

Effective Justice for Kenyans: Is ADR Really Alternative?

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Abstract

In this paper, the author critically examines whether ADR is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, this paper seeks to critically analyse the place of Alternative Dispute Resolution (ADR) in the management of disputes and conflicts in Kenya. The writer briefly looks at the earliest development or practice of ADR in various regions across the world including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a fallacy and if this perception has continually affected its effective application in conflict management in the country. ADR is a broad term used to refer to the use of negotiation, mediation, conciliation, or arbitration in conflict management.

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are the most appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict.

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1.0 Introduction

The author critically examines whether ADR is really an alternative method of managing conflicts in the search for effective justice for Kenyans. Further, this paper seeks to critically analyse the place of Alternative Dispute Resolution (ADR) in the management of disputes and conflicts in Kenya. The writer briefly looks at the earliest development or practice of ADR in various regions across the world including Africa and Kenya in particular. Also examined is whether the now common notion that ADR is alternative to the formal court process is a fallacy and if this perception has continually affected its effective application in conflict management in the country. ADR is a broad term used to refer to the use of negotiation, mediation, conciliation, or arbitration in dispute management.

This discourse posits that successful incorporation of ADR and Traditional Dispute Resolution Methods (TDRM) mechanisms in conflict management calls for a change in attitude towards the same. They ought to be treated as mechanisms that are most the appropriate in the effective resolution of certain kinds of conflicts. As such, ADR and TDRM mechanisms should be viewed as complementary to the court system; working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular dispute or conflict. Indeed, it has been argued that these techniques are not necessarily mutually exclusive in any particular conflict, but can be used sequentially or in a customized combination with other adjudicative methods for resolving disputes.¹

¹ Gene Hamilton, 'Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility', page 1, Joint Symposium, International Investment and ADR. Available at <http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapporteur%20Report%20%20ADR%20DEFINITION%20-%202019%20March.pdf> [Accessed on 16/05/2014].

2.0 Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution Mechanisms (TDRM) in Pre-Colonial Era

Before the arrival of Colonialists in Africa, African communities had their own ways of dealing with day to day challenges of life. Africans led a communal way of living and this, naturally informed their approach to handling different issues of life.² A good example is the land tenure system which was communal with no single person claiming ownership of the land, apart from user rights and holding the same in trust for future generations.³ Any group of people living together is bound to have disagreements over various issues, and Africans were no different. Thus, they had mechanisms of resolving conflicts as they arose amongst them. They understood very well what approach was applicable to what kind of dispute or conflict.⁴

For instance, in the Kalahari Desert in Botswana and Namibia the Bushmen have lived traditional lives for many thousands of years, without sophistication in dispute resolution practices which have evolved without courts and a formal state system and are suited to the needs of a collective hunter-gatherer society.⁵ The Bushmen's disputes occur over food, land and mates. Those in conflict bring other members of the tribe together to hear out both sides and where passions rise, senior tribal members hide the disputants' poisoned hunting arrows to prevent resort to violence.⁶ If resolution is not reached in the small group the larger community is brought together where everyone is able to talk through every aspect of the dispute over a number of days until the dispute has been 'talked out'. Economic reality and social dependence preclude the easy resort to violence over individual problems.⁷

As such, these approaches to conflict resolution were aimed at ensuring continued co-existence of the communities and sought to ensure that the conflicts were fully addressed to prevent their re-emergence in future.⁸ The traditional approaches therefore effectively addressed

² See generally Jomo Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, Vintage Books Edition, October 1965.

³ Ibid, pp. 21-51.

⁴ See generally Linda James Myers and David H. Shinn, 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010, available at scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220 [Accessed on 20/05/2014].

⁵ Boulle, Laurence, "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. Page 1. Available at: <http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 16/05/2014].

⁶ Ibid, page 2.

⁷ Ibid.

