

“Alternative Dispute Resolution and Article 159 of the Constitution”

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Abstract

This paper is a critical appraisal of Alternative Dispute Resolution (ADR) mechanisms in Kenya in relation to Article 159 of the Constitution. It proceeds in three parts as indicated herein;

Part I: *Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution:* This part is a critical examination of Alternative Dispute Resolution mechanisms in Kenya popularly known as ADR in relation to Article 159 of the constitution and the legal framework governing ADR in particular.

Part II: *Traditional Dispute Resolution Mechanisms and Article 159 of the Constitution:* This part discusses traditional dispute resolution mechanisms in view of Article 159 of the constitution.

Part III: *Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution: Understanding the Social Context and Cultural Setting:* This part of the paper deals with the social and cultural dimension of conflict. It sets out to investigate the role, if any, that the cultures of different communities play in resolution of conflicts.

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Part I

Alternative Dispute Resolution Mechanisms and Article 159 of the Constitution

1.0 Introduction

This part is a critical examination of Alternative Dispute Resolution mechanisms in Kenya popularly known as ADR in relation to Article 159 of the constitution and the legal framework governing ADR in particular.

The opportunities and challenges in the application of ADR mechanisms are explored in view of the need to enhance access to justice, reduce backlog of cases and resolve dispute expeditiously. The author reflects on his own experiences as an ADR practitioner and proposes certain measures that in his view would make ADR in Kenya serve the purpose it is supposed to serve to wit, making access to justice easier, lowering costs, resolving conflicts expeditiously, retaining party autonomy, maintaining the parties relationships and arriving at amicable solutions that ensure co-existence between the parties.

2.0 Brief Overview of Alternative Dispute Resolution

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.¹ Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to

¹ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

regional agencies or arrangements, or other peaceful means of their own choice.² These conflict management mechanisms are discussed hereunder;

2.1 Arbitration

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. It arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. Section 59 of the Civil Procedure Act³ provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.

The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution."⁴ This is not very elaborate and regard has to be had to other sources. According to Khan⁵, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effectiveness; confidentiality; speed and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration. The other disadvantage of this mechanism is that similar cases cannot be consolidated without the consent of the parties. Precedents are also not set as happens in court. Arbitration practice in Kenya is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delaying tactics and importation of complex legal arguments and procedures into the arbitral process. In essence arbitration is really a court process since once it is

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³ Civil Procedure Act, Revised Edition 2010(2008), *Government Printer*, Nairobi.

⁴ The Arbitration Act, Act No. 4 of 1995 (as Amended in 2009), *Government Printer*, Nairobi.

⁵ Farooq Khan, *Alternative Dispute Resolution*, A paper presented at Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

2.1.1 Some Key Provisions of the Arbitration Act

i) Role of the Court in Arbitration

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides:

“10. Except as provided in this Act, no court shall intervene in matters governed by this Act.”⁶

The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. This section epitomizes the recognition of the policy of parties autonomy which underlie the arbitration generally and in particular the Arbitration Act, 1995. The section articulates the need to restrict the court’s role in arbitration so as to give effect to that policy.⁷ The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

ii) Stay of Legal Proceedings

Generally, the courts have no direct power, and of their own motion, to compel arbitration. However, courts can do so indirectly, and upon application of a party to an arbitration agreement. This is possible where the court, after an application for stay of proceedings for reference to arbitration, refuses the claimant audience and/or remedy through the court process. Under the Act an order for stay of proceedings has the effect that if aggrieved party wants to pursue his claims, he can only do so by arbitration.⁸

⁶ This section was not affected by the 2009 Amendments.

⁷ Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293

⁸The justification is that agreements to refer disputes to arbitration are mainly contractual undertaking by parties to settle disputes out of the court and with the help of an arbitrator. The courts exist to enforce and give force of law what parties, exercising their freedom to contract, choose to agree to be bound by.

The necessity of stay of proceedings arises where the parties have a valid arbitration agreement and upon a dispute arising on a matter covered by the same, one party goes to the court in breach of the Arbitration agreement.⁹ An application for stay of the legal proceedings is what Section 6 of the Arbitration Act avails the other party if it is to give effect to the arbitration agreement.

iii) Interim Measures of Protection

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. Section 7 of the Act limits parties' freedom to contract any arbitration agreement that limits and/or bars seeking interim measures of protection in court. The jurisdiction to make such orders is the preserve of the High Court of Kenya. The courts have jurisdiction to make such orders as preserve the status quo of the subject matter of the arbitration. The powers could include those of making orders for preservation like attachment before judgement; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.

iv) Determining The Arbitral Tribunal's Jurisdiction

As per the doctrine of "*kompetenz kompetenz* ", the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement.¹⁰ The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal.¹¹

v) Interim Orders Of Protection During Arbitration

Save where parties have otherwise agreed, the arbitral tribunal may at request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject of the dispute.¹² In that connection, the

⁹ Parties commence court action despite arbitration agreement for a number of reasons. The action may be inadvertent, because s/he challenges the existence or validity of the arbitration agreement or merely to breach the arbitration agreement.

¹⁰ Section 17 (1) of the Act

¹¹ Section 17 (4) of the Act

¹² Section 18 (1) (a) of the Act as amended by the Act of 2009.

tribunal may require a party to provide security for the measure requested for¹³ or order any party to provide security in respect of any claim or any amount in dispute¹⁴ or order a claimant to provide security for costs.¹⁵

The Act gives the High Court power to enforce the preemptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.¹⁶ The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be the equivalent the one it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.¹⁷

vi) Setting Aside Arbitral Award

This is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.¹⁸ The instances when the High court may set aside an arbitral award are specifically stipulated in the act.¹⁹ They include where it is proved that a party to the arbitration agreement was under incapacity, invalidity of the arbitration agreement under the laws governing the dispute, if proper notice of appointment of an arbitrator or arbitral proceedings was not given, if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration and if the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnish a ground for setting aside arbitral awards. However, if the agreement

¹³ *Ibid.*

¹⁴ Sec. 18 (1) (b).

¹⁵ Sec. 18 (1) (c).

¹⁶ Section 18 (2) of the Act

¹⁷ Section 18 (3) of the Act

¹⁸ Section 35(1) of the Act

¹⁹ Section 35(2) of the Act

was in conflict with a provision of the Act which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.²⁰

vii) Recognition and Enforcement of Arbitral Awards

Generally, an arbitral award is recognised as binding regardless of the state in which it was made. Thus on application to High Court, a domestic arbitral award shall be enforced subject to relevant provisions of the Arbitration Act, 1995.²¹ An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.²² Any party may apply for enforcement of arbitral award.²³ But often application for enforcement is made by the party in whose favour the arbitral award was made and the other party will reply to the application.

The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof.²⁴ In addition, the parties should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seeks indulgency on compliance with these requirements to supply those documents. The arbitration award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.²⁵

2.2 Negotiation

Negotiation is an informal process and one of the most fundamental methods of conflict resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a

²⁰ *Ibid*

²¹ Section 36 (1) of the Act

²² Sec. 36 (2) of the Act as amended by the Act of 2009.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.²⁶ As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. The most common form of negotiation depends upon successfully taking and giving up of a sequence of positions. They argue that positional bargaining is not the best form of negotiation because arguing over positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.²⁷ Accordingly the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained. It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.²⁸ The pros and cons of this process are similar to those discussed under mediation.

