Ethiopian traditional communities of Gumuz, Oromo & Amhara, which experienced disputes such as territorial conflicts, grazing boundaries and intermarriages due to influx of immigrants, adopted 'Michu', denoting "friendship" method of disputes settlement.⁹² 'Michu' entails living together in peace and harmony.⁹³ Although the elders

⁸² Longman (n 80 above) 310.

⁸³ Haberstock (n 76 above) 14.

⁸⁴ F Kariuki, "Conflict Resolution by Elders in Africa: Successes, challenges, and opportunities" 2015 Chartered Institute of Arbitrators Conference, 1

⁸⁵ RD. Putnam 'Bowling Alone' (2000) 19..

⁸⁶ Kariuki (n 84 above) 4.

⁸⁷ Kariuki (n 84 above) 13.

⁸⁸ Jamison (n 8 above) 730.

⁸⁹ J. Kenyatta, 'Facing Mount Kenya: The Tribal Life of the Gikuyu' (1965) 38-41.

⁹⁰ C Chapman & A Kagaha. 'Resolving Disputes using Traditional mechanisms in the Karamoja and Teso Regions of Uganda', (2009). *Minority Rights International*, 3.

⁹¹ GT Bahtu. 'Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects'. (2014). *African Online Articles*, 109.

⁹² LJ Myers & DH Shinn. 'Appreciating Traditional Forms of Healing Conflict and in Africa and the World'. (2010) 2(1). *Black Diaspora Review* 7.

⁹³ Myers (n 92 above).

are regarded as the masters of applying TDRMs, scholars recommend capacitation of elders on issues like fair trial standards.⁹⁴

3.4. Idiomatic expressions, Lessons from Lekgotla

Lekgotla is another example of customary institution for dispute settlement where the elders use idiomatic expressions to resolve land disputes in the community of Makapanstad, North West Province, South Africa.⁹⁵ The idiomatic expressions put the interest of the community first and emphasised the power of communal cooperation as the key to finding lasting solutions that are mutually beneficial to the community at large.⁹⁶ The distinguishing feature of Lekgotla is community participation and the use of idiomatic expression during elders facilitation. Rammala posits that many scholars focus on the outcome of the negotiation or mediation process, ignoring the custom-rich content embedded in the use of idiomatic expression.⁹⁷ The closer scrutiny of the idiomatic expressions used during Lekgotla reveal that they are deeply rooted in African custom and have considerable influential value that urge disputants to reconcile.⁹⁸ The conduct of perpetrators to make confessions and request forgiveness is attributed to the persuasive force of idiomatic expressions.⁹⁹ The salient theme of all idiomatic expressions used during Lekgotla exhibit a deep cultural heritage to shape a coherent society.¹⁰⁰ However, Lekgotla has its own challenges such as being out of touch with technological advancement and not appealing to the youth.¹⁰¹ Overall, Lekgotla remains an integral part of many traditional communities' TDRMs, providing a platform for conflict settlement to ensure peace and stability in traditional communities.¹⁰²

⁹⁴ E Chigozie et al. 'Issues and Challenges of Promoting Excellence in Alternative Dispute Resolution in Africa' (2022) 11 *International Journal of Legislative Drafting and Law Reform* 36.

⁹⁵ MRN Rammala. 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North-West Province.' (2021) *South Africa' International Journal of African Renaissance studies* 219-241.

⁹⁶ Rammala (n. 95 above) 220.

⁹⁷ CZ Zondi. 'Community Participation in Community Correction Operation and Offender Reintegration.' (2012) 3(3.) *International Journal for Cross-Disciplinary Subjects in Education*, 763–771.

⁹⁸ Rammala (n. 96 above).

⁹⁹ KE Mohoang. 'Forgiveness, Reconciliation, and Politics: The Truth and Reconciliation Commission (TRC) Revisited.' (2017). Master's dissertation, University of the Free State, 43.

¹⁰⁰ AE Boniface. 'African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context.' (2012) *Potchefstroom Electronic Law Journal* 15 (5): 378–401.

¹⁰¹ Ntuli (n 41 above) 56.

¹⁰² PC Mومmakwa, "The Botswana Kgotla System: A Mechanism for Traditional Conflict Resolution in Modern Botswana. Case Study of the Kanye Kgotla.' (2010). Master's dissertation, University of Tromsø.

4. Advantages and disadvantages of TDRMs compared to the formal justice system.

There are numerous advantages which derive from using TDRMs such as flexibility, informality, cooperative, consensus based, and cost effectiveness.¹⁰³ The TDRMs repair relationships and restore peace and harmony far beyond the dispute resolution process.¹⁰⁴ They also promote access to justice for rural communities.¹⁰⁵ However, the TDRMs are not without shortcomings.¹⁰⁶ Wojkowska highlights three key areas of much criticism against TDRMs, arguing that they discriminate against women, lack due process and disregard fundamental human rights.¹⁰⁷

5. The objectives of the study

The main objectives of the study are to explore the cultural values and norms underpinning the traditional dispute resolution methods used in different cultures and traditional communities on the African continent as well as in the US. The study will further examine the effectiveness of these methods in resolving disputes and restoring relationships. The study will conduct a comparison between the restorative nature of the traditional dispute resolution methods and the punitive nature of the formal justice systems to dispute resolution. The investigation will identify the potential benefits of integrating TDRMs with the formal justice systems.

6. The Importance of the study

The study is significant because it will shed some light on the restorative nature of TDRMs and their effectiveness in promoting reconciliation, peace and stability in traditional communities. Furthermore, it will expose the cultural norms and values that underpin TDRMs and how integration with formal justice systems will promote access to justice, particularly in rural areas. The study will also contribute to the body of knowledge on alternative dispute resolution methods and provide insights on how these methods can be used to ensure social balance within communities.

¹⁰³ C Rautenbach, "Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa" (2014). *SSRN*, 290.

¹⁰⁴ Bernard (n 62 above) 835.

¹⁰⁵ R Bowd (n 33 above) 2.

¹⁰⁶ Bahtu (n 91 above) 107

¹⁰⁷ E Wojkowska. 'Doing justice: how informal justice systems can contribute' (2006). *Oslo: UND*, 20.

7. Research Questions

The traditional communities experienced many challenges regarding resolution of their disputes through formal justice systems such as huge backlog of cases in modern day courts, rigid processes followed, huge cost associated with travelling, the difficulty in acquiring legal representation and the outcome that perpetrated acrimony between disputants. As a result, even with industrialisation and the increasing utilisation of formal courts, the traditional communities continued to rely on TDRMs for decades as they were deeply entrenched in their culture. The traditional communities used TDRMs as they were flexible and restored relationships. It is against this background that more research is needed to explore the restorative nature of TDRMs.

The following questions will be used to investigate the restorative nature of the TDRMs:

- 7.1 What are the cultural norms and values underpinning TDRMs making restoration plausible?
- 7.2 How effective are TDRMs in resolving disputes within communities?
- 7.3 How integration of the TDRMs and formal justice systems can benefit traditional communities?

8. Methodology

This research will use a qualitative research design which will involve in-depth desk top analysis of literature in the realm of ADR in Africa and globally, critical evaluation of TDRMs, examination of the methods used in traditional communities to determine their effectiveness, impact, strengths, and weaknesses. The study will make recommendations supporting the use of both systems in a complementary manner to promote access to justice. There will be no quantitative methods as there will be no collection of evidence through interviews with prominent personnel in traditional communities.

9. Description of the Chapters

Chapter 1: Introduction

This chapter will provide an overview of the topic “Investigating the restorative nature of the indigenous dispute resolution methods”, its objectives, and its importance. It will also provide background information about traditional dispute resolution methods and significance.

Chapter 2: Overview of TDRMs.

This chapter will review the existing scholarly work on TDRMs, their cultural roots, and effectiveness in resolving disputes.

Chapter 3: Critical evaluation of the restorative nature of TDRMs.

This chapter will evaluate the restorative nature of the TDRMs through exploration of the values underpinning indigenous conflict settlement mechanisms. It will also assess the role of elders and reflect on the effectiveness of the TDRMs.

Chapter 4: Implications

This chapter will discuss the opportunities and challenges inherent in both TDRMs and the formal justice system to preface the significance of merging the two systems. It will highlight the benefits that will accrue with integration of TDRMs and the formal justice methods.

Chapter 5: Conclusion

This chapter will summarise the outcomes of the investigation, highlighting how TDRMs prevailed in traditional communities for centuries, flagging the cultural values and principles underpinning TDRMs, and cementing the role of elders in ensuring peace and stability. It will affirm the effectiveness of TDRMs and support integration of the two systems to promote access to justice for the rural communities.

10. Expected outcomes

The findings of this research are expected to contribute to the existing knowledge on traditional dispute resolution methods and their potential benefits in the modern-day conflict resolution methods. The research aims to provide insight into the restorative nature of the TDRMs and their effectiveness in resolving conflicts and restoring relationships. The research is also expected to identify the potential benefits of incorporating traditional dispute resolution methods in

modern legal systems, including reduced costs, improved efficiency, and increased community involvement in conflict resolution.

11. Expected impacts.

The research findings are expected to have significant impacts on the legal system and the community at large. The research will provide insights on how TDRMs can complement modern legal systems on issues such as the reduction of the backlog of cases and promoting access to justice.

12. Conclusion

This research proposal seeks to investigate the restorative nature of traditional dispute resolution methods and their potential benefits in conflict resolution. The research aims to provide insights into the effectiveness of these methods and their potential to complement modern legal systems to make justice accessible to the traditional communities.

13. Limitations

The study will focus only on the restorative nature of the TDRMs and will be limited only to desktop research and not use data collection methodologies.

14. Ethical considerations

The research will be conducted in accordance with the ethical principles. The reliance on the work of other people will be acknowledged accordingly and no plagiarism will take place.

CHAPTER 2: THE OVERVIEW OF TDRMs

7.4.2.1. Introduction

ADR, a conflict settlement system that originates from the West and used in the main for resolving commercial disputes, has been renowned as the preferred method for dispute resolution in Africa as it is the case throughout the world.¹⁰⁸ Research has shown increased enthusiasm on Africa ADR, arguing that it is not new in Africa.¹⁰⁹ This study investigates the restorative nature of the TDRMs. Many customary societies on the African continent prefer TDRMs as opposed to the adversarial formal justice system.¹¹⁰ Scholars posit that post-colonial Africa saw the imposition of the Western justice systems at the expense of traditional African methods for resolving disputes.¹¹¹ Nevertheless, the TDRMs did not fade, but continued to be used and revered in traditional communities as they were passed from one generation to the next.¹¹² Many scholars agree that TDRM focus more on restoration of relationships between disputants than punishment of the wrongdoer.¹¹³ However, in most pluralistic legal systems, studies show that there are striking similarities between these systems, which provide a basis for integration of the restorative TDRMs with modern day formal justice systems.¹¹⁴ This chapter aims to provide a critical review of published literature reflecting on the restorative nature of TDRMs. The scope of the research will cover dispute resolution approaches in traditional communities on the African continent as well as other parts of the globe, for example in the US, where traditional communities prefer restorative customary methods of settling disputes than modern day justice methods.¹¹⁵

7.5 2.2. Synopses of scholarly work on customary restorative approaches.