⁸ See Makumi Mwagiru, *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi, 2006). PP. 36-45.

the conflicts making them appropriate for the management of the particular problem. This presents a sharp contrast with the formal justice systems which seeks to settle the disputes without necessarily addressing the real cause of the conflict, thus creating a likelihood of re-emergence of the problem in future with even more severe consequences. The Missionaries and the colonial masters spread western ideas, customs, and religions to people in Africa.⁹ Africans were made to believe that unless they resorted to court, there was no other way of achieving justice. Even where they used the traditional conflict resolution mechanisms, their decisions could be appealed to the formal systems.¹⁰ This fallacy became so well entrenched in the system that Courts were elevated to a position that portrayed the TDRM and any other out of court approach to dispute management as either totally ineffective or simply undesirable. However, this is not to say that all disputes are capable of being addressed through the TDRM and any other out of court approach, especially in the wake of the human rights movement, but it is also not true to say that all disputes are capable of being adequately and satisfactorily addressed through the formal court system.

The introduction of foreign legal systems in Kenya and Africa in general thus saw the beginning of the end of active application of the informal justice systems due to their perceived inferiority in the face of imperialism, thus eroding the confidence that they had gained from the people over the years. However, as much as there was emergence of new kinds of disputes, mostly commercial in nature, the day to day types of conflicts amongst people never went away. The formal legal system could not address most of these and the more Informal Justice Systems (IJS) remained the most applicable, applying hand in hand in areas where the formal system failed or could not reach. They were therefore part of everyday life of the people thus making them appear more like the most appropriate disputes mechanisms as compared to the foreign and often complicated formal justice system.

⁹ Jomo Kenyatta, *op.cit.* pp. 259-269.

¹⁰ 'Historical Background of the Judiciary in Kenya', available at http://judiciary.marsgroupkenya.org/index.php?option=com_content&view=article&id=45&Itemid=37 [Accessed on 20/05/2014].

3.0 Emergence of Formal Justice System in Kenya

With the Colonial incursion in Africa came the introduction of the formal justice systems that before then were non-existent and even unknown. The colonial masters came with the mindset of amassing as much wealth as they could, not only for themselves, but also for their countries of origin.

With the private ownership of property by the colonialists especially the settlers, there arose the need for protection of their rights to the property and also enforcing the same against others. The colonialists frowned upon the African communal way of life, and especially with regard to ownership of property including land. This was not favourable to their policy of sourcing raw materials for their countries and settling their people in Africa. Indeed, it has been correctly argued that even if it weakly described actual systems of property-holding, the rhetoric of absolute private property was politically important.¹¹ The idea that absolute private property was the best way to incentivize owners and maximize productivity was used not only to legitimate the enclosing of commons, but also, to legitimate the taking of land from foreign peoples with different systems of property.¹²

It has also been rightly pointed out that the Classical-Christian legalistic tradition in which disputes over colonial property were embedded dictated that land appropriations be legitimated by appeal to some pre-existing law, which was complicated by the fact that the lands in question were patently inhabited by peoples thought to be outside the civic history of the Old World.¹³

The foreigners sought to inculcate their way of life into Africans either openly or through subtle ways such as using Christianity to condemn the African cultural practices without due regard to the positive aspects of the same. The Africans, together with their ways of life,

¹¹ John Brewer and Susan Staves, "Introduction," in *Early Modern Conceptions of Property*, ed. Brewer and Staves, p. 18. [As quoted in Onur Ulas Ince, 'John Locke and Colonial Capitalism', PhD Candidate, Department of Government, Cornell University, page 16, available at http://government.arts.cornell.edu/assets/psac/fa12/Ince_PSAC_Sep28.pdf [Accessed on 17/05/2014]. See also H.W.O Okoth Ogendo, *Tenants of the crown: The Evolution of Agrarian Law and Institutions in Kenya*, Acts Press 1995.; Garrett Hardin, *The Tragedy of the Commons*, *Science*, New Series, Vol. 162, No. 3859. (Dec. 13, 1968), pp. 1243-1248.

Available at

<http://links.jstor.org/sici?sici=0036-8075%2819681213%293%3A162%3A3859%3C1243%3ATTOTC%3E2.0.CO%3B2-N>

¹² Ibid.