2.3 Mediation

Mediation is one of the alternative dispute resolution mechanisms which has been practised since antiquity and is thus a restatement of customary jurisprudence. It existed even before the other alternative dispute resolution mechanisms were invented. Both mediation and the other alternative dispute resolution mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures.²⁹

Mediation is also recognized as one of the mechanisms for managing conflicts in Kenya. Article 159 of the Constitution provides that in exercising judicial authority, the

²⁶ See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994).

²⁷ Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981), p.4.

²⁸ Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115

²⁹ Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p.73.

courts and tribunals shall be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.³⁰ The constitution has therefore elevated the importance of mediation and the other traditional conflict resolution mechanisms in resolving conflicts in the Kenyan context. Constitutionalisation of mediation means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging mediation and the other traditional means of conflict management as opposed to the formal mechanisms.

Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.³¹ It can also be defined as the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.³² Greenhouse³³ says that;

“Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputant...”

The above definitions are not entirely correct as they connote that the mediator must be neutral and impartial. However, the truth of the matter is that a mediator may not be a neutral and impartial third party but must be acceptable to the parties. The fact that the mediator possesses certain resources valued by the parties, then the latter are less

³⁰ Article 159 (2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi.

³¹ P. Fenn, “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, *Workbook on Mediation*, op. cit, p.10

³² Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14

³³ Carol J. Greenhouse, “Mediation; A Comparative Approach”, *Man*, New Series, Vol. 20, No. 1, *Royal Anthropological Institute of Great Britain and Ireland*, (Mar., 1985), pp. 90-114, pg. 90.

concerned with the impartiality of the mediator. Psychological factors are alternative reasons for a mediator's lack of impartiality.³⁴

Perhaps the best definition of mediation is offered by Bercovitch who defines it as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation is, in essence, a form of "assisted negotiation" it does not have any direct legal basis.³⁵ The agreement reached does not have to be in writing. It is binding because the parties have undertaken to negotiate the conflict voluntarily.

The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock. In such circumstances, they agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock. This whole notion of agreeing on a third party to assist in the negotiations shows that mediation is a voluntary process since both parties to the conflict have to agree to the mediation process and the mediator.³⁶ Mediation is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.³⁷ Mediation is thus a continuation of the negotiation process in the presence of a third party

A mediator is one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." He must be acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.³⁸ The presumed effectiveness of the mediator derives from the diverse functions he can serve in a conflict situation. For instance he

³⁴ Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp.53-54

³⁵ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.290

³⁶ Makumi Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, op.cit, pp. 115-116

³⁷ Ibid.,p.115

³⁸Michael Barkun, "Conflict Resolution through Implicit Mediation," *Journal of Conflict Resolution*, VIII (June, 1964), p. 126

can change for the better the behaviour of the disputants just by being present.³⁹ Arthur Meyer who observes that;

*“The mediator is a catalytic agent. The mere presence of an outsider, aside from anything he may do or say, will cause a change, and almost certainly a change for the better, in the behaviour of the disputing parties. . . Progress has been made through the mediator's presence, though that presence has brought nothing more than temperate speech.”*⁴⁰

Though approached from differing perspectives, all the definitions seem to agree that mediation is a negotiation process in which parties (disputants) are assisted by a third party known as a mediator. It would seem from the above discussion therefore that mediation can only be understood as an aspect of the general structure and process of negotiation. Its widespread application in the management of conflicts and disputes in the contemporary world is because it is a flexible, confidential, cost-effective and speedier process of settling disputes. It affords the parties in dispute autonomy over the mediator, *fora* for mediation, over the process and over the outcome.

2.3.1 Advantages and Disadvantages of Mediation

Due to the above cited attributes mediation and especially mediation in the political process has the advantages, *inter alia*, that it is a fast process compared to the other processes as the timing of the process is within the control of the parties, is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome. On confidentiality it is argued that any admissions, proposals or offers for solutions will not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.⁴¹

It is expeditious and time saving since it is often possible to schedule mediation around work schedules or on the weekend. Mediations are thus often marketed as being both economically and time efficient⁴². However, that marketing assumes that both

³⁹ Marvin C. Ott, “Mediation as a Method of Conflict Resolution: Two Cases”, International Organization, Vol. 26, No. 4, *The University of Wisconsin Press*, Autumn, 1972, pp. 595-618, at p. 597.

⁴⁰ Arthur Meyer, "Function of the Mediator in Collective Bargaining," *Industrial and Labor Relations Review*, XIII, No. 2 (January, 1960), p. 161.

⁴¹Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-meditation.html>, accessed on 3rd September 2012.

⁴² “Beyond the Myths; Get the Facts about Dispute Resolution”, *American Bar Association*, Washington DC, 2007, p. 8, sourced from www.abanet.org/dispute, accessed on 30th August 2012.

parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.⁴³

Mediation in the political process is also non-coercive in that parties have autonomy over the forum, the process, and the outcome. There are no sanctions such as are applied in courts and in arbitration.

Despite possessing the above positive attributes mediation has some drawbacks.⁴⁴ Firstly, is the issue of power imbalance. Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that party's needs and interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. As such for a mediation process to be legitimate, it must be able to deal fairly with disputes involving significant power differences.⁴⁵ A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.⁴⁶ Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would be able to measure the distribution of power between parties, and then intervene to redistribute power more equally.⁴⁷

Secondly, mediation suffers from its non-binding nature. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to

⁴³ Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-meditation.html>, op. cit.

⁴⁴ See generally Owen Fiss, "Against Settlement", 93 *Yale Law Journal* 1073(1984).

⁴⁵ Claire Baylis and Robyn Carroll, "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135

⁴⁶ Carolyn Manning, *Power Imbalance in Mediation*, an unpublished paper sourced from www.dialmformediation.com.au, accessed on 30th August 2012.

⁴⁷ Power Imbalances in Mediation, SCMC Briefing Papers, *Scottish Community Mediation Centres*, Edinburgh, sourced from www.scmc.sacro.org.uk, accessed on 30/08/2012.

continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.⁴⁸ It is a process that requires the goodwill of the parties. The non-binding nature of mediation also means that a decision cannot be imposed on the parties.⁴⁹

Thirdly mediation may lead to endless proceedings. Moreover, and unlike in litigation there are no precedents that are set in mediation hence creating uncertainty in the way decisions will be made in future. Lastly, mediation may not be suitable when one party needs urgent protection like an injunction and hence viewed against litigation this could be a demerit.

2.4 Conciliation

Conciliation is a process in which a third party, called a *conciliator*, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. The difference between mediation and conciliation is that the conciliator, unlike the mediator who is supposed to be neutral, may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations. Frequently, conciliation is used to restore the parties to a pre-dispute *status quo*, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.

2.4.1 Use of Conciliation in Labour Disputes

Section 47 of the Employment Act⁵⁰ provides for complaints of summary dismissal or unfair termination. It is provided under subsection 2 that;

“A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section 49.”

Though not expressly stated, the practice alluded to therein is conciliation.

⁴⁸Sourced from <http://resources.lawinfo.com/en/Articles/mediation/Federal/the-pros-and-cons-of-mediation.html>, accessed on 3rd September 2012.

⁴⁹ Ibid.

⁵⁰ Act No. 11 of 2007.

Section 12 (9) of the **Labour Institutions Act**⁵¹ provides that;

*“The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through **conciliation**.”*

It can be seen that this Act encourages parties to conciliate their differences.

Section 58 of the Labour Relations Act⁵² provides that;

“(1) An employer, group of employers or employers' organisation and a trade union may conclude a collective agreement providing for-

(a) the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

(b) the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.