Price examined the significance of bridging the customary and modern-day forms of resolving conflict in Africa.¹¹⁶ The author argues that this was necessary due to the declining trust and confidence of the African communities in the effectiveness of the post-colonial legal system to solve their disputes.¹¹⁷ Uwazie agrees with that view, indicating that

¹⁰⁸ HS Freehills (n 12 above) 7.

¹⁰⁹ G Everard, 'Book Review Arbitration in Africa.' (1998) *Int'l Journal*, 457.

¹¹⁰ O Abe & S Ouma. "Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa". (2017) (6). *Ave Maria International Law Journal*, 1-19.

¹¹¹ N Ntuli. (n 101 above) 37.

¹¹² Gebre-Egziabher (n 3 above)

¹¹³ AT Ajayi, & LO Buhari. "Methods of Conflict Resolution in African Traditional Society." (2014) 8(2). *African Research Review*, 138, p. 139.

¹¹⁴ B Tshehla. 'The restorative justice bug bites the South African criminal justice system.' (2004) 17(1). *South African Journal of Criminal Justice*, 6. See also Article 159 of the Constitution of Kenya.

¹¹⁵ Okulski (n 55 above).

¹¹⁶ Price (n 2 above) 393.

¹¹⁷ Price (n 116 above) 394.

the common factors confronting the post- colonial court systems are the escalating high cost of litigation and huge cases backlog.¹¹⁸ The deficiencies in the formal justice system make the reconciliatory TDRMs the preferred methods for dispute resolution because they focus on building lasting harmonious relationships and peace in the community.¹¹⁹ It is that peace within the community that motivates the elders to assume mediator or arbitrator roles to resolve conflict within their societies.¹²⁰ The enforcement of the decisions of the elders did not present compliance challenges as the traditional communities were socialised by customs to accept their authority.¹²¹ The TDRMs make no provision for appeal and as a result attracted criticism by many scholars for failing procedural fairness standards.¹²²

Kariuki highlights the resilience of the restorative traditional African justice method and explores the role of the elders to promote peace and harmony within traditional African communities where one or a group of elders were able to resolve disputes through restoration and healing.¹²³ The author acknowledges the inevitable reality that where there are people, conflict will arise.¹²⁴ He examines the theoretical foundation of the institution of the elders, that it is embedded in the African culture that the elders have accumulated adequate expertise that will enable them to resolve disputes and restore harmonious relations in the society.¹²⁵ The focus was always on healing, forgiveness and restoration of good relations as opposed to the adversarial approach of the formal justice system.¹²⁶ The elder 's role in the family is that of bringing peace, harmony and stability.¹²⁷

Aiyedun et al observed that the post-colonial justice system relegated the traditional dispute resolution mechanisms to the background and took superior status¹²⁸. Integration will enable the TDRMs to contribute certain restorative offerings and address challenges such as lack of access to justice experienced by traditional communities.¹²⁹ Integration is important because TDRMs offer advantages such as cultural relevance, involve the whole of the community, quicker resolution of conflicts, flexibility, less costly and emphasis is placed on restoration of relationships.¹³⁰ The authors identified shared features between TDRMs and modern legal justice systems which provide a greater prospect for

¹¹⁸ Uwazie (n 40 above) 1.

¹¹⁹ Aiyedun (n 27 above) 161.

¹²⁰ TB Ghebretekle and M Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325-347,

¹²¹ Price (n 117 above) 401.

¹²² Bennett TW (1995) *Human rights and African customary law under the South African Constitution*. Cape Town: Juta, 4.

¹²³ F Kariuki, "Conflict Resolution by Elders in Africa: Successes, challenges, and opportunities". (2015) Chartered Institute of Arbitrators Conference, 2.

¹²⁴ Kariuki (n 123 above) See also O Abifarin et al. 'Dispute Resolution within/between Religious Organisations in Nigeria: Litigation or Alternative Dispute Resolution?'. (2019) 2. *University of The Gambia Law Review (GLR)*, 6-18.

¹²⁵ Kariuki (n 124 above) 3.

¹²⁶ Kariuki (n 125 above) 17.

¹²⁷ J Kenyatta. *Facing Mount Kenya. The tribal life of the Gikuyu*. Vintage Books, New York, 1965, p. 253

¹²⁸ Aiyedun (n 119 above) 155.

¹²⁹ Aiyedun (n 128 above) 154.

¹³⁰ (n 129 above.) 168.

integration.¹³¹ For instance, both systems afford disputants the right to be heard, which is the key aspect for due process.¹³²

Skelton made a comparative analysis between restorative customary dispute resolution methods and post-colonial restorative justice systems and found that there are salient resemblances.¹³³ The author highlights that both systems focus on creating harmony and peace in communities, emphasise reconciliation and restoration of relationships, uphold the values of respect and human dignity, they are simple and flexible, no precedents, focus on lasting solutions, and leverage on community involvement and ownership of the process.¹³⁴ To amplify this point, Orcutt et al posit that some institutions of higher learning have adopted restorative justice approaches to settle students' sexual misconduct cases informally through reparation of harm and restoration of relationships.¹³⁵ However, this exposition does not take away the argument that the modern day justice system is adversarial, costly and protracted.¹³⁶

Abe et al examined the TDRMs in Rwanda, Nigeria, and Kenya.¹³⁷ The authors make a strong case for the return to TDRMs because they promote harmony and social cohesion within indigent societies.¹³⁸ They observed that the assessed countries urged disputants to first try reconciliatory methods before they approached formal courts, which are adversarial and promote individual rights at the expense of the whole community.¹³⁹ They posit that while the Rwandan Gacaca could ease the caseload by attending to genocide matters, it lacked due process since by custom, no appeal could come against the decision of the elders.¹⁴⁰

Abe's article provides a glimpse of TDRMs evolving to resolution of disputes by electronic media, giving examples in traditional communities of restorative online programmes such as "Help us to resolve this conflict" and "Hear our story and decide", where truth telling was regarded as the key to healing and reconciliation.¹⁴¹ The novel COVID 19 pandemic has propelled the world to use online dispute resolution platforms given the impracticality of physical meetings at the

¹³¹ (n 130 above) 172.

¹³² (n. 131 above).

¹³³ A Skelton. "Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa". (2007) (1) *Acta Juridica*, 228-246, p. 228 par. 1.

¹³⁴ (n. 133 above) 231-236.

¹³⁵ M Orcutt et al. "Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct". (2020) 45 *J.C. & U.L.* 204.

¹³⁶ O Abe, 'Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa' (2017) 25(1) *Willamette Journal of International Law and Dispute Resolution*, 56.

¹³⁷ Abe et al (n 11 above).

¹³⁸ Abe (n 137 above).

¹³⁹ (n 138 above) 3.

¹⁴⁰ (n 139 above) 12.

¹⁴¹ (n 140 above) 15.

time.¹⁴² This presents the subject for future research for TDRMs to leverage on technological advancement without losing the cultural context.¹⁴³

Ntuli, like other african scholars, posits that negotiation, mediation, and conciliation are not entirely new in Africa in view of the traditional justice system that predates colonial era, involving members of the society and often held under a tree.¹⁴⁴ He criticises the received modern-day justice system for location in urban areas only, making it costly for rural communities to participate due to costly distance.¹⁴⁵ The author highlights unique challenges facing rural communities that impede them to access justice such as conducting court proceedings in foreign language as well as high transport fees to attend courts.¹⁴⁶

Scholars consider the peacemaking system as a type of restorative TDRMs for traditional communities.¹⁴⁷ In the US, the traditional Indian American communities have two legal systems at their disposal, namely, the Indian Tribal Courts which follow the western adversarial justice system, and the traditional peacemaking system that seeks to restore peace and harmony amongst disputants.¹⁴⁸ Albeit the peace system is efficient and restores relationships, Okulski posits that it has the potential to silence the most vulnerable groups.¹⁴⁹

Muigua examined access to justice and development in Kenya through ADR and TDRMs.¹⁵⁰ The authors posit that in Kenya, the formal justice included the ADR and TDRMs as mechanisms for resolving disputes and as a result, there is improved access to justice.¹⁵¹ They argue that when everyone in the community can make use of the Justice mechanisms to resolve their grievances, the rule of law gains prominence and people 's plight improves.¹⁵² This assertion requires closer scrutiny because access to justice is likely to improve resolution of disputes but not necessarily alleviate poverty that keeps escalating particularly in traditional African communities. The authors observed that TDRMs assisted rural communities to resolve a variety of disputes relating to land, political authority, commercial and family differences in a manner that reconciled disputants and harmonised relations.¹⁵³ While the authors conclude

¹⁴² A.J. Schmitz, "Arbitration in the age of covid: examining arbitration's move online", (2021) 22(2) *Cardozo Journal of Conflict Resolution*, 245-292

¹⁴³ (n 141 above) 19.

¹⁴⁴ Ntuli (n 101 above) 40.

¹⁴⁵ (n. 4 above) p.37.

¹⁴⁶ ISS Report, 17 Dec 2021, "African Conflict to watch in 2022" p.1.

¹⁴⁷ U Gretchen 'Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities' (1999) 20(2) *Hamline Journal of Public Law & Policy* 419-452.

¹⁴⁸ (n 147 above) 420.

¹⁴⁹ Okulski (n. 115 above) 265.

¹⁵⁰ Muigua (n 35 above) 1-21.

¹⁵¹ Muigua (n 150 above) 2.

¹⁵² (n 151 above) 11.

¹⁵³ (n 152 above) 13.

that there is a link between the rule of law, access to justice and the advancement of the peoples' needs in Kenya, they acknowledge that justice remains inaccessible to the poor.¹⁵⁴

Rammala investigated Lekgotla, as an example of TDRMs that uses idiomatic expressions to resolve disputes amicably, reconcile disputants and restore relationships.¹⁵⁵ Lekgotla is deeply rooted in African custom and uses idiomatic expressions to confess and apologise, showing remorse, speaking messages of forgiveness, as well as the restoration of relationships.¹⁵⁶ In modern day life that is driven by 4IR and technological advancement, institutions like Lekgotla are likely to become obsolete as modern day communities no longer have time to sit in a circle and listen to idiomatic expressions aimed at resolving disputes.¹⁵⁷

Ajayi et al address the essence of dispute resolution in customary African communities and argue that it involves not just bringing the disputants together, but also delving deep to eradicate the very root cause of the conflict to ensure harmony and preserve future relationships.¹⁵⁸ The restorative approaches provide a conducive environment for peace, stability, and the advancement of the interests of the whole community.¹⁵⁹ Muigua et al share this view, arguing that ADR ensures better access to justice by traditional communities and has positive spin offs on the developmental agenda of the community.¹⁶⁰

7.6

2.3. Conclusion

The reviewed literature shows that in Africa, most countries adopted a pluralistic legal system.¹⁶¹ The same is the case with the US Navajo traditional Indian community.¹⁶² The assessed literature supports the view that the TDRMs use restorative approaches to dispute resolution.¹⁶³ These restorative approaches have benefits such as efficiency, culture relevance, emphasise restoration and are informal and flexible.¹⁶⁴ They promote community harmony, reconcile disputants, and preserve peace and stability within traditional communities.¹⁶⁵ The TDRMs are located within traditional communities and will promote better access to justice.¹⁶⁶ However, the TDRMs also have certain disadvantages, such

¹⁵⁴ (n 153 above).