¹³ Anthony Pagden, "The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700," in *OHBE* Vol. 1, ed. Canny, pp. 37-8 [As quoted in Onur Ulas Ince, op. cit. page 15].

were considered barbaric, and the colonialists embarked on importing not only their notion of civilisation, but also all other aspects of their system including dispute management mechanisms namely formal courts of law. Civilisation was equated to the rule of law.¹⁴ They were bent on engendering and protecting the perceived exclusive right to property acquired in Africa by the colonialists. Capitalism and imperialism took root at the expense of the African way of doing things. It is arguable that the most damaging impact of imperial rule in Africa was not only economic and political, but was also psychological.¹⁵

In order to subdue the purportedly inferior African way of life, including their approaches to conflicts and disputes management mechanisms, there was put in place qualifications for the African customary law in the name of a ‘repugnancy clause’. Every customary law practice had to be subjected to this subjective test of repugnancy to morality or justice.¹⁶ It is important to note that the concepts of morality and justice were defined, not according to the African conception of the same, but according to the colonial masters’ perception of what was moral or just. Africans had little if anything to say on what they considered morally right or just. African values and ways of doing things were so severely undermined that the Africans began to see themselves as inferior and conditioned to see Westerners and their culture as superior. Africans were expected, as a matter of law, to submit all their disputes to the newly introduced formal legal systems, without any recourse to use of their more familiar ways of addressing any disputes or conflicts. For as long as the Africans viewed everything through the prism of Western concepts, ideals, values and policies, anything African was regarded as either second class or an inferior alternative to the Western ways of doing things. It is not therefore difficult to see why traditional justice systems were regarded as capable of being only alternative to Court system even in the independent Africa, including Kenya. Unfortunately, this has continued to the present African countries’ legal systems and particularly Kenya. It is only recently that there have been spirited efforts by a section of Kenyans to ensure legal recognition of what are now known as ADR and TDRM mechanisms. However, much still needs to be done to change people’s perceptions instead of waiting for the courts to mandatorily refer people for ADR.

¹⁴ See Mahmood Mamdan, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press; 1st edition (April 1, 1996)

¹⁵ ‘Imperialism in Africa’, page 1, available at <http://www.ocs.cnyric.org/webpages/phyland/files/imperialism%20in%20africa.pdf> [Accessed on 17/05/2014]. ;See also Mahmood Mamdan, *op.cit.*

¹⁶ See Section 3(2), Judicature Act, Cap 8, laws of Kenya and Section 2, Magistrate’s Act, Cap 10, Laws of Kenya.

4.0 Place of Traditional Justice Systems in Kenyan Legal System

The Kenyan *Judicature Act*¹⁷ under Section 3(2) outlines the formal sources of law in the country. These are listed as follows: the Constitution; Statutory law or Acts of Parliament, including foreign laws named in the First Schedule of the *Judicature Act*; Subsidiary legislation; the substance of the common law, doctrines of equity, English Statutes of general application, and procedure and practice observed in courts in England until 12 August 1897; and African customary laws, including certain religious laws (Islamic and Hindu). However, section 3(2) of the *Judicature Act* provides that customary law will apply to the extent that it is not repugnant to justice and morality.

Customary law is applicable in a numerous areas, including: Land held under customary tenure, marriage, divorce, maintenance of children, dowry, matters affecting the status of women, widows, guardianship, custody, adoption, legitimacy of children, and succession.¹⁸ The *Magistrates' Act*¹⁹ provides under section 17 thereof that a magistrate's court may call for and hear evidence of the African customary law applicable to any case before it.²⁰ Section 2 thereof also specifies the areas and matters upon which the court shall be guided by customary law. The Act provides that "claim under customary law" means a claim concerning any of the following matters under African customary law: land held under customary tenure; marriage, divorce, maintenance or dowry; seduction or pregnancy of an unmarried woman or girl; enticement of or adultery with a married woman; matters affecting status, and in particular the status of women, widows and children, including guardianship, custody, adoption and legitimacy; and intestate succession and administration of intestate estates, so far as not governed by any written law. This for a long time relegated customary law affecting its appreciation across other areas. For instance, in the case of *Kimani v Gikanga*²¹ the Court of Appeal for Eastern Africa was dealing with an action involving questions as to title of land and other rights in Kenya. The Respondents became the registered proprietors of land which under land consolidation replaced the land left by Gikanga, their father and the registration was originally done under the *Native Land Tenure*

¹⁷ Cap 8, Laws of Kenya.