(2)

(3) An award in an arbitration in terms of a collective agreement contemplated in subsection (1) is final and binding and –

(a) is subject to appeal on points of law to any court;

(b) may be set aside by the Industrial Court on any ground recognised in law; or

(c) may be enforced by the Industrial Court.

(4) An application to review an arbitration award shall be made to the Industrial Court within thirty days of the award.

Further the Act⁵³ provides that; “Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute...” Persons who may be appointed as

⁵¹ Act No. 12 of 2007.

⁵² ACT No. 14 of 2007.

⁵³ Under section 65 (1)

conciliators include a public officer, any other person drawn from a panel of conciliators or a conciliator from the conciliation and mediation commission.⁵⁴

Section 67 of the Act provides for the conciliator's powers to resolve a dispute. It provides in **subsection 2** that for the purposes of resolving any trade dispute, the conciliator or conciliation committee may –

- a) Mediate between the parties
- b) Conduct a fact finding exercise; and
- c) Make recommendations or proposals to the parties for settling the dispute.

The conciliator or conciliation committee shall have power to summon and question any person to attend a conciliation.⁵⁵

Section 68 of the Act provides that;

“(1) If a trade dispute is settled in conciliation the terms of the agreement shall be –

- (a) recorded in writing; and
- (b) signed by the parties and the conciliator.

(2) A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.

Section 69 provides that **a trade dispute is deemed to be unresolved after conciliation** if the-

- (a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or
- (b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

Section 70 of the Act provides that the minister may appoint a conciliator or conciliation committee in public interest to prevent the dispute from arising or to resolve

⁵⁴ See section 66 (1) of the Act.

⁵⁵ See section 67(3) of the Act.

a dispute. The minister may also appoint a committee of inquiry to investigate any trade dispute and report to the minister.⁵⁶

2.5 Convening

Convening serves primarily to identify the issues and individuals with an interest in a specific controversy. The neutral, called a *convenor*, is tasked with bringing the parties together to negotiate an acceptable solution. This technique is helpful where the identity of interested parties and the nature of issues are uncertain. Once the parties are identified and have had an opportunity to meet, other ADR techniques may be used to resolve the issues.

2.6 Early Neutral Evaluation

Early Neutral Evaluation involves an informal presentation by the parties to a neutral with respected credentials for an oral or written evaluation of the parties' positions. The evaluation may be binding or non-binding. Many courts require early neutral evaluation, particularly when the dispute involves technical or factual issues that lend themselves to expert evaluation. It may also be an effective alternative to formal discovery in traditional litigation.

2.7 Adjudication

Adjudication is defined under the Chartered Institute of Arbitrators (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as an adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.⁵⁷ It is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract)⁵⁸, flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or

⁵⁶ Under section 71 of the Labour Relations Act.

⁵⁷ The CI Arb (K) Adjudication Rules, Rule 2.1

⁵⁸ *Ibid*, Rule 23.1.

litigation.⁵⁹ Adjudication is thus effective in simple construction disputes that need to be settled within some very strict time schedules.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the arbitrator is also crucial as his decision is binding and that it does not enhance relationships between the parties.

2.8 Facilitation

Facilitation improves the flow of information within a group or among disputing parties. The neutral, called a *facilitator*, provides procedural direction to enable the group to effectively move through negotiation towards agreement. The facilitator's focus is on the procedural assistance to conflict resolution, compared to a mediator who is more likely to be involved with substantive issues. Consequently, it is common for a mediator to become a facilitator, but not the reverse.

2.9 Fact-Finding or Neutral Fact-Finding

Fact-Finding or Neutral Fact-Finding is an investigative process in which a neutral "fact finder" independently determines facts for a particular dispute usually after the parties have reached an impasse. It succeeds when the opinion of the neutral carries sufficient weight to move the parties away from impasse, and it deals only with questions of fact, not interpretations of law or policy. The parties benefit by having the facts collected and organized to facilitate negotiations or, if negotiations fail, for traditional litigation.

2.10 Mediation-Arbitration (Med-Arb)

Mediation Arbitration (Med-Arb) is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, a neutral third party issues a binding or non-binding arbitration decision on the cause of the impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes. Use of the same person for both processes creates a problem since

⁵⁹ Ibid., Rule 29

when the mediator turned arbitrator must ignore previously acquired confidential information.⁶⁰

2.11 Mini-trial

Mini-trial is a dispute resolution technique which provides an opportunity for a summary presentation of evidence by lawyer or other fully informed representative for each side to decision makers, usually a senior executive from each side. After receiving the evidence, the decision makers privately discuss the case. "Mini-trial" is not a small trial; it is a sophisticated and structured settlement technique used to narrow the gap between the parties' perceptions of the dispute and which "facts" are actually in dispute.

This hybrid technique can occur with or without a neutral's assistance, but neutrals frequently facilitate the processes for presentation of evidence and discussion among the decision makers, and serve as a mediator to reach a settlement. Mini-trials can be more expensive than most other ADR techniques because the cost of presenting even summary evidence to senior executives is high. Therefore, this process is generally reserved for significant cases involving potential expenditure of substantial time and resources in litigation.⁶¹

2.12 Ombudsman (Ombudsperson)

Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints. The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.⁶²

2.13 Peer Review Panels or Dispute Resolution Panels

Peer Review Panels or Dispute Resolution Panels use groups or panels to conduct fact-finding inquiries, assess issues, and present a workable resolution to resolve disputes. The panel is often composed of two or more neutral subject matter experts selected by

⁶⁰ See generally Chapter One in Kariuki Muigua, "*Settling Disputes through Arbitration in Kenya*", (Ladona Publishers, Nairobi, 2012)

⁶¹ Ibid

⁶² Ibid

the disputing parties. Decisions of the panel may or may not be binding, depending on the advance agreement of the parties. This method attempts to resolve disputes at their inception to avoid traditional litigation.

2.14 Private Judging

Private Judging, also called "rent-a-judge", is an approach midway between arbitration and litigation in terms of formality and control of the parties. The parties typically present their case to a judge in a privately maintained courtroom with all the accoutrements of the formal judicial process. Private Judges are frequently retired or former "public" judges with subject matter expertise. This approach is gaining popularity in commercial situations because disputes can be concluded much quickly than under the traditional court system.⁶³

2.15 Hybrid ADR⁶⁴

Hybrid ADR is any creative adaptation of ADR techniques for dispute resolution. ADR has found its niche as an adjunct to traditional litigation because of the financial and emotional cost as well as the other aggravations of formal litigation. Processes leading to less litigation cost or risk may be considered ADR, regardless of the labels used to identify them. The distinguishing characteristic is that the techniques enable parties to acquire sufficient information to evaluate litigation risk and voluntarily negotiate resolution directly with each other. The techniques can be applied in any sequence as long as the parties are moving in good faith toward resolution of all or part of a dispute.

2.16 Expert Determination

This is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet etc⁶⁵ It is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, op. cit, p.16

architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not.⁶⁶

2.17 Traditional Dispute Resolution Mechanisms

These are mechanisms that have always existed amongst communities for the management of conflicts. They include what is known today as mediation, negotiation, Med-Arb and other norms. (These mechanisms will be discussed separately later in Part II of this Paper)

3.0 Alternative Dispute Resolution in the Kenyan Context

Alternative Dispute Resolution is now recognized in the Kenyan legal framework. Recognizing ADR as a one of the main conflict resolution mechanisms in Kenya is thus encouraging. The status of ADR has been elevated and its applicability to a wide array of disputes will thus be seen in the near future. In the ensuing discussion I will assess court annexed ADR in light of the current legal framework.