¹⁵⁵ Rammala (n 98 above) 221.

¹⁵⁶ (n 155 above) 228- 236.

¹⁵⁷ I Ononogbu. 'Transformation of dispute resolution in Africa'. (2015) 2(1). *International Journal of Online Dispute Resolution*, 77-87.

¹⁵⁸ Ajayi (n 113 above) 154.

¹⁵⁹ (n 158 above).

¹⁶⁰ Muigua (n 153 above).

¹⁶¹ Pimentel (n. 38 above) 3.

¹⁶² Ulrich (n 148 above) 419.

¹⁶³ Orcutt (n. 135 above) 205.

¹⁶⁴ CE Lyon. "Alternative methods for sentencing youthful offenders: using traditional tribal methods as a model". (2006) 4 (1). *Ave Maria Law Review*, 211-248.

¹⁶⁵ JW Zion & R Yazzie, 'Indigenous Law in North America in the Wake of Conquest, 20 B.C'. (1997) 74(114). *INT'L & Comp. L. REv.* 55.

¹⁶⁶ Bowd (n 33 above) 2.

as lack of legal protection, limited space, gender bias and have no accountability mechanisms.¹⁶⁷ The lessons from the Novel COVID 19 show that dispute resolution needs to make use of technology and move with the times.¹⁶⁸ TDRMs may benefit from the use of technology as it has become more dependable in all corners of society.¹⁶⁹ The latter aspect provides an opportunity for future research.

CHAPTER 3. CRITICAL EVALUATION OF THE RESTORATIVE NATURE OF TDRMs

3.1. Introduction

The settlement of conflicts is an important element of keeping social cohesion and harmony within any community.¹⁷⁰ Historically, TDRMs are not new in Africa as they have evolved over centuries.¹⁷¹ The traditional African communities have long trusted their distinctive, timeless dispute settlement methods, which emphasise restoration, healing, and forgiveness.¹⁷² These communities have relied on TDRMs during the pre- and post- colonial period to resolve disputes and ensure peace and stability within societies.¹⁷³ Scholars have observed that African traditional communities used various customary methods for resolving disputes, however, these methods were similar in that they focused on healing, forgiveness, restoration of relationships and peace of the whole community rather than punishment.¹⁷⁴ The success of these methods is attributed to issues like culture relevance, informality, accessibility, speed and restoration of relationships.¹⁷⁵

This chapter aims to provide a critical analysis of TDRMs, reflecting on the cultural values and principles underpinning these methods, making restoration plausible. The study will critique the role of elders and further assess the effectiveness of the TDRMs through a few select case studies. The conclusion will affirm the position that many traditional communities in Africa and US have applied the TDRMs successfully, albeit challenges exist. It will also show

¹⁶⁷ South African Law Commission (SALC) Project 90 Customary Law "Report on Traditional courts and the Judicial function of traditional leaders (2003) 1.

¹⁶⁸ Ononogbu (n 157 above).

¹⁶⁹ Abe (n 153 above).

¹⁷⁰ TB Ghebretsele & M Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12(2) *Mizan Law Review* 325.

¹⁷¹ O Abifarin et al. "Dispute Resolution within/ between Religious Organisations in Nigeria: Litigation or Alternative Dispute Resolution?" (2019) 2 *University of The Gambia Law Review*, 6.

¹⁷² Ntuli, (n 144 above) 36.

¹⁷³ Berhane-Ghebretsele (n 1 above) 327.

¹⁷⁴ Aiyedun (n 128 above) 154.

¹⁷⁵ Berhane-Ghebretsele (n 173 above).

that while elders played a key role in conflict settlement, ensuring that peace and stability is sustained within the communities, several weaknesses need to be addressed, lest the role of elders will diminish.

3.2. Understanding of the TDRM and Restorative justice approaches.

In unpacking the restorative nature of TDRMs, it is necessary to point out that these methods are part of ADR.¹⁷⁶ Zion and Yazzie hold strong views that TDRMs are not the alternative dispute resolution methods but the original methods of resolving disputes in traditional communities.¹⁷⁷ ADR, as a concept, originates from the US.¹⁷⁸ It is the leading and preferred method used to resolve international commercial disputes throughout the world, where disputants are assisted by knowledgeable impartial professionals to resolve their disputes.¹⁷⁹ ADR is hailed as more effective and less costly, when compared with the formal court processes that are protracted and tedious.¹⁸⁰ With the advancement of technology and eCommerce, coupled with the advent of the Novel Pandemic Covid 19, ADR took a huge leap and evolved to Online platforms, which saw disputants cutting on travel and accommodation costs, to mention few benefits.¹⁸¹ ADR gained prominence throughout the world, including the African continent, where various challenges such as land disputes, political power struggles, maritime borders and family differences continued to confront the African communities.¹⁸² Many African communities have, after colonialism, adopted pluralistic legal systems, which caused customary legal systems to co-exist with formal justice systems inherited from the West.¹⁸³ The customary informal systems were relegated to the background as western formal justice systems were considered superior.¹⁸⁴ Traditional communities were not pleased with that development as they found Western legal system inaccessible and hostile in many respects.¹⁸⁵ As a result, they continued to use customary practices to resolve disputes because they found them more accessible, less formal and fast.¹⁸⁶ A survey undertaken in Libya showed that the majority of the

¹⁷⁶ J Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana'. (2016) 21 *Harvard Negotiation Law Review*, 59.

¹⁷⁷ Zion (n 165 above) 74.

¹⁷⁸ CR Drahozal, 'New Experiences of International Arbitration in the United States'. (2006) 54 *American Journal of Comparative Law* 233.

¹⁷⁹ Price, (n 117 above) 393.

¹⁸⁰ (n. 10 above) 397.

¹⁸¹ AEB Yuksel, 'Online International'. (2007) 4 *Ankara Law Review* 83.

¹⁸² E Ibe & U Abugu, 'Issues and Challenges of Promoting Excellence in Alternative Dispute Resolution in Africa' (2022) 11 *International Journal of Legislative Drafting and Law Reform*, 36.

¹⁸³ D Pimentel, (n 161 above) 3.

¹⁸⁴ S Olanike, Adedokun-Odewale, 'Role of Traditional Leaders in Conflict Resolution and Management in Nigeria' (2017) 20(2) *Nigerian Law Journal* 303.

¹⁸⁵ AA Justin, 'Influence of Negotiation Dispute Resolution Mechanism on Sustainable Conflict Resolution in Bungoma County, Kenya' (2021) 111. *Journal of Law, Policy and Globalization* 61.

¹⁸⁶ Ibe (n 13 above) 43.

population in traditional communities use informal processes to settle their disputes because they have lost confidence in the formal justice system.¹⁸⁷

TDRMs refer to unwritten, indigenous practices and principles for resolving disputes, passed through generations from time immemorial, and used by various traditional communities to resolve conflict.¹⁸⁸ TDRMs take the form of negotiation, mediation, conciliation and arbitration.¹⁸⁹ Opeyemi posits that TDRMs in Yoruba traditional communities in Nigeria, follow a step by step process according to levels of authority.¹⁹⁰ Firstly, the disputants will try to reach a settlement by themselves, if in vain, they will summon the assistance of an elderly member of the community to facilitate their deliberation to reach a settlement. If no settlement was reached, the conflict will be elevated to the Headman thereafter it will be taken to the Chief for arbitration and resolution to foster reconciliation and healing.¹⁹¹ The spinoffs of the method outlined related to accessibility, community based and quick.¹⁹² The enforcement of the award did not present difficulties because of community involvement and the unquestionable authority of elders as people with knowledge, experience and wisdom regarding the application of TDRMs.¹⁹³ As a result, any disobedient conduct in compliance with the sanction meted by the elders would be scorned by the community.¹⁹⁴

The key principle that undergirds TDRMs is restoration, as it fosters reparation and reconciliation.¹⁹⁵ In this context, restorative justice places the focus on repairing the harm, healing the victim and fosters reintegration as opposed to vengeance and punishment in formal justice systems.¹⁹⁶ This point is clearly articulated from Zehr 's definition of restorative justice as a process in which parties who were affected by the offence, namely, the victim, the offender, and the community jointly resolve how to deal with the repercussions of the offence and its forthcoming implications.¹⁹⁷ It is against that backdrop that the restorative posture of TDRMs signifies a deliberate commitment to promote healing and reconciliation which impact on the social cohesion of the community.¹⁹⁸ The community is a key stakeholder in restorative approaches because it is suitably placed to know and understand the root causes of the issues that lead

¹⁸⁷ Uwazie (n 118 above) 1.

¹⁸⁸ Uwazie (n 187 above).

¹⁸⁹ Olanike (n. 15 above.) 306.

¹⁹⁰ O Opeyemi, 'Judicial System: Any Alternative in ADR?' (2009) 14. *This Day*, 54.

¹⁹¹ AO Ajetunmobi, (2017) '*Alternative Dispute Resolution & Arbitration in Nigeria.*' Princeton & Associates Publishing Co Ltd. Lagos, 12.

¹⁹² M Cappelletti & B Garth 'Access to justice: the worldwide movement to make rights effective, a general report in Cappelletti M & Garth B (eds) *Access to justice: a world survey*'. (1978)1. *Milan: Giuffre Editore*, 268.

¹⁹³ Aiyedun (n 174 above.) 157.

¹⁹⁴ CE Goldberg, 'Overextended Borrowing: Tribal Peacemaking Applied in Non- Indian Disputes.' (1997) 72. *WASH. L. REV.* 1015.

¹⁹⁵ Ibe (n. 186 above.)

¹⁹⁶ H Zehr '*Changing Lenses: A New Focus for Crime and Justice*, (1990) 181.

¹⁹⁷ H Zehr '*The little book of restorative justice*' (2002) 36.