¹⁸ Gitonga, F.K., Provisions Of The General Laws, *The International Journal of Not-for-Profit Law*, Volume 12, Issue 2, February 2010, International Center for Not-for-Profit Law, available at http://www.icnl.org/research/journal/vol12iss2/special_3.htm [Accessed on 17/05/2014].

¹⁹ Cap 10, Laws of Kenya [Revised Edition 2012 [2010].

²⁰ Section 17, Cap 10.

²¹ Court of Appeal for Eastern Africa, [1965] E.A. 735.

Rules, 1956. The Plaintiff claimed that he had lived and assisted Gikanga in his life, something that made him acquire 30 acres from the estate as well as becoming the *Muramati* (head of family in charge of land) upon the death of Gikanga. The issue was how the Court would establish customary laws as facts before it. The Court held that any person seeking to rely on customary law must prove the same in court. In other words, the Court will not take judicial notice of customary law and agreements as the one portrayed in the foregoing case would not just be recognised.

It is noteworthy that the current Constitution of Kenya, 2010²² does not expressly refer to customary law as one of the sources of law in Kenya. This notwithstanding, it is apparent that the Constitution recognises customary law as a source of law in Kenya. It states under Article 2(4) that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. This is in line with the statutes that have made express reference to customary law.²³ Under Article 11, the Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. The state is mandated with promoting all forms of national and cultural expression through literature and other media. To this extent, customary law is applicable as a source of law in Kenya.

The Constitution also provides under Article 44 that every person has a right to enjoy their language and culture though no one should be compelled to perform, observe or undergo any cultural practice or right. It is also noteworthy that Article 45(4) provides that the Parliament shall enact legislation that recognises: marriages concluded under any tradition, or system of religious, personal or family law; and any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with the Constitution.

Regarding management of disputes and conflicts, the Constitution of Kenya has several provisions seeking to promote ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. One of the principles of land Policy as provided for under the Constitution is encouragement of communities to settle land disputes through recognised local

²² Government Printer, 2010, Nairobi.

²³ See Magistrates Act, Cap 10 and Judicature Act, Cap 8.

community initiatives consistent with the Constitution.²⁴ Further, the National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.²⁵ One of the guiding principles in the exercise of judicial authority by the courts and tribunals is the promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* [Emphasis ours], subject to repugnancy to morality or justice.²⁶ It is important to note that even under the current Constitution of Kenya, the repugnancy test for ADR and TDRM has been retained.²⁷ In relation to governance related disputes, Article 189(3) state that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Clause (4) therefore is to the effect that national legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. Where the two Houses of National Assembly fails to agree on a single version of a Bill, the Constitution allows the Speakers of both Houses to appoint a mediation committee consisting of equal numbers of members of each House to attempt to develop a version of the Bill that both Houses will pass.²⁸ These are the major provisions that directly vouch for application of ADR as well as TDRM mechanisms in the resolution of conflicts and settlement of disputes. These provisions demonstrate the paradigm shift in the way ADR is perceived in the mainstream legal system.

5.0 Are ADR Mechanisms Alternative?

ADR and TDRM mechanisms have been associated with a number of advantages over litigation. Generally, ADR mechanisms are hailed as expeditious, cost effective and lenient on procedural rules. Specifically, ADR mechanisms, perhaps with the exception of arbitration, seek to address the root causes of the dispute or the conflict. Justice is a highly subjective notion and the justice needs of one person in a certain situation are totally different from those of another. Justice must demonstrate fairness, affordability and flexibility. Fairness includes both substantive and procedural fairness. Procedural fairness, also known as rules or principles of natural justice,

²⁴ Article 60(1)(g).

²⁵ Article 67(2)(f); See also sec. 5(1)(f), *National Land Commission Act*, No. 5 of 2012.