3.1 Constitution

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁶⁷

The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the

⁶⁶ Kariuki Muigua, “*Settling Disputes through Arbitration in Kenya*”, op.cit.

⁶⁷ Constitution of Kenya 2010, op.cit

key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

3.2 Civil Procedure Act

There are numerous provisions under the Civil Procedure Act, Cap. 21, Laws of Kenya, on the use of ADR in conflict management. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. There were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.⁶⁸ The upshot of these provisions is that, once the necessary practice notes and/or directions are issued, the practice of court-annexed mediation may take off in Kenya.

Section 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.⁶⁹ In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties. This provision can also serve as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

3.3 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (As Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to

⁶⁸ Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, op. cit.

⁶⁹ Section 1A (2) of Civil Procedure Act, op. cit.

arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that;

“Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit.

Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award. Order 46 rule 20 of the Civil Procedure Rules provides that;

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

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR will thus go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs.

Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3.4 Mediation and other ADR Mechanisms

The clamor to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act has amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes.⁷⁰ Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings. This definition depicts mediation in the political process but then the context within which mediation is to take place makes the whole process legal.⁷¹

Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.⁷²

⁷⁰ Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012, *Government Printer*, Nairobi, 2012, whose date of commencement is 12th July 2012.

⁷¹ Section 2 of the Civil Procedure Act.

⁷² Section 59A of the Civil Procedure Act.

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation.⁷³ Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.⁷⁴ Such reference should, however, be conducted in accordance with the mediation rules.⁷⁵ Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation under this part shall be recorded in writing and registered with the court giving direction under sub section (1), and shall be enforceable as if it were a judgment of that court. No appeal shall lie against an agreement referred to in subsection (4).⁷⁶

Under Section 59C, a suit may be referred to **any other method of dispute resolution** where the parties agree or where the court considers the case suitable for referral.⁷⁷ Under Section 59C (2), any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.⁷⁸ No appeal shall lie in respect of any judgment entered under this section.⁷⁹ Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.⁸⁰ Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

The aforesaid amendments to the Civil Procedure Act are not, in my view, really introducing mediation *per se*, but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for

⁷³ Section 59B (1) of the Civil Procedure Act

⁷⁴ Section 59B (2)

⁷⁵ Section 59B (3)

⁷⁶ Section 59B (4)

⁷⁷ Section 59C (1).

⁷⁸ Section 59C (3)

⁷⁹ Section 59C(4)

⁸⁰ Section 59D of the Civil Procedure Act.

ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from a westerner's perspective and not in the traditional, political and informal perspective where it could lead to a resolution of the conflict.

4.0 Challenges and Opportunities

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there still are certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite dispute resolution.

These challenges relate to lack of capacity in terms of insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation. Equally, parties may lose their autonomy when ADR is court-mandated; the fundamental quality of mediation, that is, its voluntary nature, is interfered with through the court order calling for mediation; enforcement of mediated agreements entered into with the assistance of unqualified mediators is excluded; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached.

Mediation in the legal process is temporal and may not deal with the negative elements of the underlying inter-disputant-relationship. Mediation also risks being a court process because even after the parties have negotiated and even reached a solution to the conflict, they nevertheless have to go back to court for enforcement of the mediated agreement. Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.

The effective operationalisation of the Arbitration law and court supervised ADR faces challenges as there is an overlap of some provisions. Moreover the public have not been fully made aware of ADR methods of conflict management and their usefulness. Nevertheless, the adoption of ADR may have the effect of lowering the costs of accessing justice as ADR mechanisms are cheaper compared with the court process. Some ADR methods such as negotiation and mediation address underlying psychological

dimensions which cannot be addressed in courts and hence where ADR mechanisms are utilized, the dispute may not flare up again.

5.0 Conclusion

There is now in place a comprehensive legal framework governing ADR in Kenya. With the passage of the constitution of Kenya 2010, ADR has now been explicitly recognized by Kenyan law. ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of Rights as enshrined in the constitution must at all times be kept in mind and upheld. The future of Alternative Dispute Resolution in Kenya is bright and really promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements.

Part II

Traditional Dispute Resolution Mechanisms

1.0 Introduction

Traditional dispute resolution mechanisms are now well entrenched in Article 159 of the Constitution of Kenya, 2010. They are to be promoted by the courts and tribunals established thereof. This part discusses traditional dispute resolution mechanisms in view of Article 159 of the constitution. The author argues that where they have been used in managing conflicts they have been effective since they are closer to the people, flexible, expeditious, fosters relationships, voluntary and cost-effective. The author begins this part with a short background and then proceeds to examine Article 159 of the constitution, the range of traditional dispute resolution mechanisms, implementation of traditional dispute resolution mechanisms and ends with a short conclusion.

2.0 Background

Before the advent of colonialism communities living in Africa and Kenya in particular had their own conflict resolution mechanisms. Whenever a conflict arose negotiations could be done. In other instances the elders such the Council of elders or elderly men and women could act as third parties in the resolution of the conflict. Moreover, disputants could be reconciled by the elders and close family relations and advised on the need to co-exist harmoniously. As such traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence among the Africans.

Apart from the foregoing, there were certain institutions, principles, values and traditions that were crucial in the resolution of conflicts. These will be looked at later in depth. In a way therefore, the existence of traditional conflict resolution mechanisms such as negotiation, reconciliation, mediation and others in Kenya is enough evidence that these concepts are not new in this country. They are practices that have been in application for a very long period. Consequently the recognition given to traditional dispute resolution mechanisms in article 159 (c) of the Constitution is thus a restatement of customary jurisprudence. They existed even before the other alternative dispute resolution mechanisms were invented. Nonetheless, both the traditional dispute resolution mechanisms and ADR

mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures.¹

Conflict resolution among the traditional African people was anchored on the ability of the people to negotiate. However, with the arrival of the colonialists, western notions of justice such as the application of the common law of England were introduced in Kenya. The common law brought the court system which being adversarial greatly eroded the traditional conflict resolution mechanisms.

3.0 Article 159 of the Constitution

Traditional dispute resolution mechanisms are now recognized and protected in the supreme law of the land. They have been recognized as some of the mechanisms for managing conflicts in Kenya. Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or result to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.²

From Article 159 (1) it is clear that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities. Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora), disputes are resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system as they are very informal. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation.³

¹ Paul Obo Idornigie, "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p.73.

² Article 159 (2) (c) of the Constitution of Kenya 2010, *Government Printer*, Nairobi.

³ *Ibid*, Article 11

Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the constitution.

As it will be seen shortly traditional dispute resolution mechanisms have been very effective in resolving conflicts especially natural resource-based conflicts among the pastoralist communities in Kenya. Such conflicts are intractable with complex cultural dimensions and the formal mechanisms of conflict management may not address the underlying causes of the conflict. Traditional justice mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people and help reduce backlog of cases in courts.

The only limitation to the application of these mechanisms is that they must not be used in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality. Justice and morality are however not defined in the constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law, for instance disinheriting women in a succession dispute.