¹⁹⁸ TW Bennett '*Human rights and African customary law under the South African Constitution*', (1995) 4 Cape Town: Juta.

to conflict within that community.¹⁹⁹ The TDRMs tackle the root cause of the conflict, avert future disputes and ensure that traditional communities enjoy sustainable peace.²⁰⁰

3.3. Exploring the cultural values and principles underpinning TDRMs.

Many scholars agree that the TDRMs are deeply rooted in cultural values and principles of traditional communities and focus on communal welfare.²⁰¹ Schoeman points out that these methods differ from formal justice systems by prioritising restitution and social balance rather than focusing on retribution.²⁰² An in-depth analysis of some of the key cultural values and principles underpinning TDRM shows that they all have a bearing on fostering a reconciliatory outcome at the end of the dispute resolution process.²⁰³ Ajayi and Buhari 's analysis of TDRMs confirm that the cultural values and principles that embed these mechanisms include, but are not limited to, community and collective responsibility, truth telling, respect for the elders, restorative justice, oral tradition of engagement, community involvement, spiritual and ancestral presence, non -confrontation, holistic understanding, as well as flexibility and adaptability.²⁰⁴ They posit that TDRM focus on recuperation and reinstating the offending party to his rightful place in the society.²⁰⁵

Research shows that traditional societies embrace the cultural practices of community and collective responsibility, where the wellbeing of the individual is intertwined with that of the whole community.²⁰⁶ In this context, disputes are not only considered as affecting disputants but also disturb the fabric of communal peace.²⁰⁷ African communities prioritise the collective good of the community, ahead of individual interests and use TDRMs to ensure harmony and social cohesion within the community.²⁰⁸ The community involvement approach ensures that decision-making considers the

¹⁹⁹ Zehr (n 197 above) 28.

²⁰⁰ Bennet (n 198 above.)

²⁰¹ Abe (n 169 above) 1.

²⁰² Ml Schoeman, "A Philosophical view of social transformation through restorative justice teachings: a case study of traditional leaders in Ixopo, South Africa" (2012) 13(2) *Phronimon* 23.

²⁰³ Chigozie (n 94 above) 36.

²⁰⁴ Ajayi (n 158 above) 138.

²⁰⁵ (n 204 above) 151.

²⁰⁶ CZ Zondi. "Community Participation in Community Correction Operation and Offender Re-integration." (2012) 3 (3). *International Journal for Cross-Disciplinary Subjects in Education*, 76.

²⁰⁷ Rammala, (n 155 above) 219.

²⁰⁸ Rammala (n. 207 above) 235.

inputs of all affected stakeholders.²⁰⁹ Elders navigate disputes through consensus building rather than adversarial arguments and that ensure collective ownership of the decision.²¹⁰

The African philosophy of Ubuntu recognises the interconnectedness of human beings which Tutu regards as the essence of humanity because it promotes the wellbeing of the whole society.²¹¹ Ubuntu creates a favourable environment for collaborative resolution of conflict.²¹² It encourages an offender to admit wrongdoing and ask for forgiveness while on the other hand persuading the victim and community to forgive the offender and allow for his reintegration into the community.²¹³ Ubuntu makes restoration seamless because it discourages vengeance and promotes forgiveness, reparation, reconciliation and peace.²¹⁴ Ubuntu encapsulates many of the values guiding TDRMs, like care, collaboration, generosity, tolerance, sharing, just to mention a few.²¹⁵

In many traditional communities, respect for seniors, ancestors, families and fellow community members is a cultural practice that impacts on the application of TDRMs positively.²¹⁶ All stakeholders during conflict resolution abide by this foundational principle that fosters listening to all sides, acknowledging complaints, and treating everyone with dignity throughout the process.²¹⁷ In some communities, spirituality and ancestral guidance play a significant role in dispute resolution because elders may, in certain instances, request direction from the departed to apprise their decisions.²¹⁸ It is common practice across African communities to entrust the responsibility to apply TDRMs with elders, to serve as negotiators, advisors or mediators because of their wealth of knowledge and experience in the application of cultural practices.²¹⁹ Traditional communities embrace, among others, the cultural principle of respect for seniors, ancestors, and families and that enjoins everyone to submit to the authority of elders and abide with their decisions during conflict resolution processes.²²⁰

²⁰⁹ Zehr (n 199 above) 56.

²¹⁰ LR Singer, 'Nonjudicial dispute resolution mechanisms: the effects on justice for the poor'. (1979) 13(8). *Clearinghouse Review*, 569.

²¹¹ DM Tutu, 'No future without forgiveness' (1999), 30.

²¹² N Masina 'Xhosa Practices of Ubuntu for South Africa' in Zartman 1W (ed) Traditional cures for modern conflicts: African conflict "medicine" (2000), 181.

²¹³ D. Francis (2007). 'Peace and conflict studies: an African overview of basic concepts', in S. G. Best (ed.), Introduction to Peace and Conflict Studies in West Africa', 26.

²¹⁴ Tutu (n 211 above).

²¹⁵ Tutu (n 4214 above) 29.

²¹⁶ Kariuki (n 126 above) 1.

²¹⁷ Abe (n 201 above) 5.

²¹⁸ Ajayi (n 204 above) 142.

²¹⁹ LR Olanrewaju et al. 'Resolving Conflict in African Traditional Society: An Imperative of Indigenous African System'. (2020) 4(1). *African Journal of History and Archaeology*, 40.

²²⁰ (n 219 above) 46.

TDRMs utilise restorative principles as a matter of custom.²²¹ Restoration in traditional justice settings fosters reconciliation as all stakeholders participate directly in the process to resolve the conflict.²²² This restorative approach differs with adversarial court systems that seek to punish the offender and protect individual rights.²²³ Restorative justice principle prioritises forgiveness, healing, reconciliation and reintegrating the offender into the community.²²⁴ Huston 's analysis of how tertiary institutions implemented restorative justice approaches to resolve sexual misconduct disputes amongst students reveal that repairing of the harm, inclusivity in decision making, active accountability and building trust are the core ingredients that make restorative approaches effective.²²⁵ Orcutt affirms this position and emphasises the importance of focusing on restoration of the victim and reintegration of the offender into society as opposed to paying more attention to the rules that were transgressed.²²⁶ Through a facilitated dialogue during dispute resolution, all stakeholders will realise a sense of justice that restores harmony and social balance within the community.²²⁷

In African traditional communities, TDRMs maintain a strong oral tradition of communicating stories, using idiomatic expressions, interpreting customary norms through generations as guiding principles that shape dispute resolution.²²⁸ Rammala shows how the community of Makapanstad in North West Province, South Africa, used idiomatic expressions as mechanisms to resolve disputes through the sharing of proverbs, stories and historical events to influence decision-making.²²⁹ Given this exposition reflecting on some of the cultural values and norms, the view that African communities prefer TDRM because they resonate with their culture has substance.²³⁰

3.4. A reflection on the enduring role of elders in restorative TDRMs.

Many authors acknowledge the prominent role of elders in resolving conflict in traditional communities and promoting restitution, reconciliation and social balance.²³¹ This vital role merits closer scrutiny to determine the factors influencing traditional communities to entrust unfettered authority regarding the application of TDRMs with elders.²³² Kenya

²²¹ Chigozie (n 203 above) 9.

²²² Chigozie (n 221 above) 39.

²²³ CM Huston, 'Restorative Justice: A Comparative Analysis of Campus Implementation' (2015). *Honors College*, 218.

²²⁴ A Dieng, 'ADR in Sub-Saharan African Countries' (2011) *Arbitration, Mediation and Conciliation Centre of Dakar*, 1.

²²⁵ Huston (n 223 above) 9.

²²⁶ Orcutt, (n 163 above) 204.

²²⁷ Orcutt (n 226 above).

²²⁸ Ajayi (n 218 above).

²²⁹ Rammala (n 208 above).

²³⁰ KC Omeje 'Understanding Conflict Resolution in Africa' 88 In David J. Francis (ed.) *Peace and Conflict in Africa*, (2008) 88.

²³¹ Cappelletti (n 192 above) 270.

²³² Cappelletti (n 231 above).

posits that traditional communities were stable and peaceful because elders executed their conflict resolution duties with precision.²³³ In cementing this assertion, Obasanjo attributed the conflict that engulfed the Nigerian communities of Amugeri and Umuoba to the absence of elders' active roleplay in resolving differences, which led to chaos and turmoil.²³⁴ The African communities have trust and confidence in elders because they possess excellent negotiation and facilitation skills which they use to mediate disagreements and fights²³⁵. A distinct feature of the elders' expertise in implementing TDRMs is their deliberate targeting of restoration and reconciliation as the outcome for the collective peace and stability.²³⁶ The elders' restorative approaches in TDRM differ with formal justice processes that are rigid and place emphasis on punishing the wrongdoer for the harm caused.²³⁷

However, there are certain challenges confronting elders when implementing TDRM within their various societies.²³⁸ There is no remuneration for the role of elders in resolving disputes.²³⁹ Ntuli posits that this may expose them to manipulation, fraud and corruption.²⁴⁰ Kenyatta argues that elders should serve their communities without expecting any remuneration.²⁴¹ The greatest reward is to earn the respect and trust of the society they serve selflessly.²⁴² The enormous power and influence they have may lead to power imbalance and likely biases during the facilitation of dispute settlement process.²⁴³ Elders' TDRM practices in certain communities discriminate against women and marginalised groups.²⁴⁴ Due to varying degrees of complexity, elders may need to upgrade their knowledge in dispute resolution to keep up with the requirements of fair trial standards and due process of the law.²⁴⁵ Given the advent of modernisation and technological advancement, the elders may need to familiarise with technology to move with the times.²⁴⁶

The investigation makes an observation on the role of elders in dispute resolution that it evolves with time and it is still relevant in contemporary communities.²⁴⁷ For example, following the assassination of a popular leader named Chris

²³³ J Kenyatta 'Facing Mount Kenya: The Tribal Life of the Gikuyu' (1965) 38-41.

²³⁴ OB Nwolise, 'Traditional Models of Bargaining and conflict resolution in Africa: perspective on peace and conflict in Africa' (2005) 160.

²³⁵ Cappelletti (n 231 above).

²³⁶ T Nhlapo, 'The judicial function of traditional leaders: a contribution to restorative justice?' Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa, Cape Town 14-17 March 2005, 3, 6 and 17.

²³⁷ B Tshehla, 'Traditional justice in practice: a Limpopo case study' (Pretoria: ISS 2005) (ISS Monograph Series No 115) 19-25.

²³⁸ Ntuli (n 172 above) 54

²³⁹ Ntuli (n 238 above)

²⁴⁰ Ntuli (n 238 above)

²⁴¹ Kenyatta (n 223 above).

²⁴² Kenyatta (n 241 above).

²⁴³ B R. Schaller, 'Culturally Speaking: Equality, Responsibility and the Social Compact'. (1994) 14(3) *Quarterly Law Review*, 347.