²⁶ Article 159(2)(c).

²⁷ Article 159(3). This provision is to the effect that Traditional dispute resolution mechanisms shall not be used in a way that— contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the Constitution or any written law.

²⁸ See Article 112 and 113.

is said to consist of two elements namely: The right to be heard which includes- the right to know the case against them; the right to know the way in which the issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and the right to an impartial decision which includes-the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.²⁹ Lord Hewart, in the English case of *Rex v Sussex Justices; Ex parte McCarthy* rightly held that “... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”³⁰

Article 159 (1) of the Constitution provides 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.³¹ It emphasises the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law*” [Emphasis ours].³²

Article 159 can be construed as generally encouraging application of both formal court systems and ADR and TDRM in the pursuit of justice.³³ As already noted, ADR comprises several mechanisms which vary in their application and the advantages that go with each of them. Litigation is classified under dispute settlement mechanisms while ADR mechanisms are classified under the conflict resolution ones. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.³⁴ Litigation usually leaves broken relationships and there is a possibility of the problem recurring in future or even worse still the dissatisfied party

²⁹ *Rex v Sussex Justices; Ex parte McCarthy*, ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010

³⁰ ([1924] 1 KB 256, [1923] All ER Rep 233).

³¹ *Ibid.*, Article 159(2) (d)

³² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³³ Article 159(2).

³⁴ David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> [Accessed on 18/05/2014]; See also generally Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, op.cit. pp.36-41.

may seek to personally administer 'justice' in ways they think was the most appropriate. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. However, it is noteworthy that in matters of protection of human rights, litigation offers the best channel to ensure protection and enforcement of the same.³⁵ Further, where there is need for an injunction, litigation offers best solution. To this extent, litigation would be useful especially if there is no incentive for preserving relationships.

Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.³⁶ 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.³⁷ 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.³⁸

The ADR mechanisms are mainly intended for conflict resolution and have, as their major selling point, their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people. For instance, negotiation allows parties to fully control both the process and the outcome through a mechanism which will not impose any outcome which is not mutually acceptable.³⁹

Conflict resolution mechanisms are usually preferred to settlement for their effectiveness in addressing the root causes of the conflict and negate the need for future conflict or conflict management.⁴⁰ They are suitable for certain types of conflicts especially those that involve intense emotions but at the same time require preservation of relationships. In such situations,

³⁵ Article 22(1) of the Constitution of Kenya 2010 provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

³⁶ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, op.cit; See also Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010', page 7, available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf>

³⁷ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), op.cit. p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

³⁸ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

³⁹ Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya*, page 11, (Glenwood Publishers, 2012).

⁴⁰ Ibid.

settlement mechanisms such as litigation are inappropriate. It is only resolution mechanisms such as ADR that are capable of addressing such instances of conflicts. This therefore begs the question whether ADR would be an alternative to litigation in such a scenario or the more appropriate means of resolving the conflict. ADR is arguably more ‘appropriate’ than alternative in the management of some of the everyday disputes among the people of Kenya. Courts and the law makers in general seem to have recognised this fact. For instance, Statutes and courts have required disputants to employ ADR mechanisms in handling their disputes before going to courts. This is evident in provisions of various statutes.⁴¹ Indeed, in some instances, the Courts may send the parties away if it emerges that they did not make any attempts to resolve their disputes or conflicts through ADR mechanisms before approaching the Courts. This court practice takes us back to the question whether ADR mechanisms are really alternative to the Court process or complementary.

While it is to be acknowledged that in some jurisdictions such as the United Kingdom ADR is purely alternative to litigation, ADR mechanisms form an important part of conflict management mechanisms in Kenya and Africa in general. The actualization of Article 48 of the Constitution on the right of access to justice by all in Kenya requires various instruments and institutions. These include both formal and informal mechanisms of conflict management and access to justice. Article 48 is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as highlighted in the previous section.