4.0 Resolution and Settlement

Traditional justice systems are resolution mechanisms. Where they have been employed they have been effective in managing conflicts and their declarations and resolution have been recognized by the government. This is exemplified for instance by the Modogashe Declaration in which members of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socioeconomic problems, identifying role of peace committees among others. It also outlined decisions made by the community around these issues affecting the community

especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.⁴

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.⁵ Since resolution is non-power based and non-coercive it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.⁶ The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.⁷ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.⁸

Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings. Within conflict management literature resolution is often presented as being inherently superior to settlement as it deals with the root causes of the conflict and negates the need for future conflict or conflict management. Resolution is contrasted with settlement. The later is a potentially damaging half-measure which leaves the causes of the conflict unaddressed and hence the possibility of the conflict later flaring up while a resolution addresses the root causes of the conflict.⁹

On the other hand a settlement is informed by the power possessed by the parties to the conflict. In a conflict then a settlement implies that the parties have to come to

⁴ See generally, CEWARN Baseline Study: For the Kenyan-Side of the Somali Cluster, available at, www.cewarn.org, (accessed on 30/08/2012)

⁵David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

⁶ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

⁷ Ibid

⁸ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit., p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

⁹ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, op.cit.296

accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing the process becomes a contest of whose power will be dominant. Power therefore defines both the process and the outcome in a settlement.¹⁰

A settlement process, “seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute”. Due to its superficial nature settlement is only reached over the issues of the conflict. As such a settlement may be an effective immediate solution to a violent situation and it will therefore not address the factors that instigated conflict in the first place.

It has been observed that settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties’ relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms are prone to flare up again in future leading to conflicts.¹¹ Mediation in the traditional concept led to a resolution. Mediation in this context is different from the mediation envisaged in Sections 59A-59D of the Civil Procedure Act¹² which envisages a court-annexed mediation. Court-annexed mediation results in a settlement rather than a resolution due to the lack of voluntariness and party autonomy.

5.0 Traditional Dispute Resolution Mechanisms

5.1 Negotiation

This is the most widely used mechanism for dispute resolution. It is customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources and coming up with amicable solutions without resort to courts. In Kenya today many conflicts are being resolved through negotiation. Even in the traditional lives of many Kenyans many conflicts were resolved through negotiations.

¹⁰ Claire Baylis and Robyn Carroll, “Power Issues in Mediation”, ”, *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135

¹¹ A.B. Fetherston, “From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia”, *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8

¹² Civil Procedure Act, Cap. 21 Laws of Kenya, *Government Printer*, Nairobi

In negotiation parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties room to come up with creative solutions. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹³ As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome is arrived at in negotiation it is one that satisfies both parties and addresses the root causes of the conflict and that is why negotiation is a conflict resolution mechanism.

In appropriate cases courts should be at the forefront in encouraging parties to negotiate so as to come up with mutually acceptable solution and allow for the expeditious resolution of their dispute. This could happen for example in family disputes. It has happened in many cases before courts, where the judge or magistrate asks the parties or their advocates to negotiate and then record consent.

5.2 Mediation

Mediation in traditional dispute resolution is a very informal process. It is a continuation of the negotiation process by other means whereby instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.¹⁴ Mediation is thus a continuation of the negotiation process in the presence of a third party.

It is voluntarily entered into, parties' exhibited autonomy in the choice of the mediator, over the process and the outcome. It is effective, efficient, depicted fairness and addressed power imbalances among parties. Such mediations result in a resolution of the conflict as opposed to a settlement. The outcome of the process is acceptable to the parties

¹³ See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994); Roger Fischer and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981), p.4.

¹⁴Makumi Mwangiri, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006),p.115

and enduring. An example of the use of mediation informally to resolve conflicts is the peace committees in Northern Kenya among the Pastoralist communities.

The earliest models of peace committees were used in the North Rift and Western Regions by the National Council of Churches of Kenya (NCCCK) where it led in the development of Village Peace and Development Committees (VPDCs). Later, Peace Committees borrowing heavily from the NCCCK model were formed by POKATUSA (Pokot, Karamojong, Turkana and Sabiny), a World Vision's cross-border peace building Project.¹⁵ One such committee is the Wajir Peace and Development Committee inspired the formation and strengthening of peace committees in various parts of the country notably Garissa, Mandera, Isiolo, Samburu, the POKATUSA cluster among others.¹⁶ The main attractive feature of the Wajir Peace and Development Committee is that the local people owned the process of mediation and the outcome of the process has been enduring. This is the main essence of resolution as opposed to mere settlement of the issues in the conflict.

Local peace dialogues, negotiations and reconciliation meetings often result to peace and harmonious co-existence. If such conflicts are to be lodged in a court of law it would be difficult for the underlying causes to be addressed hence the recognition of the role of traditional dispute resolution mechanisms in the constitution.¹⁷

5.3 Problem-Solving Workshop

This is a conflict resolution mechanism. Though used in formal systems it is a traditional and informal mechanism whose focus is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. It tries to understand the root causes of the conflict. When the parties have understood the causes of the conflict they can then ultimately resolve the conflict. It is a more analytical mode of managing conflicts and that is why it resolves because the nature and sources of particular

¹⁵ Mohamud Adan and Ruto Pkalya, "*The Concept Peace Committee; A Snapshot Analysis of the Concept Peace Committee in Relation to Peacebuilding Initiatives in Kenya*", (Practical Action, Nairobi, 2006), pg. 7.

¹⁶ Ibid.

¹⁷ Andries Odendaal, "Local and Peace and Development Committees in Kenya", an unpublished paper forming part of a study commissioned by the *United Nations Development Programme's Bureau for Crisis Prevention and Recovery (BCPR) titled Local Peacebuilding and National Peace Architectures: Lessons Learned from Local peace Forums; a Working Paper*, pp. 6-7

conflicts will have been known.¹⁸ It could for example be employed intractable conflicts and other complex cases where analysis is vital in the effective determination of the dispute.

6.0 Other Traditional dispute resolution Mechanisms

Apart from the foregoing there are other concepts and mechanisms that are used in conflict resolution by many Kenyan communities. These included;

6.1 Council of Elders

This is a common mechanism that has been used in resolving conflicts in many areas in Kenya. It is also a common institution in almost all communities in Kenya. The institution of *Wazee* exists in almost all communities in Kenya. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment.¹⁹

Among the Pokot and Marakwet the council of elders is referred to as *kokwo* and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise old men who are knowledgeable in the affairs and history of the community.²⁰

The council of elders among the Agikuyu community was referred to as the '*Kiama*' and used to act as an arbitral forum or mediator in dispute resolution. These elders and institutions were accessible to the populace and their decisions were respected. This notion is in consonance with the earlier assertion that mediation has been practiced by Kenyan communities for centuries only that it was not known as mediation. It was the familiar way of sitting down informally and agreeing on certain issues, such as the allocation of

¹⁸ M. Light, "Problem-Solving Workshops: The Role of Scholarship in Conflict Resolution" in M. Banks (ed), *Conflict in World Society: A New Perspective on International Relations* (Brighton: Wheatsheaf Books, 1984) pp. 146-160; See also A.B. Fetherston, "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 4-8

¹⁹ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 30/08/2012). p. 8.

²⁰ See generally, a Report by Ruto. P, Mohamud .A, & Isabella .M (eds. Betty Rabar & Martin Karimi) *Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004)

resources. In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community disputes such as those involving use and access to natural resources among the communities in Kenya.