²⁴⁴ CS Van der Waal, (2006) "Formal and informal dispute resolution" in Hinz MO & Pateman K (eds) *The shade of new leaves: governance in traditional authority: a southern African perspective.* (Munster: LIT Verlag) 140.

²⁴⁵ QC Eze, 'Beyond the Courts -Community Tribunals and the Application of Customary law', available at <http://info.worldbank.org/etools/docs/library/108502/eze-paper.pdf>.

²⁴⁶ Abe (n 217 above)

²⁴⁷ A transcript of the sermon at the funeral of Mr Chris Hani on 19 April 1993, 21 April 1993.

Hani on 10 April 1993 in South Africa, it took one elder of society, Arch-Bishop Desmond Tutu, to call for calm and denounce violence and vengeance publicly.²⁴⁸ He urged the nation to embrace forgiveness and commit to peace, reconciliation and democracy.²⁴⁹

The responsibility of elders in resolving disputes in African communities remains vital albeit facing certain challenges like capacitation, remuneration, and resource allocation that supports implementation of TDRMs.²⁵⁰ Tackling these shortcomings will ensure that elders continue to play a positive role in TDRM to foster peace and harmony within societies.²⁵¹ As aptly put by Eze, such measures can be implemented through capacitation of elders so that they can duly apply due process and fairness principles consistently.²⁵²

3.5. Assessment of the effectiveness of TDRMs through case studies.

Many scholars agree that traditional communities around the world have relied on TDRM to settle disputes outside of the formal justice process.²⁵³ Analysis of TDRM through case studies shows that these methods can be effective in resolving conflicts, albeit having their own shortfalls.²⁵⁴ In assessing the TDRM s' effectiveness in the selected case studies, the analysis will consider factors such as accessibility of the methods, speed in resolving conflict, culture relevance, restorative justice, involvement of the community, whether they brought reconciliation and impacted on the peace and social cohesion within the community.²⁵⁵ Factors which present limitations in the relevant case study will also be highlighted so that appropriate redress can be recommended. An evaluation of few case studies to demonstrate the effectiveness of TDRM follows hereunder:

²⁴⁸ (n. 247 above).

²⁴⁹ (n. 247 above).

²⁵⁰ GT Bahtu, 'Popular Dispute Resolution Mechanisms in Ethiopia: Trends, Opportunities, Challenges and Prospects,' p.109.

²⁵¹ Chigozie (n 222 above) 53.

²⁵² Eze (n 245 above).

²⁵³ C Chapman and A Kagaha, 'Resolving Disputes using Traditional Mechanisms in the Karamoja and Teso Regions of Uganda,' (2009). *Minority Rights International*, 3.

²⁵⁴ C Osi, 'Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation' (2008) 10(1) *Cardozo Journal of Conflict Resolution*, 163.

²⁵⁵ The criteria used is not exhaustive.

3.5.1. The Gacaca courts in Rwanda.

Following the 1994 Rwandan genocide conflict, when authorities realised that the formal courts were failing to make progress on resolving genocide cases, they formalised the traditional gacaca courts.²⁵⁶ These courts were institutionalised to tackle the devastating genocide caseload.²⁵⁷ The objective of these community-based institutions was to promote justice and accountability by accelerating prosecutions, finding the truth, punishing the perpetrators, as well as reconciling the Hutus and Tutsis.²⁵⁸ The revitalised Gacaca courts have retributive characteristics similar to that of formal justice systems whereas the pre-colonial Gacaca was largely restorative.²⁵⁹ In more serious offences it could issue capital punishment.²⁶⁰ Ingelare analysed two thousand gacaca trials and observed that it has transitioned from confession and restoration orientation to accusation and retribution.²⁶¹ The question that scholars grappled with was whether the formalised Gacaca that is retributive can still foster forgiveness, reconciliation and peace amongst the Rwandans?²⁶² Nevertheless, many communities submitted to Gacaca because it still retained all other traditional characteristics which are deeply rooted in the Rwandan culture.²⁶³ The Rwandan communities found Gacaca more accessible to a large number of people because they were established locally across Rwanda.²⁶⁴ The restorative nature of Gacaca, on the other hand, provided an opportunity for victims and perpetrators to come together and seek resolution of the conflict.²⁶⁵ Community involvement ensured collective ownership of the process and instilled a sense of village based justice.²⁶⁶ The processing of over 1.5 million matters between 2005 and 2012 affirm their efficiency.²⁶⁷ The process allowed for truth-telling and prioritised restorative justice, focusing on rehabilitation, reparation, and reconciliation.²⁶⁸ However, the Gacaca courts were not without challenges.²⁶⁹ Critics point out that it has not lived up

²⁵⁶ D Rawson, 'From Retribution to Reconciliation: Transitional Justice in Rwanda, 1994-2011' (2012) 13(2). *Georgetown Journal of International Affairs*, 115.

²⁵⁷ J Raper, 'The Gacaca Experiment: Rwanda's Restorative Dispute Resolution: Response to the 1994 Genocide' (2005) 5 (1) *PEPPS. Disp. Resol. L.J.*, 30.

²⁵⁸ T Longman 'An Assessment of Rwanda's Gacaca Courts' (2009) 21(3) *Peace Review: A Journal of Social Justice*, 306. see also P Clark, 2010, 'The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers.', eBook2010.

²⁵⁹ A Chakravarty 'Investing in authoritarian rule: punishment and patronage in Rwanda's Gacaca courts for genocide crimes.' (2016)

²⁶⁰ Chakravarty (n 91 above).

²⁶¹ B Ingelare (2016) 'Inside Rwanda 's gacaca courts: seeking justice after genocide.' eBook2016.

²⁶² KC Doughty, 'Remediation in Rwanda: grassroots legal forums.' (2016) 1.

²⁶³ T Longman, 'Trying Times for Rwanda,' (2010) 32(2): *Harvard International Review*, 48.

²⁶⁴ L Haberstock, "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda," (2014) 8 (4) *Global Tides*, 1.

²⁶⁵ Haberstock (n 96 above) 8.

²⁶⁶ J Sarkin, 'Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in The New Millennium of using Community Based Gacaca Tribunals to deal with the Past.' (2000) 2. *International Law FORUM Du Droit International*, 112-21.

²⁶⁷ Haberstock, (n 97 above) 12.

²⁶⁸ K Brounéus, "Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts," (2008): 39 (1) *Security Dialogue*, 55.

²⁶⁹ Longman (n 263 above) 40.

to its traditional posture of social construction because it instilled fear and intimidation due to its retributive authority.²⁷⁰ The Judges who presided over Gacaca originated from the communities and legal qualification was not a prerequisite.²⁷¹ This would justify concerns raised by other scholars regarding fairness and impartiality, arguing that Gacaca may compromise due process of the law.²⁷² Furthermore, the truth telling process had the potential to refresh memories of victims with the trauma they have endured during the genocide, which may inhibit the healing process.²⁷³ Brounéus' study involving witnesses at Gacaca hearings revealed that they all suffered psychological trauma as they refreshed traumatic memories of the genocide.²⁷⁴ The lack of capacity to administer justice may have resulted with the travesty of justice where wrongdoers have lighter sentences or completely evaded punishment and accountability.²⁷⁵ Sullo highlights fair trial standards that Gacaca did not apply like legal representation, being tried in absentia, presumption of innocence, just to point a few, which may have completely compromised justice.²⁷⁶ Overall, even with the criticism by some scholars, others posit that Gacaca courts were successful in fostering healing and reconciliation, addressing the root cause of the genocide conflict, and thereby contributing to rebuilding a cohesive Rwandan society post- genocide.²⁷⁷

3.5.2. Peacemaking Process and Circle Sentencing in North America.

Peacemaking process and Circle Sentencing are TDRMs used in many traditional Indian communities in North America.²⁷⁸ The Peacemaking process refers to a method of conflict settlement used within the Navajo indigenous Indian American community which uses non-adversarial customary approaches to settle disputes, focusing on conciliation and the restoration of peace and harmony.²⁷⁹ In Circle Sentencing, the offender and his family, the victim and his family as well as community members affected by the crime sit in a circle and talk about the dispute focusing on reconciliation.²⁸⁰ Bradford observed that through these methods, communities have settled family related conflicts

²⁷⁰ Longman (n 269 above) 52.

²⁷¹ M Rettig, 'Gacaca: Truth, Justice, and Reconciliation in Post Conflict Rwanda?' (2008) 51(3) *African Studies Review* 29.

²⁷² Rettig (n 103 above).

²⁷³ Brounéus (n 100 above) 63-64.

²⁷⁴ Brounéus (n 105 above).

²⁷⁵ P Sullo, '*Beyond genocide: transitional justice and gacaca courts in Rwanda, the search for truth, justice and reconciliation.*' (2018).

²⁷⁶ Sullo (n 107 above) 167.

²⁷⁷ Rawson (n 256 above) 120.

²⁷⁸ HL Brown, 'The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum' (1999) 24(2) *American Indian Law Review*, 297.

²⁷⁹ PE Bernard, 'Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking.' (1996) 27. *U. TOL. Law. Review*, 578.

²⁸⁰ DW Van Ness, 'Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice,' (1997) 20 (8). *INT'L COMMUNITY CORRECTIONS*, 436.

using unwritten traditional rules and procedures they have practised over the years within their societies.²⁸¹ These methods are community based because during the peacemaking process, all disputants and their families sit in a circle, with the assistance of a qualified professional from the government, to resolve their dispute.²⁸² The Peacemaking circle methods resonate with traditional communities like Navajo because they are entrenched in their culture.²⁸³ The case of Crow Dog is a typical example that Peacemaking Circles are restorative in nature and focus on reconciling disputants to ensure peace and social harmony within the community.²⁸⁴ In that case, the perpetrator 's family met with the deceased 's relatives, engaged and ultimately agreed on the damages of \$600 to be paid as compensation to the deceased 's family.²⁸⁵ However, the federal courts imposed capital punishment to Crow Dog for the offence of murder, only to be reversed by the US Supreme courts affirming the autonomy of the Indian communities to apply laws and dispute resolution according to their custom.²⁸⁶ This sparked huge political and legal debates in the US calling for legislative reforms.²⁸⁷ Tribal Peacemaking processes are non-punitive and support community involvement which fosters collective ownership for conflict resolution.²⁸⁸ The Process Circle decisions are consensus based, which encourage wrongdoers to comply with the agreed outcomes.²⁸⁹ The Navajo community regards Peacemaking Circles as making justice accessible and that is affirmed by Sheenwary who advises the Afghanistan people to draw lessons from the customary Navajo Peace-making system in resolving their disputes in a manner that brings restoration and unity.²⁹⁰ Like any other TDRM, Peacemaking Circle has shortcomings such as lack of enforcement mechanism and may victimise women and marginalised groups in gender based violence.²⁹¹

3.5.3. Kipsigis TDRMs in Kenya

²⁸¹ WC Bradford, 'Reclaiming indigenous legal autonomy on the path to peaceful coexistence: the theory, practice, and limitations of tribal peacemaking in Indian dispute resolution'. (2000) 76(3). *North Dakota Law Review*, 551.