To the ordinary *mwananchi*⁴² negotiation is usually the first port of call when there is a dispute. Negotiation, as an informal process of conflict resolution, offers parties maximum control over the process to identify and discuss their issues enabling them to reach a mutually acceptable solution without the help of a third party. Its focus is on common interests of the parties rather than their relative power or position. It is associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. This makes it very applicable to everyday life disputes which would

⁴¹ Such as *Environment and Land Court Act*, 2011, *National Land Commission Act*, 2012 and *Labour Relations Act*, 2007.

⁴² Mwananchi is the Swahili word for “Citizen” used to connote the people of Kenya.

otherwise be aggravated by any attempts to litigate them. If parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.⁴³ Mediation is associated with same advantages as negotiation. However, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since mediation does not have enforcement mechanism but relies on parties' goodwill. Conciliation on the other hand involves a third party, called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations. It therefore follows that where there are already severed relationships which need restoration, conciliation would work best instead of litigation or any other mechanism such as arbitration which would exacerbate the situation. For instance, transitional justice is defined as 'that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'.⁴⁴ It entails two aspects of justice namely *retribution* (punishment and corrective action for wrongdoings) and *restoration* (emphasising the construction of relationships between the individuals and communities).⁴⁵ While formal justice system may effectively achieve retributive justice, restorative justice may arguably only be effectively achieved through ADR/TDRM mechanisms.

Traditional conflict resolution processes are said to be part of a well-structured, time-proven social system geared towards reconciliation, maintenance and improvement of social relationships since they are deeply rooted in the customs and traditions of peoples of Africa; they strive to restore a balance, to settle conflict and eliminate disputes.⁴⁶ Indeed, it is contended that conflicts must be understood in their social context, involving values and beliefs, fears and suspicions, interests and needs, attitudes and actions, relationships and networks in order to ensure that their root causes are addressed.⁴⁷ This is not always possible or necessary in all scenarios. However, it should be appreciated that where this is the case, then the most

⁴³ Makumi Mwagiru, op. cit. page 115.

⁴⁴ Kenya Human Rights Commission, Transitional Justice in Kenya: A Toolkit for Training and Engagement, page 14, 2010. Available at www.khrc.or.ke/.../7-transitional-justic... [Accessed on 19/05/2014].

⁴⁵ Ibid.

⁴⁶ Kwaku Osei-Hwedie and Morena J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, page 33, *University of Botswana*.

⁴⁷ Ibid, pages 35-36.

appropriate dispute management mechanisms should be used. In this case, it would be ADR as opposed to the formal justice system.⁴⁸ For example, it has been documented in a study of non-formal dispute resolution processes in a slum area in Nairobi that these processes operate in a wider socio-economic context and are integrated into the social and economic fabric of life. Thus, for instance, the mandate of the village committees extend beyond hearing disputes to other important aspects of community life such as security, environmental management, health and civic education.⁴⁹ This is a clear indication that the formal and informal justice systems are not antagonistic but are indeed capable of complimenting each other in promoting access to justice for all not only in Kenya but also across Africa.⁵⁰

From the foregoing, it is apparent that it is hard to dismiss ADR/TDRM mechanisms as merely alternative to litigation. They cannot be dispensed with as yet due to their utmost appropriateness in handling certain kinds of conflicts in the society. The debate that remains thus is whether ADR mechanisms are really alternative to formal justice systems.

6.0 Conclusion

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may be aware of their right of access to justice but with no means of realizing the same, as well as consolidating and harmonizing the various statutes relating to ADR including the Arbitration Act with the constitution to ensure access to justice by all becomes a reality. There is also a need for continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large so as to support ADR mechanisms in all possible aspects. It is apparent that ADR has not lost its relevance in the society and what it requires is mainstreaming without necessarily formalizing it in a way that takes away all the benefits that come with its application to a dispute. The answer to the question whether ADR is really alternative in not a straightforward one. However, it is clear that ADR can play a key role in the realisation of the right to access justice in society, which is a human right. If justice can be

⁴⁸ ADR mechanisms are also at times referred to as Alternative Justice Systems (AJS).

⁴⁹ Kamau, W.W. (2007), *Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context*, PhD Dissertation, York University, as quoted in FIDA – Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya*, page 5.