6.2 Consensus Approaches

Traditionally the *consensus approach* was used where resolutions were attained on the basis of consensus rather than on winner-takes-all approach. Consensual outcomes were highly regarded as they created confidence as party had autonomy over the process. Thus the decision of the elders was effective, durable and long lasting. An agreement reached through consensus could be communicated to the whole community and affirmed as a social contract in a ritual way. This was done to pass the news of the satisfactory conclusion of the conflict resolution process. In terms of implementing the agreement the parties and the entire community followed up to confirm compliance with the agreement.²¹

6.3 Role of Local Elders in Conflict Resolution

Traditional local leaders including male and female elders played a pivotal role in conflict management. Due to their the wide powers, knowledge, wisdom and the respect they were accorded in the society they could resolve family conflicts and conflicts related to natural resources. There are some conflicts that come to courts that could well have been handled by the local elders in a community or the Local administration such as the chief. There are many disputes that are reported to chiefs and other local administrators everyday and resolved without moving to court. Recognizing the role played by such leaders in their locality in dispute resolution will ease access to justice and bring it to the people. Such opportunities are the ones that are being evinced by article 159 of the constitution.

The success of the above mechanisms in conflict management was due to the strong values held by the people *inter alia*, communal living, respect for one another and environment, reciprocity, kinship ties, age-grade systems and joking relations. The traditional and cultural ties still exist among many Kenyans. Conflicts for example arising among kinsmen with such strong ties may not be amicably resolved in courts. Such conflicts

²¹Karugire S.R, *A Political History of Uganda*, (Fountain Publishers, Kampala, 2010), pp. 1-16; See also Ayot H.O, *A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940*, (KLB, Nairobi, 1979), pp. 177-190

would best be resolved through traditional conflict resolution mechanisms so as to foster and preserve relations.

7.0 Implementation of Traditional Dispute Resolution Mechanisms

Before the promulgation of the Constitution of Kenya 2010, it used to be contended that one of the main barriers to accessing justice in Kenya was the lack of awareness and recognition of traditional dispute resolution mechanisms.²² Traditional dispute resolution mechanisms are now recognized by the constitution. So as to realize access to justice these mechanisms must be effectively embedded within the justice system. A legal and policy legal structure should be developed to effectively link these mechanisms with the formal court systems. Caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration. The legal environment has swallowed arbitral practice in Kenya. It has become a court process in which lawyers use court technicalities to derail the process. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice.

A framework should also be formulated providing that before parties file a case in court, they should first exhaust traditional dispute resolution mechanisms in appropriate disputes so as to ease backlogs in courts. For instance a boundary dispute should first be looked into at the local level by the elders or recognized council of elders through negotiations and informal mediations before they are brought to court. Mediations conducted in such a forum are distinguishable from court-annexed mediation as envisaged in section 59A-59D of the Civil Procedure Act. Whereas court-annexed mediation is a legal process leading to a settlement informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships.

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a criterion for selecting elders, areas of jurisdiction and the types of disputes that are to be handled by the elders or a community dispute resolution committee. Such dispute resolution committees should take cognizance of the devolved units.

²² Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *op. cit*

8.0 Conclusion

Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict continuum has been recognized in the constitution. They include negotiation, reconciliation, informal mediation, council of elders, local elders, problem solving workshops among others. Constitutionalisation of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise traditional dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if traditional conflict resolution mechanisms can be applied and linked up well with courts and tribunals.

Part III

Alternative Dispute Resolution: Understanding the Social Context and Cultural Setting

1.0 Introduction

Article 159 (2) (c) of the constitution provides that in exercising judicial authority, the courts and tribunals shall promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The said alternative forms of dispute resolution have been discussed previously in this paper and their attributes have been highlighted. That discussion however cannot be complete without considering the role of culture and social settings in resolution of conflicts while utilizing ADR mechanisms.

This part of the paper deals with the social and cultural dimension of conflict. It sets out to investigate the role, if any, that the cultures of different communities play in resolution of conflicts.

2.0 Understanding Culture

Culture has been characterized as the system of meaning and value shared by a community, informing its way of life and enabling it to make sense to the world. The cultural identity of a people is acquired through learning or acculturation permitting intelligible communication and interaction whether linguistic, nonverbal, ritualistic or symbolic between them.¹ It has been called an underground river, an organic thing inside of us and between us and an iceberg that is almost fully submerged.² Cultures are the continually evolving, vibrant filters that generate situated perspectives and notions of time, and govern social interactions through shared, socially constructed norms and values. These shared understandings form connections between people and provide internalised mechanisms about how to create meaning in one's existence.³ The interests that our cultures generate often remain invisible while more static positions make themselves known above the water's surface.⁴ The process

¹ Raymond Cohen, "Cultural Aspects of International Mediation;" in Jacob Bercovitch's (Ed.), *Resolving International Conflicts: The Theory and Practice of Mediation*, Lynne Rienner Publishers, US, 1996, pp. 107-128, at pg. 109.

² Michelle LeBaron, *Bridging Cultural Conflicts: A New Approach for a Changing World* (San Francisco: Jossey-Bass, 2003). pg. 23.

³ Mneesha Ilanya Gellman *Powerful Cultures: Indigenous and Western Conflict Resolution Processes in Cambodian Peacebuilding* Journal of Peace Conflict & Development 11, November 2007, pg. 10.

⁴ Mneesha, supra.

by which people obtain this invisible iceberg of culturally scripted symbol-filters is called *acculturation*. Acculturation brings with it certain cultural traps. These cultural traps include taking one's perspective as the correct one; trying to categorise all minutia of cultural information; seeing intercultural communication as impossible; failing to notice cultural differences and not observing commonalities.⁵

Culture and social norms are fundamental in conflict resolution since culture is an essential part of conflict and conflict resolution.⁶ Culture is embedded in every conflict because conflicts arise in human relationships. The ways cultures differ in conflict resolution has been of longstanding interest not only to psychologists and anthropologists but also to scholars in the applied fields of international diplomacy and business.⁷

3.0 Culture and Conflict Resolution

Traditional dispute resolution mechanisms such as negotiation and mediation are entwined within the cultures of most communities in Kenya. This is the main reason why cultural aspects of the Kenyan people are also protected under Article 11 of the constitution. Article 11 (1) recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. In sub-article (2) the Constitution obligates the State to promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. Sub-article (3) (a) requires the enactment of legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage.

It would thus be wrong to recognize traditional dispute resolution mechanisms on one side and on the other fail to recognize the cultural diversities of the Kenyan people. The constitution recognises that there are certain matters that can well be handled through traditional dispute resolution mechanisms where culture plays a crucial role.

Mediation which is one of the traditional dispute resolution mechanisms is clearly central to the maintenance of social control in many societies including Kenya as discussed in Part II of this paper. The preconditions of successful mediation include a community that

⁵ LeBaron, *supra*, pg. 34.

⁶ Michelle LeBaron, "Culture and Conflict." Conflict Research Consortium, University of Colorado, Boulder, July 2003 available at <http://www.beyondintractability.org/essay/culture_conflict/> accessed on 03/09/2012.

⁷ Michael W. Morris & Ho-Ying Fu, "How Does Culture Influence Conflict Resolution? A Dynamic Constructivist Analysis" *Research Paper Series*, Research Paper No. 1649, Graduate School of Business, Stanford University, October 2000, pg. 3.

shares values, disputants who share a commitment to settle the dispute, and a cultural preference for the procedures and likely outcomes of mediation.⁸ This has been the main reason why conflicts in the North Eastern province have not been referred to courts but are rather addressed in peace committees as discussed in Part II of this paper. Peace Committees have been successful in managing conflicts since the local people own the process of mediation, people are reconciled and interests are addressed informally and voluntarily and all the underlying causes of conflict addressed. Those conflicts cannot be well addressed by a mechanism that does not appreciate the way of life of the people. For example, where resources such as grazing lands are communally owned the dispute resolution mechanism that is close to the people and one that will be seen to do justice to all is the most effective one. This is the main essence of resolution as opposed to mere settlement of the issues in the conflict. Negotiation, mediation and problem-solving workshops are resolution mechanisms and produce similar outcomes.