²⁸² U Gretchen (n 147 above) 419.

²⁸³ CE Goldberg, 'Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes,' (1997) 72. *WASH. L. REV.*, 1003.

²⁸⁴ SL Harring, 'Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty,' (1989) 14. *AMERICAN INDIAN LAW REVIEW*, 191.

²⁸⁵ (n. 116 above).

²⁸⁶ (n. 117 above) 199.

²⁸⁷ The US Congress enacted the Indian Tribal Justice Act (ITJA) 1993 to strengthen the traditional tribal legal system.

²⁸⁸ S Daicoff, 'Families in circle process: restorative justice in family law' (2015) 53 (3) *Family Court Review*, 427.

²⁸⁹ Okulski (n 123 above) 264.

²⁹⁰ B Sheenwary, 'Institutionalising Customary Dispute resolution in Afghanistan: Lessons from the Navajo approach to Harmonising Traditional and formal Justice.' (2017) 32. *OHIO STATE JOURNAL ON DISPUTE RESOLUTION*, 245, p. 246.

²⁹¹ Okulski (n 121 above) 264.

In Kenya, the Constitution recognises the TDRMs as complementary platforms to access justice.²⁹² The Kipsigis community in Kenya provides a good example of how traditional societies use TDRMs to resolve disputes such as land, family feuds, divorce and in some instances issues like murder.²⁹³ This community assembled a council of elders called Kamasian Council to resolve disputes within the Kipsigis community.²⁹⁴ The Kamasian Council used approaches that were embedded in their culture, for instance, when considering a matrimonial conflict involving a polygamous relationship, only elders in polygamous marriages will preside over that conflict or where unintentional murder dispute is involved, cleansing ceremony and reparation will form part of conflict settlement.²⁹⁵ Kiplagat et al conducted a study on Kipsigis TDRMs. Most of the community members viewed the methods to be effective avenues for access to justice for the indigenous people who lacked resources to make use of formal courts.²⁹⁶ The Kipsigis community regards the TDRMs to be fair as everyone gets an audience publicly and the community participates, unlike adversarial judicial processes.²⁹⁷ The enduring question remains conformity of these methods to standards of fair trial and due process of the law.²⁹⁸

3.5.4. Traditional Courts in South Africa

South Africa, like most African countries, has a pluralistic legal system.²⁹⁹ During the pre-and post- colonial era, diverse traditional communities applied TDRMs, focusing on reconciliation to ensure peace and stability in their communities.³⁰⁰ The Constitution has accepted traditional courts in South Africa as part of the legal system, providing options of a choice communities will exercise for settling conflict.³⁰¹ These traditional courts follow customary approaches where proceedings are informal, occur in open courts, and prioritise restoration.³⁰² The main objective of the proceedings focuses on getting reconciliation between the disputants.³⁰³ They apply remedies based on Ubuntu, emphasising

²⁹² The Constitution of Kenya, Article 159(2) (c).

²⁹³ Kariuki (n 48 above) 11.

²⁹⁴ Kariuki (n 125 above).

²⁹⁵ Kariuki (n 126 above).

²⁹⁶ J Kiplagat et al, 'The efficacy of traditional dispute resolution (TDRMS) in achieving access to justice for marginalised: A focus on the Kipsigis Community in Kenya' (2020) 8(1) *Nazarene University Law Journal*, 149- 171.

²⁹⁷ Kiplagat et al (n 128 above).

²⁹⁸ Kiplagat et al (n 129 above).

²⁹⁹ C Rautenbach, 'Legal Reform of Traditional Courts in South Africa: Exploring the Links between UBUNTU, Restorative Justice and Therapeutic Jurisprudence' (2015) 2(2) *Journal of International and Comparative Law* 275.

³⁰⁰ DS Koyana, 'Traditional Courts in South Africa in the Twenty-First Century in J Fenrich, P Galizzi and TE Higgins' (eds) *The Future of African Customary Law.* (2011) 227.

³⁰¹ Constitution, S 166. See also Kinama, p. 33.

³⁰² C Rautenbach and JC Bekker (eds), (2014) *Introduction to Legal Pluralism in South Africa* (Durban: LexisNexis, 4th ed, 18.

³⁰³ Rautenbach (n 131 above)

restoration of human dignity of the victim as opposed to punishment of the wrongdoer.³⁰⁴ Mokgoro acknowledged the restorative nature of traditional law and emphasised that our law's objective should be to restore harmonious human and social relationships where there is violation of community norms.³⁰⁵ While traditional courts may be generally effective due to benefits such as quick resolution and restoration, they also face certain challenges like lack of resources, insufficient knowledge by communities, resistance by legal professionals, gender bias and competition with western justice systems.³⁰⁶

3.5.5. Truth and Reconciliation Commission in South Africa

South Africa 's Truth and Reconciliation Commission (TRC) is often regarded as an effective restorative justice mechanism.³⁰⁷ Gibson argues that the truth process expedited reconciliation because it placed responsibility for atrocities on all participants in the struggle against apartheid.³⁰⁸ The intervention was aimed at rebuilding a unified society by tackling past injustices to foster a culture of openness and transparency.³⁰⁹ Its effectiveness can be assessed through several key points such as acknowledgement of victims, truth telling, reparation, forgiveness and reconciliation.³¹⁰ The TRC afforded the society an avenue to share their experiences, which reminded them that there were untold sufferings from which healing is required.³¹¹ There was open dialogue which was conducive for truth telling about past atrocities, which helped the role players to take full responsibility for their actions and ask for forgiveness.³¹² The wrongdoers were allowed to confess their wrongs during open public hearings and requested forgiveness and amnesty from criminal prosecution.³¹³ While truth emerged on many issues that occurred during apartheid and forgiveness was granted, the effectiveness of the TRC is relative given the structural inequalities and poverty that is raging on. Some sectors of the population remain dissatisfied that there was no reparation for the harm suffered and some atrocities were not accounted for.

³⁰⁴ KD Kaunda, (1966) 'A Humanist in Africa' London: Longmans Green, 22-28.

³⁰⁵ *Dikhoto vs Mokhotla* 2006 (6) SA 235, [68] (CC).

³⁰⁶ Ntuli (n 72 above) 56.

³⁰⁷ H Adam, and K Adam 'The politics of memory in divided societies. In *After the TRC: Reflections on truth and reconciliation in South Africa*', (2000) 32- 47.

³⁰⁸ JL Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa' (2006) 50(3) *Journal of Conflict Resolution* 409.

³⁰⁹ Adam (n 139 above) 33.

³¹⁰ JL Gibson 'Overcoming apartheid: Can truth reconcile a divided nation?' (2004)

³¹¹ Tutu (n 47 above) 91.

³¹² Adam (n 141 above)

³¹³ Gibson (n 140 above)

3.6. Conclusion

TDRMs are part of ADR.³¹⁴ ADR is the preferred method of settling conflict which is ubiquitous across the globe.³¹⁵ Traditional communities across Africa and in the US used the TDRMs before and after colonisation.³¹⁶ Pluralistic legal systems exist in most African countries where the inherited western justice system took superior status albeit it did not deter traditional communities from using TDRMs.³¹⁷ The customary societies continued to rely on informal approaches because they deliberately aimed at achieving reconciliatory outcomes.³¹⁸ Central to the success and effectiveness of the restorative dispute resolution approaches, is direct participation in the deliberations by all the stakeholders affected by the conflict, focusing on reparation, re-integration, peace and social harmony.³¹⁹ The cultural values such as respect for seniors, ancestors, parents, fellow neighbours as well as ubuntu enable positive engagements which make restoration and reconciliation in TDRMs a reality.³²⁰ The role of elders remains a key factor in unlocking peaceful settlement of conflicts and fostering social cohesion within traditional communities.³²¹

Several case studies affirm the effectiveness of TDRMs.³²² Some scholars questioned the hybrid nature of contemporary Gacaca which was restorative and retributive at the same time.³²³ Corey and Joireman argue contemporary Gacaca was highly punitive and inhibited reconciliation.³²⁴ However, many scholars commended Gacaca to be a classic model to be emulated by other nations albeit there is room for improvement.³²⁵ Peacemaking process and Circle sentencing in the US have shown that applying customary methods to settle conflict has assisted local courts to gain familiarity with the traditional communities.³²⁶ The same uptake of high confidence and trust in TDRMs is evident with the Kipsigis traditional community which largely use TDRMs towards promotion of justice as opposed to retribution.³²⁷ The traditional courts in SA are widely spread across the country and serve to promote access to

³¹⁴ (n 313 above)

³¹⁵ Abe and Ouma (n 33 above) 3.

³¹⁶ K Muigua, 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya' 2010, <http://www.kmco.co.ke/attachments/artide/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>.

³¹⁷ A Sium, 'Revisiting the Black Man's Burden: Eritrea and the Curse of the Nation-State' (A Masters' Thesis submitted to the Department of Sociology and Equity Studies in Education, Ontario Institute for Studies in Education, University of Toronto, 2010).

³¹⁸ Constitution of Kenya, Article 159(2)(c).

³¹⁹ JA Edzii, 'Is Alternative Dispute Resolution a Solution to Interpersonal and Group Conflicts in West Africa? The Case of Ghana' (A Masters' Dissertation submitted to the Faculty of Law, University of Ghana, Legon, 2018) 46.

³²⁰ (n 137 above).

³²¹ Rammala (n 61 above) 230, Chigozie (n 54 above) 38.

³²² H Grayson, & N Hitchcott, (2019). "Rwanda since 1994. stories of change" 8.

³²³ M Rettig, "Gacaca: 'Truth, Justice, and Reconciliation in Post-conflict Rwanda?' (2008) 51(3) *African Studies Review*, 33. See also C Hulme, 'The Truth Heals: Punishment and Reconciliation at Rwanda's Gacaca Courts' (2014). *Honors Thesis Collection*. 212. Also, at <https://repository.wellesley.edu/thesiscollection/212>.

³²⁴ A Corey and S Joireman, "Retributive Justice: The Gacaca Courts in Rwanda," (2004) 103. *African Affairs*, 84.

³²⁵ M Mamdani, (2002) 'When Victims Become Killers', 266.

³²⁶ Okulski (n 289 above).