⁵⁰ Informal justice systems are also referred to as Alternative Justice Systems by some scholars.

effectively realised through ADR, it can no longer be viewed solely as alternative. The time to debate the question whether ADR is really alternative is now ripe.

References

1. Bercovitch, J., “Mediation Success or Failure: A Search for the Elusive Criteria”, *Cardozo Journal of Conflict Resolution*, Vol.7.289.
2. Bloomfield, D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> [Accessed on 18/05/2014].
3. Brewer, J., and Staves, s., “Introduction,” in *Early Modern Conceptions of Property*, ed. Brewer and Staves.
4. *Constitution of Kenya*, 2010, Government Printer, Nairobi.
5. FIDA – Kenya, *Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya*.
6. Gitonga, F.K., Provisions Of The General Laws, *The International Journal of Not-for-Profit Law*, Volume 12, Issue 2, February 2010, International Center for Not-for-Profit Law, available at http://www.icnl.org/research/journal/vol12iss2/special_3.htm [Accessed on 17/05/2014].
7. Hamilton, G., ‘Rapporteur Report: Alternative Dispute Resolution (ADR) —Definitions, Types and Feasibility’, Joint Symposium, International Investment and ADR. Available at <http://investmentadr.wlu.edu/deptimages/Symposium%202010/Rapporteur%20Report%20%20ADR%20DEFINITION%20-%2019%20March.pdf> [Accessed on 16/05/2014].
8. Hardin, G., *The Tragedy of the Commons*, Science, New Series, Vol. 162, No. 3859. (Dec. 13, 1968), pp. 1243-1248.
9. ‘Historical Background of the Judiciary in Kenya’, available at http://judiciary.marsgroupkenya.org/index.php?option=com_content&view=article&id=45&Itemid=37 [Accessed on 20/05/2014].
10. H.W.O Okoth Ogendo, *Tenants of the crown: The Evolution of Agrarian Law and Institutions in Kenya*, Acts Press 1995.
11. Ince, O.U., ‘John Locke and Colonial Capitalism’, PhD Candidate, Department of Government, Cornell University,

- available at http://government.arts.cornell.edu/assets/psac/fa12/Ince_PSAC_Sep28.pdf
[Accessed on 17/05/2014].
12. 'Imperialism in Africa', available at
<http://www.ocs.cnyric.org/webpages/phyland/files/imperialism%20in%20africa.pdf>
[Accessed on 17/05/2014].
 13. James M.L., and Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World, 2010,
available at scholarworks.iu.edu/journals/index.php/bdr/article/download/.../1220 [Accessed on 20/05/2014].
 14. Judicature Act, Cap 8, laws of Kenya.
 15. Kamau, W.W. (2007), Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context, PhD Dissertation, York University.
 16. Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [Accessed on 19/05/2014]
 17. Kenya Human Rights Commission, Transitional Justice in Kenya: A Toolkit for Training and Engagement, 2010. Available at www.khrc.or.ke/.../7-transitional-justic...
 18. Kenyatta, J., Facing Mount Kenya, The Tribal Life of the Kikuyu, Vintage Books Edition, October 1965.
 19. Laurence, B., "A History of Alternative Dispute Resolution," ADR Bulletin: Vol. 7: No. 7, Article 3, 2005. Available at: <http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 16/05/2014].
 20. Magistrate's Act, Cap 10, Laws of Kenya. [Revised Edition 2012 [2010].
 21. Mamdan, M., Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism, Princeton University Press; 1st edition (April 1, 1996)
 22. Muigua, K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010,
available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf>.
 23., Resolving Conflicts through Mediation in Kenya, (Glenwood Publishers, 2012).
 24. Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Centre for Conflict Research, Nairobi, 2006).

25. National Land Commission Act, No. 5 of 2012.
26. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
27. Osei-Hwedie, K., and Morena J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, University of Botswana.
28. Pagden, A., “The Struggle for Legitimacy and the Image of Empire in the Atlantic to c. 1700,” in OHBE Vol. 1, ed. Canny, pp. 37-8.