Recognition of ADR and traditional dispute resolution mechanisms in Article 159 is thus predicated on ensuring that everyone has access to justice (whether in courts or in other informal fora), that disputes are resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system as they are very informal. It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation.⁹ Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the constitution.

Traditional dispute resolution mechanisms have been very effective in resolving conflicts especially natural resource-based conflicts among the pastoralist communities in Kenya. Such conflicts are intractable with complex cultural dimensions and the formal mechanisms of conflict management may not address the underlying causes of the conflict. Traditional justice mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice closer to the people and help reduce backlog of cases in courts.

An effective dispute resolution system performs six basic functions. It should seek to prevent disputes from arising; it should resolve disputes by healing the parties' emotional

⁸ Carol J. Greenhouse, *Mediation; A Comparative Approach*, Man, New Series, Vol. 20, No. 1, *Royal Anthropological Institute of Great Britain and Ireland*, (Mar., 1985), pp. 90-114, pg. 91; Witty, C., *Mediation and society*, Academic Press, New York, 1980.

⁹ *Ibid*, Article 11

wounds; it should act to reconcile the parties' divergent interests; it should determine the parties' rights; must determine the facts of the case in terms of what rights and norms are at stake, and decide which norms have precedence; it must test the parties' relative power; it must avert the use of power-based strategies when possible, and offer lower cost power-based alternatives and finally it must contain unresolved disputes to prevent escalation into violence, and steer the parties back into the system for further resolution.¹⁰ Traditional dispute resolution mechanisms in Kenya are of such a kind as they are culture specific and address the underlying causes of the conflict, power imbalances, foster relationships, and their outcomes are mutually satisfying.

The Bushmen's traditional approach to handling conflict fulfills these six basic functions. They avoid conflicts through a practice of sharing through *hxaro*-the systematic practice of gift exchange, which fosters friendly relations among the Bushmen. Children are taught to fear and avoid violence. They are also taught to avoid disputes. Parents and elders emphasize sharing good fortune as a way of showing appreciation for that good fortune. Adults continue this practice of sharing through *hxaro* - the systematic practice of gift exchange, which fosters friendly relations among the Bushmen. Children are also given a strong sense of respect for community norms and society is characterized by its members' strong social discipline. Friends and relatives of the parties will intervene early in an incipient conflict and encourage the parties to discuss their problem.¹¹

When the parties cannot sort their disagreement by themselves, the community elders convene a *xotla*, which is a public meeting to discuss the issue. All the adult members of the community attend, and the parties are allowed to express their grievances and feelings publicly before the assembled community. One key function of the *xotla* is to give the parties a sense of being heard. The *xotla* can go on for days, until the parties have literally exhausted their negative feelings.¹²

The *xotla* also serves as a forum for consensual decision-making. Concerned parties are alerted to the coming meeting ahead of time, and so have time to consider the problem and possible solutions. The goal of the *xotla* is to reach "a solution that meets the needs of everyone and that everyone can support." The *xotla* itself is an open and inclusive process. Anyone can speak, and can question the parties. Bushmen culture is strongly classless, so

¹⁰ William L. Ury, "Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design," *Negotiation Journal* vol. 11, no. 4 (October 1995), pp. 379-389.

¹¹ Ibid

¹² Ibid

much so that individuals tend to avoid assuming authority, or even being the center of attention. The elders in the community act as facilitators rather than arbitrators, and have the task of voicing the emerging consensus.¹³

The emphasis of the Bushmen's conflict resolution mechanisms is to educate the offender regarding the societal norms. Due to their interdependence and their intense socialization to respect social norms, this approach is usually sufficient. More complex or serious cases may be resolved in the *xotla*.

The above techniques attempt to avert the use of power-based strategies for resolving disputes. The Bushmen also have relatively low cost power-based alternatives for dealing with conflict. Relative power is tested by figuring out who needs whom the most. Bushman society is fairly classless, with power being evenly and widely dispersed. This makes coercive bilateral power-plays (such as war) less likely to be effective, and so less appealing. The emphasis on consensual conflict resolution and classless ethos means that Bushmen communities will not force a solution on disputing parties. However the community employs social pressure to encourage dispute resolution.

As noted above, Bushmen children are socialized to fear and avoid violence. When tempers flare people will actively intervene to break up fights and if violence occurs or tensions remain high, one or both groups will be asked to move away. Separating the parties allows tempers to cool and social norms to reassert control. The secret of the Bushmen for managing conflicts is the vigilant, active, and constructive involvement of the community.¹⁴ The community acts as a third force in all conflicts, and actively intervenes to preserve the community's collective unity. Unlike states or governments this third force is not a superior dominant force. Community norms tend to prevent serious disputes. Further, the community as a whole participates in reconciling the parties interests to achieve a consensual settlement, and in witnessing and responding to violations of rights and norms. Conflicting parties are also under social pressure to resolve their disputes.

4.0 Cultural Values Fostering Conflict Resolution

i. Common Humanity/Communal Living

The principle of *common humanity/communal living* saw Africans consider themselves as one people. Divisions among the members were abhorred. No wonder it is common in Africa to hear people saying “*we are all one people, we are all Africans, we are all one community*”.

¹³ Ibid

¹⁴ Ibid., pg. 386

This is reflected in the southern Africa term “*ubuntu*” and the Swahili one “*utu*” meaning humanness. The cultural and social settings of Kenyans emphasize peaceful coexistence. Conflicts in African traditional society are a threat to the existence of the society itself. In essence they underscored corporate/communal interests as opposed to selfish ambitions or individualistic pursuits. Individualistic ideals were introduced into the African people by the Europeans in propagating the capitalist ideology. This principle stressed the central value, despite cultural and ethnic differences, human beings are basically the same and hence the African communal way of life. By living in a communal setting there is acceptance that every member of the community is entitled to access natural resources with the result that this principle forms an integral aspect in resolving conflicts involving natural resources such as land.¹⁵ It has been suggested that there were few environmental conflicts among the Maasai community because land, forest and water resources in the olden days were communally owned. The grazing lands, watering points, hunting grounds and the forests were accessed equally by the members of the particular clans that possessed them. Thus the scarcity or abundance of a resource was never a source of conflict as such.¹⁶

ii. Reciprocity

Reciprocity is the other principle that creates an ideal environment for conflict resolution. A mutual exchange of privileges, goods, favours, obligations among others exists among African communities that foster peaceful coexistence hence eliminating the likelihood of wars and conflicts. Among pastoralist communities where there was a calamity say famine or death of livestock, other communities would come to the aid of that particular community. Reciprocity thus nurtures a culture of communal life which fosters relationships rather than destroys them. Reciprocity emphasizes sharing and sustains a sense for collective security through a social set up which supports an egalitarian social living. Reciprocity enhances harmonious relationships by putting communal interests above individual pursuits. Through this principle individual norms are transformed into social welfare security schemes and thus a sense of justice and fairness was embedded in it as mutual trust became an overriding value.¹⁷

¹⁵ Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu, (accessed on 03/09/2012)

¹⁶ Kariuki Muigua, “*Resolving Environmental Conflicts through Mediation in Kenya*”, (Unpublished Doctoral Thesis, 2011), p. 139.