³²⁷ Abe and Ouma (n 147 above) 16.

justice for rural communities and ensure peace and stability through ubuntu based TDRMs.³²⁸ Many scholars hailed the TRC in South Africa a success story that exposed the truth, and fostered reconciliation and rebuilding of a unified society.³²⁹

However, TDRMs face certain shortcomings that may affect their effectiveness such as lack of funding and lack of institutionalisation.³³⁰ In order to mitigate against these challenges, resources must be allocated to support the use of TDRMs. There must be training for elders to ensure uniformity and standardisation in applying due process as required by the African Charter on Human and People's rights relating to fair trial.³³¹ The TDRMs remain vital instruments for conflict settlement in traditional communities to ensure reconciliation and social cohesion.³³²

CHAPTER 4. IMPLICATIONS AND RECOMMENDATIONS

4.1. Introduction.

Many African traditional communities regard TDRMs as a conduit for access to justice, and enable a stable, peaceful and harmonious environment to prevail.³³³ These restorative dispute resolution methods, albeit unwritten and passed from one generation to the next, survived subjugation and relegation to the background at the expense of post-colonial imposed formal justice system.³³⁴ Given the legal pluralism prevailing in African communities, disputants have options which legal system to consider in resolving their disputes and the decision will be informed by various factors such as accessibility, efficiency, effectiveness, language used, flexibility and cost implications.³³⁵ The effectiveness of traditional dispute resolution methods depends on various factors, including the nature of the dispute, the parties involved, and the specific context in which the dispute arises.³³⁶ While these methods offer several advantages, they also have limitations that can affect their ability to resolve certain types of disputes.³³⁷ In many cases, a combination of traditional

³²⁸ Rautenbach (n 131 above) 290.

³²⁹ Adam (n 139 above).

³³⁰ Chigozie (n 54 above) 45.

³³¹ Dakar Declaration of the African Commission on Human and Peoples' Rights, Dakar, Senegal, Sep. 11, 1999.

³³² P Holomisa, "Balancing Law and Tradition", (2011) 35. *SA Crime Quarterly* 17.

³³³ K Muigua, & K Francis, 'Alternative Dispute Resolution: Access to Justice and Development in Kenya' (2015) *Strathmore Law Journal* 1.

³³⁴ Ntuli (n 307 above) 37.

³³⁵ Abe (n 246 above) 2.

³³⁶ Aiyedun, (n 193 above) 168.

³³⁷ Ntuli (n 334 above).

and modern approaches to the resolution of dispute may be the most effective way to address a wide range of conflicts.³³⁸ This chapter aims to delve into the implications of the restorative approaches to dispute resolution by examining the benefits and limitations of TDRMs, the significance of integration with formal legal systems as well as some key recommendations to address certain shortcomings inherent in the TDRMs.

4.2. Limitations and opportunities.

TDRMs can be more efficient, cost-effective, and culturally appropriate for certain types of conflicts, particularly those involving interpersonal relationships or community issues such as land disputes, family differences and insults.³³⁹ The African rural communities prefer these informal approaches because they have reaped benefits which derive from using TDRMs.³⁴⁰ They are flexible, informal, cost efficient and less stressful.³⁴¹ They promote peace and harmony through forgiveness and reconciliation.³⁴² The restorative informal approaches focus on building communities and entrench customary values such as ubuntu, meaning everyone 's well being is intertwined with that of others in the whole community.³⁴³ The African value of Ubuntu connotes the interconnectedness of humanity in that the wellbeing of one person is caught up and bound in the wellbeing of the whole community.³⁴⁴ The TDRMs promote collective peace, stability, and cohesion in the society.³⁴⁵ One of the key strengths of traditional methods like negotiation and mediation is their focus on preserving relationships.³⁴⁶ These methods often provide a less adversarial environment than litigation, allowing parties to maintain communication using the customary language they understand and potentially salvage relationships after the dispute is resolved.³⁴⁷ In contrast, the modern justice system tends to be more adversarial and can strain relationships.³⁴⁸ Traditional methods are often more flexible and informal than litigation,

³³⁸ Abe (n 335 above)

³³⁹ Abifarin (n 171 above) 6.

³⁴⁰ J Metoui, 'Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities' (2007) 2 *Journal of Dispute Resolution* 517- 526.

³⁴¹ N Somaru & C Rautenbach, 'The Indian Approach to Criminal Justice: The Role of Traditional Courts as Alternative Dispute Resolution Mechanisms' (2020) 53(2) *Comparative and International Law Journal of Southern Africa* 1- 23.

³⁴² Somaru (n 342 above) 26.

³⁴³ N Masina, 'Xhosa Practices of Ubuntu for South Africa' in Zartman 1W (ed) (2008) *Traditional cures for modern conflicts: African conflict medicine* 181.

³⁴⁴ Masina (n 344 above).

³⁴⁵ Masina (n 345 above).

³⁴⁶ H L Brown, 'The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum' (1999) 24(2) *American Indian Law Review* 297, p. 302

³⁴⁷ A Oyeniya, 'Conflict Resolution in the Extractives: A Consideration of Traditional Conflict Resolution Paradigms in Post-Colonial Africa' (2017) 25(1) *Willamette Journal of International Law and Dispute Resolution* 56, p. 73 par. 1.

³⁴⁸ (n 347 above).

allowing parties to tailor the resolution process to their specific needs, providing more flexibility than the formal procedures of the modern justice system.³⁴⁹ This can lead to more creative and customised solutions that may not be available through formal court processes.³⁵⁰ The TDRMs place more emphasis on the consensus of disputants than adjudication which focuses on determination of rights and liabilities.³⁵¹ The legal process can be complex and formal, requiring legal representation and adherence to procedural rules that may be overwhelming to traditional African communities.³⁵² TDRMs offer a level of confidentiality that is not always available in formal legal proceedings³⁵³. This can be mainly vital for parties who prefer to keep sensitive material private.³⁵⁴ Proceedings in court, on the other hand, are a matter of public record, which may not encourage participation of disputants seeking to keep their conflict confidential.³⁵⁵ Traditional methods provide speedy conflict settlement to rural communities and are less expensive than litigation.³⁵⁶ This can be beneficial for parties who wish to resolve their disputes in a timely manner without incurring exorbitant legal fees.³⁵⁷ On the other hand, Litigation in the modern justice system can be costly and time-consuming, potentially making it inaccessible to individuals and small businesses with limited resources.³⁵⁸

However, TDRMs are not without shortcomings.³⁵⁹ The informal approaches drew much criticism in that most of them are out of touch with the current developments characterised by technological advancement.³⁶⁰ The TDRMs disregard individual rights as the emphasis is based on the wellbeing of the collective rather than that of individuals.³⁶¹ In instances like offences of murder, the TDRMs lack in-depth to ensure justice for the victims.³⁶² In such instances, regardless of what the community does, the state will still be expected to process such matters before formal courts to ensure that justice is seen to be served.³⁶³ Additionally, the elders who adjudicate on societal conflicts are given unfettered powers such that they are open to bias and acts of corruption.³⁶⁴ The TDRMs outcomes are final and binding,

³⁴⁹ E Chigozie et al, 'Issues and Challenges of Promoting Excellence in Alternative Dispute Resolution in Africa' (2022) 11 *International Journal of Legislative Drafting and Law Reform* 36.

³⁵⁰ (n 349 above).

³⁵¹ L R Singer 'Nonjudicial dispute resolution mechanisms: the effects on justice for the poor'. (1979) 13(8) *Clearinghouse Review* 570.

³⁵² M Findlay, 'Decolonising Restoration and Justice: Restoration in Transitional Cultures' (2000) 39 (4) *Howard Journal of Criminal Justice* 399.

³⁵³ C Osi (n 254 above) 206.

³⁵⁴ Aiyedun (n 337 above) 162.

³⁵⁵ Singer (n 351 above) 577.

³⁵⁶ Singer (n. 355 above)

³⁵⁷ Osi (n. 353 above) 64.

³⁵⁸ Findlay (n 352 above)

³⁵⁹ Aiyedun (n 355 above) 166.

³⁶⁰ Oyenini argues that there were traditional communities that used technology to resolve their conflict.

³⁶¹ Price (n 179 above) 402.

³⁶² SL Harring, "Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty". (1989)14 *AMERICAN INDIAN LAW REVIEW* 205.

³⁶³ Harring (n 363 above).

³⁶⁴ Harring (n 363 above).

offering no avenue to appeal if any of the parties is not satisfied.³⁶⁵ This attracted much criticism indicating that TDRMs lack due process. To this end, there are proposals to strengthen the TDRMs with the inclusion of appeal avenues in case disputants are not satisfied.³⁶⁶ Other key limitations relate to enforceability, lack of precedents and factors such as power imbalance.³⁶⁷ There is no enforcement mechanism for TDRMs, however, the disputants voluntarily complied with the decisions of elders.³⁶⁸ Compliance with the decisions of the elders augers well with custom in African communities.³⁶⁹ Unlike in the formal justice system where coercive methods like imprisonment prevail, the TDRMs place focus on bringing the disputants together and restoring their relationship beyond the dispute.³⁷⁰ Further shortfall of TDRMs is the lack of legal precedent and procedural guarantees.³⁷¹ The decisions made through traditional methods do not contribute to the development of judicial precedent and may not always align with public policy objectives.³⁷² This can limit the broader impact of these resolutions on legal and social norms.³⁷³ Unlike TDRMs, Court judgments contribute to the development of legal precedent and help uphold public policy objectives, providing a standardised framework for future similar cases.³⁷⁴

4.3. The benefits of integrating the restorative approaches and formal legal systems.

Many African communities have pluralistic legal systems where the formal justice system takes superior status while the customary practices of the indigenous communities are relegated to an inferior level.³⁷⁵ Integration of restorative traditional methods with the contemporary justice System will mitigate against the relegation of TDRMs to the background, and bring more efficiency, reduce backlogs, and accelerate the finalisation of disputes.³⁷⁶ The integration

³⁶⁵ Kariuki (n 216 above) 1.

³⁶⁶ South African Law Commission (SALC) Project 90 Customary Law 'Report on Traditional courts and the Judicial function of traditional leaders (2003) 1.

³⁶⁷ T Bennett, "Access to justice and human rights in the traditional courts of sub-Saharan Africa" in Bennett T et al (eds) *African perspectives on tradition and justice* (2012) 21-9.

³⁶⁸ Aiyedun (n 355 above) 157.

³⁶⁹ W C Bradford, "Reclaiming indigenous legal autonomy on the path to peaceful coexistence: the theory, practice, and limitations of tribal peacemaking in Indian dispute resolution". (2000) 76(3) *North Dakota Law Review*, 551, p 582.

³⁷⁰ U Gretchen 'Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities' (1999) 20(2) *Hamline Journal of Public Law & Policy* 419- 432.

³⁷¹ E Wojkowska, 'Doing justice: how informal justice systems can contribute', 2006, Oslo: UNDP, 20-4.

³⁷² Aiyedun (n 369 above) 161.

³⁷³ Aiyedun (n 373 above).

³⁷⁴ E Kinama 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 *Strathmore Law Journal* 22.

³⁷⁵ Price (n 362 above) 397.