¹⁷ Ibid

Among the Agikuyu way of life the ‘*Kiama*’ or Council of Elders believed that if you assist the neighbour in domestic chores, gardening or during adversity that neighbour would do the same for you in future. Those who did not reciprocate acts of neighbouriness were looked down upon and could not be assisted when faced with difficulties. Anchored on this principle conflict resolution mechanisms in the traditional African society had to be responsive to conflicts by mending broken or damaged relationships to restore justice, restore conflicting parties into the community and continue with the spirit of togetherness.¹⁸

iii. Respect

The culture of most communities in Kenya respect towards parents, elders, ancestors and the environment is cherished. Respect is enhanced further by strong traditions, customs and norms as wayward members of the community faced disastrous consequences such as the imposition of fines and other penalties. The culture of a people ensure that that respect was codified in taboos and the concept of social distance which regulated “*what one could do, whom to talk to and how to relate to one another according to one’s sex, age and status.*” In this way social conflicts are avoided and resolved through respect that people had to one another, parents, elders, the ancestors and even to the environment.¹⁹

For instance among the Agikuyu traditions, norms and customs no man could dare to remove his neighbour’s boundary mark, for fear of his neighbour’s curses and out of respect for him. Boundary trees and lilies among the Agikuyu were ceremonially planted and highly respected by the people. If the boundary trees or lilies dried out, fell down or was rooted up by wild animals, the two neighbours would replace it but if they could not agree as to the actual place where the mark was, they called one or two elders who after conducting a ceremony replanted the tree or lilies.²⁰ Respect inculcated through such traditions, norms and customs thus ensured that neighbours lived harmoniously and could not engage in boundary disputes.

iv. Family ties and Kinship Relations

Family ties and community networking are constantly respected, maintained and strengthened. Whenever kinship or social relationships are disturbed by a dispute, priority is

¹⁸Nora .F & Fernando .T, *The Importance of Training on ADR in the Creation of a Justice of Peace in the Community of Portuguese-Speaking Countries*, A Paper presented at the International Congress on Mediation, Lisbon, Portugal, 7-9 October 2010, available at www.gral.mj.pt, (accessed on 30/08/2012)

¹⁹ Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, op.cit

²⁰ Kenyatta. J, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965), pp.38-41

given to their restoration.²¹ When the disputing parties, their supporters and the elders concerned engage in talking a matter through, it is usually the issue of relationships which receives prime attention. The relationships of the past are reviewed, the tense relationships of the current conflict are investigated, and a settlement is sought that would improve future relationships. Further, when the background and causes of a conflict are explored, the social situation of each individual or party is considered. In doing this, the idea is to form an impression of the interests and needs, aspirations and motivations of each party.²²

5.0 Culture and Traditional Dispute Resolution Mechanisms

As discussed in Part II of this paper traditional dispute resolution mechanisms such as mediation, negotiation, problem solving workshops and the council of elders or *wazee* institutions have been effective where they have been used in managing conflicts. The Peace Committees in the North Eastern province is a classic example where this has happened. They are successful because they are informed by certain cultural values which are respected by the people.

However and as cautioned in Part II not all cultural aspects of a people are civil. Some are discriminatory, barbaric, callous and inhuman. As the constitution stipulates traditional dispute resolution mechanisms must not be used in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality. Justice and morality are however not defined in the constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law, for instance disinheriting women in a succession dispute.

Consequently, cultural practices that are repugnant to justice and morality, contravene the Bill of Rights and contrary to written laws and that hinder the participation of women in conflict management should be discarded. Women empowerment to enable them participate in the various conflict resolution fora as they are the majority of the victims of conflicts is essential. Their role as carriers of life and as agents of peace has not changed in modern society. As such their participation in conflict resolution activities should not be

²¹ Hizkias Assefa, "Peace and reconciliation as a paradigm: A philosophy of peace and its implications on conflict, governance and economic growth in Africa", Nairobi Peace Initiative, Nairobi, 1993, pg. 6.

²² Jannie Malan, "Conflict Resolution Wisdom from Africa", African Centre for the Constructive Resolution of Disputes (ACCORD), (University of Durban-Westville, South Africa), 1997.

curtailed by the adoption of formal dispute resolution mechanisms or adherence to traditions hindering their role on the same. Women have the capacity to negotiate and bring about peace either directly or through creation of peace networks among warring communities. Their participation in conflict resolution should thus be enhanced.

It should be realised that justice and peace building generally goes beyond conflict management measures. It also involves the development of institutional capacities that alter the situations that lead to violent conflicts. Courts are not the best forums for the resolution of violent and multicultural conflicts in the society. In such a scenario harnessing the good cultural practices and dispute resolution mechanisms as suggested in Part II is what is needed. Resort to courts searching for justice in total disregard of the social setting and cultural aspects of a conflict may thus destroy relationships rather than build and foster relationships. Kenyans have not lost the capacity to negotiate and resolve disputes informally and voluntarily. A framework for the effective implementation of traditional dispute resolution mechanisms so that they are linked up with formal systems to enhance access to justice should thus be developed.

It can be seen that culture and social settings are central in conflict resolution among communities, be they western or otherwise. The only point of departure would be that the difference in culture determines how well a conflict renders itself to alternative forms of dispute resolution. It is arguable from the above discussion that due to the culture of collectivity and common interests, resolution of conflicts using alternative dispute resolution methods in Africa is bound to enjoy enormous success than in western countries, which have a more individualistic cultural and social structure.

Realising access to justice for all Kenyans by promoting traditional forms of dispute resolution is essential. Realization of the fact that in some parts of the country, the demographic changes, cultural, economic and socio-political orientation of the people has not changed greatly is of essence. Kenya is still a cultural society. This is its foundation as a state. Each of the 42 tribes have their own cultures which have to be valued, respected and recognized and the good elements thereof utilized for the good of the nation.²³ The constitution recognizes this in Article 11 by stating that culture is the foundation of the nation and that all forms of national and cultural expression shall be promoted.

Kenyans as a people have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts.

²³ See Kenya Ethnic and Race Relations Policy by the National Cohesion and Integration Commission (NCIC), available at www.cohesion.or.ke, (accessed on 30/08/2012)

This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms may achieve both. They are still a part of the Kenyan society and hence their constitutionalisation. Cultural, kinship and other ties that have always tied us together as one people have not died out. Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and to the environment. This explains why we still have the cooperative movement, harambee and other schemes that are a communal endeavour.

6.0 Conclusion

The paper has discussed alternative dispute resolution mechanisms, traditional dispute resolution mechanisms and cultural and the social context and cultural setting in light of Article 159 of the Constitution. ADR mechanisms and practice have a promising future in Kenya in light of article 159. ADR will play a crucial role in enhancing access to justice, reduce backlog in courts and enhance the expeditious resolution of disputes. In Part I the author has argued that the practice of mediation and arbitration is bound to be entangled and become a legal process in view of the legal framework in place providing for court-annexed mediation and court-mandated arbitration.

With respect to traditional dispute resolution mechanisms the author has argued that these mechanisms have been effective in managing conflicts where they have been used and that their recognition in the constitution will lead to a paradigm shift in the policy on resolution of conflicts whereby justice will be accessible to all, without delay and without regard to procedural technicalities. The effective operationalization of traditional dispute resolution mechanisms is eagerly awaited.

Last but not least the author has put forth the argument that the success of traditional dispute resolution mechanisms is tied to the fact that conflict is linked to the social setting and cultural aspects of a community and that in view of article 11 of the constitution such mechanisms should occupy their rightful place in enhancing access to justice and fostering peaceful coexistence among Kenyans.