³⁷⁶ Chigozie (n 330 above) 44.

of TDRMs into modern day justice systems can bring several potential benefits, but it also raises significant challenges and considerations.³⁷⁷ Since TDRMs are deeply rooted in the cultural norms, values, and traditions of a community, integrating these mechanisms into modern justice systems can enhance cultural sensitivity and respect for diverse perspectives, especially in cases involving indigenous communities or marginalised groups.³⁷⁸ The active community participation in TDRMs fosters a sense of ownership in the justice process and decisions, leading to greater acceptance and compliance with the outcomes.³⁷⁹ The flexibility and informality of TDRMs can lead to quicker resolution of conflicts and that will lessen the burden on the overloaded court roll and give timely justice to disputants.³⁸⁰ The TDRMs will identify the underlying causes of the conflict, ensure restoration and preservation of relationships as opposed to focusing on retribution and punishment. This restorative approach brings healing and reconciliation between the disputants, leading to more sustainable outcomes.³⁸¹ The shared features of both the TDRMs and formal justice systems, such as the right to be heard, will contribute to the transitional efforts for integrating these distinct legal systems.³⁸²

Valuable lessons can be drawn from the Navajo American Indian community where the authorities institutionalised the Peacemaking process as a means of resolving communal and family disputes.³⁸³ African countries like Rwanda, Ghana, Kenya, Nigeria and South Africa among others, have shown a growing interest in adopting traditional methods of resolving problems as they resonate with their values and customs to build stable and harmonious communities through reconciliation and healing.³⁸⁴ Gacaca in Rwanda, is a typical example of how the TDRMs can complement the formal justice system to resolve a deep sited genocide conflict and bring harmony, peace and unity for Rwandan people.³⁸⁵ Ghana is another example where the national regulatory framework includes the customary problem-solving mechanism as a recognised method for resolving disputes.³⁸⁶ Rural communities welcomed this development as they were able to access justice in their own communities, using the language they understand and under less intimidating conditions.³⁸⁷ In Kenya, the Constitution required that disputants must use both ADR and indigenous dispute resolution

³⁷⁷ (n 377 above).

³⁷⁸ Brown (n 15 above) 299.

³⁷⁹ Ghebretkle (n 120 above) 325.

³⁸⁰ Uwazie (n 188 above) 1.

³⁸¹ Chigozie (n 330 above) 38.

³⁸² A Skelton (n 133 above) 228.

³⁸³ Okulski (n 289 above) 264.

³⁸⁴ MRN Rammala 'Lekgotla and Idiomatic Expressions in Traditional Dispute Resolution: The Case of Makapanstad, North-West Province' (2021) *South Africa International Journal of African Renaissance studies* 219-241.

³⁸⁵ J Raper 'The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide'. (2005) 5 *Pepperdine Dispute Resolution Law Journal*, 1.

³⁸⁶ Price (n 362 above).

³⁸⁷ Price (n 586 above).

methods before litigation.³⁸⁸ Muigua et al posit that access to justice contributes to the developmental goals of a community.³⁸⁹

Additionally, the restorative justice movement that emerged from the USA in the 1970 has influenced the formal justice system to embrace the principle of restorative justice to a greater extent, such that many institutions and communities have adopted restorative approaches to resolve disputes such as student sexual offences and police misdemeanours.³⁹⁰

4.4. Challenges, considerations and recommendations

Integrating TDRMs into contemporary justice systems may present challenges in terms of legal harmonisation, enforcement of decisions, and consistency with existing laws.³⁹¹ Gacaca experiment shows that balancing the need to respect cultural diversity with the requirements of a legal system based on the rule of law can be complex.³⁹² Many African scholars advocate for the inclusion of the customary restorative approaches for resolving disputes in the formal legal systems.³⁹³ However, they concede that TDRMs may not always align with international human rights standards or principles of gender equality.³⁹⁴ Some customary practices may discriminate against certain groups or fail to protect the rights of susceptible individuals, such as women or minorities.³⁹⁵ Additionally, TDRMs may lack prescribed legal safeguards, such as the right to legal representation, the right to appeal, or transparent decision-making procedures.³⁹⁶ This can raise issues about fairness, accountability, and the protection of individual rights.³⁹⁷

³⁸⁸ Article 159 of the Constitution of Kenya.

³⁸⁹ (n 388 above).

³⁹⁰ M Orcutt et al, "Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct," (2020) 45 *J.C. & U.L.* 204; C E Lyon, 'Alternative methods for sentencing youthful offenders: using traditional tribal methods as model'. (2006) 4 (1) *Ave Maria Law Review*, 211-248.

³⁹¹ O Oluduro 'Customary Arbitration in Nigeria: Development and Prospects' (2011)19(2) *African Journal of International and Comparative Law* 307.

³⁹² D Rawson 'From Retribution to Reconciliation: Transitional Justice in Rwanda, 1994-2011' (2012) 13(2) *Georgetown Journal of International Affairs* 115.

³⁹³ Kinama (n 374 above) 28.

³⁹⁴ J Kiplagat et al, 'The efficacy of traditional dispute resolution (TDRMS) in achieving access to justice for marginalised: A focus on the Kipsigis Community in Kenya' (2020) 8(1) *Nazarene University Law Journal*, 149- 171.

³⁹⁵ BR Schaller, 'Culturally Speaking: Equality, Responsibility and the Social Compact'. (1994) 14(3) *Quarterly Law Review*, 347.

³⁹⁶ M Mamdani, *Citizen and subject: contemporary Africa and the legacy of late colonialism*, (1996) Princeton: Princeton University Press, 118.

³⁹⁷ T Muriithi "Practical peacemaking wisdom from Africa: reflections on ubuntu" (2006) 1(4) *The Journal of Pan African Studies*, 30-32.

Effective integration of TDRMs may require ample training and capacity building for traditional leaders, mediators, and other participants involved in the dispute resolution process.³⁹⁸ Embarking on education and skills development programs is essential to ensure the quality and legitimacy of these methods. Introducing innovative incentives like remuneration for the role played by elders in TDRMs will mitigate against the risk of manipulation to fraud and corruption.³⁹⁹

CHAPTER 5. CONCLUSION

The investigation revealed that in Africa, most countries have adopted a pluralistic legal system, albeit the formal legal system occupies superior status while inferior status is for TDRMs.⁴⁰⁰ The same was the case with the US Navajo traditional American Indian community, which has since made inroads in institutionalising the Peacemaking process as part of the formal legal system.⁴⁰¹ Legal pluralism provides options to disputants on which method to use for resolving their dispute, and the choice will depend on what is effective in their views.⁴⁰² The traditional communities used negotiation, mediation and arbitration for centuries, that is, before, during and after colonialism.⁴⁰³ Many Scholars support the view that the TDRMs use restorative approaches to dispute resolution and focus on restoration and the preservation of relationships while formal justice systems focus on retribution and punishment.⁴⁰⁴ These restorative approaches have enabled African communities to live in harmony and maintain peace and stability due to their efficiency, flexibility, community involvement as well as consensus based outcomes.⁴⁰⁵ The networks that exist in traditional communities create social bonds and foster interconnectedness of the whole community.⁴⁰⁶ These methods have a high success rate in resolving disputes and reconciling disputants because they are embedded in the culture of traditional communities.⁴⁰⁷ The cultural norms that underpin these methods contribute to their acceptance by the

³⁹⁸ Bennet (n 367 above).

³⁹⁹ (n 398 above)

⁴⁰⁰ J Griffiths 'What is Legal Pluralism?' (1986) *J. LEG.PLURALISM & UNOFFICIAL L.* 24.

⁴⁰¹ RD Austin 'American Indian Customary Law in the Modern Courts of American Indian Nations'. (2011) 11(2). *Wyoming Law Review*, 351. See also B Sheenwary 'Institutionalising Customary Dispute resolution in Afghanistan: Lessons from the Navajo approach to Harmonising Traditional and formal Justice' (2017) 32 *Ohio State Journal on Dispute Resolution*, 245.

⁴⁰² EE Uwazie 'Social Relations and Peacekeeping Among the Igbo' in I William- Zartman (ed) *Traditional cures for modern conflicts "Medicine"* (2022) 15.

⁴⁰³ Chigozie (n 349 above)) 42

⁴⁰⁴ Gretchen (n 39 above).

⁴⁰⁵ Price (n 402 above).

⁴⁰⁶ Putnam (n 85 above).

⁴⁰⁷ D Mekonnen 'Indigenous legal tradition as a supplement to African transitional justice initiatives.' (2010) 10(3) *African Journal on Conflict resolution* 111.

customary societies.⁴⁰⁸ Values such as Ubuntu, communal living, reciprocity, and respect for seniors, ancestors as well as fellow community members, create a conducive environment for peaceful facilitation and settlement of the disputes.⁴⁰⁹ The restorative approaches tackle the root cause of the conflict to ensure a win-win situation as opposed to the formal justice win-lose outcome that fuels continued hostility between disputants far beyond court proceedings.⁴¹⁰ African traditional communities revere elders for their experience, knowledge and wisdom in applying customary norms during TDRMs to ensure reconciliation of disputants, focusing on communal peace and social balance.⁴¹¹ The effectiveness of these methods manifest in reconciling the disputants and restoring relationships, which positively impact on the promotion of social cohesion in the community.⁴¹² Overall, the restorative TDRMs afforded the rural communities access to justice.⁴¹³ Most African countries like Kenya, Ethiopia and South Africa have made efforts to include the customary mechanisms in their legal frameworks.⁴¹⁴

However, the TDRMs also have certain disadvantages, such as gender bias, lack of legal protection, due process and accountability mechanisms.⁴¹⁵ To uplift the standard of the TDRMs to acceptable quality, scholars recommend capacity building through education and training programs to equip the traditional leaders with the requisite skill to ensure that outcomes are consistent and fair.⁴¹⁶

⁴⁰⁸ K Muigua 'Traditional dispute resolution mechanisms under article 159 of the Constitution of Kenya 2010' (2018) *Online African Journals* 13. <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf>

⁴⁰⁹ Muigua (n 409 above).

⁴¹⁰ B Bujo 'The Ethical Dimension of Community-The African Model and the Dialogue between North and South' (1998) *Pauline's Publications Africa* 198.

⁴¹¹ EL Enyew 'Ethiopian customary dispute resolution mechanisms: Forms of restorative justice?' (2014) 14(1) *African Journals on conflict resolution* 141. <https://hdl.handle.net/10520/EJC156248>

⁴¹² OL Rasaki & AI Ganiyu 'Resolving conflict in African Traditional Society: An Imperative of Indigenous African System' 2020 4(1) *African Journal of History and Archaeology* 40.

⁴¹³ C Rautenbach (n 299 above) 276.

⁴¹⁴ The Constitution, 1966, s 211 and 212.

⁴¹⁵ T Nhlapo & C Himonga. 'African customary law in South Africa: post-apartheid and living law Perspectives'. (2014) Ch. 14.

⁴¹⁶ Kinama (n 393 above)

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