

Court Sanctioned Mediation in Kenya-An Appraisal

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Abstract

This paper is informed by the post constitution 2010 enactment of laws in Kenya recognizing the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and the subsequent set up of legal and institutional framework on court sanctioned mediation. The paper evaluates the effectiveness of these frameworks in ensuring effective mediation in Kenya and makes viable recommendations on the same with the aim of ensuring that the same achieves the desired results of effective justice for the people of Kenya.

1. Introduction

This paper critically analyses the merits and demerits of court annexed or court mandated mediation and suggests plausible ways of entrenching mediation in the Kenyan justice system. In this paper the author also explores the attributes of informal conflict resolution mechanisms including mediation, highlighting the fact that negotiation and mediation are not alien concepts in the conflict resolution discourse in Kenya.¹ It is on this basis that recommendations are made to enhance the practice of mediation in Kenya.

2. Conceptualising Mediation

Mediation is basically an informal process, where a mediator who is a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement. A mediator is not part of the conflict, but an outsider who strives to ensure that the process of the conflict resolution turns out to be a perfect picture in the estimation of the parties.²

The Kenyan *Civil Procedure Act*³ defines 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

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¹The Constitution advocates for the use of Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute Resolution Mechanisms (TDRMS) for the management of disputes and conflicts in Kenya. See Articles 60(1) (g); 67(1); 159(2); 189.

² M. Mironi, "From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation", 73(1) *Arbitration* 52 (2007), p. 53.

³ Cap 21, Laws of Kenya.

course of judicial proceedings. This definition depicts mediation as taking part in the context that makes the whole process legal.⁴

Mediation is actually negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and they cannot dictate the outcomes of the negotiation.⁵

The parties to the conflict are given the opportunity to play the lead role, although the mediator may be involved in direct communications between them or their representatives. The mediator may also seek to transform the relationship between the parties and to lead parties to reach an outcome that addresses the aggregate of their interests in the conflict.⁶ Indeed, it has been observed that mediation is more of a private affair in which the mediator is neither applying nor interpreting the law but just facilitating the parties to arrive at their mutual agreement.⁷ Mediation, with its confidentiality safeguards, offers a much more private, low-keyed approach to conflict resolution. It attempts to remove the parties' adversarial posturing replacing it with a harmonious relationship.⁸

Mediation is often believed to work best in a conflict in which the parties have had a significant prior relationship or when the parties have an interest in continuing a relationship in the future.⁹

Thus, mediation is distinguishable from the other mechanisms of conflict resolution in that the resolution framework is owned by the parties who drive the process of reaching a negotiated outcome.¹⁰ It is party centred and this makes its outcome more acceptable to them as they feel they can identify with the mediation outcome or their side of the story influenced such outcome.

3. Background

There has been enactment of laws in Kenya recognizing the role of Alternative Dispute Resolution (ADR) mechanisms in enhancing access to justice and peaceful coexistence and such

⁴ *Ibid*, Section 2 of the Civil Procedure Act.

⁵ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *Unpublished*, University of Nairobi. P.43.

⁶ C. Pollack, "The Role of the Mediation Advocate: a User's Guide to Mediation", 73(1) *Arbitration* 20, (2007), p 20-23.

⁷ *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* [2014] eKLR, para. 10. [Per GV Odunga, J]

⁸ C.S. Meschievitz, "Mediation and Medical Malpractice: Problems with Definition and Implementation", *Law and Contemporary Problems*, Vol. 54, No. 1 in, *Medical Malpractice: Lessons for Reform*, (The Medical Malpractice System and Existing Reforms), (Duke University School of Law, Winter, 1991), pp. 195-215.

⁹ J.S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers*, University casebook series, Foundation Press, 1989, p. 47.

¹⁰ M.Tarrazon, "The Pursuit of Harmony: the Art of Mediating, the Art of Singing", 73(1) *Arbitration* 49, (2007), pp. 50-51.

mechanisms consist of mediation amongst others. It is however important to point out that such ADR mechanisms do operate either outside the law or as it has been the case in some countries, they are regulated through legislation.

In some jurisdictions, mediation is court annexed and provided for under the law and, as such, the parties are not given much choice in deciding whether or not to mediate their conflict before lodging it to the court. The constitution of Kenya now provides that in exercising judicial authority, the courts and tribunals must abide by certain principles which include *inter alia* promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute management mechanisms.¹¹

The *Civil Procedure Act*¹² provides for mediation of disputes.¹³ The Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process.¹⁴ This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice to 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.¹⁵ The Chief Justice has since appointed Members to the Committee and had them gazetted.¹⁶

Mediation is to be conducted in accordance with the Mediation Rules.¹⁷ Sub clause (4) provides that an agreement between the parties to a dispute as a result of mediation under this part must be recorded in writing and registered with the court giving direction under sub clause (1), and the same shall be enforceable as if it were a judgment of that court and no appeal shall lie against an agreement referred to in sub clause (4).¹⁸

Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the civil procedure Act seems to reflect the concept of mediation as viewed from a Westerner's perspective and not in the traditional and informal way. In addition to the foregoing Kenya's Judiciary efforts towards promoting the use of ADR have been witnessed in the

¹¹ Article 159(2) (c), Constitution of Kenya 2010 (Government Printer, Nairobi).

¹² Cap 21, Laws of Kenya.

¹³ Sections 2 and 59 *Civil Procedure Act* as Amended by the *Statute Law (Miscellaneous Amendments) Act* No. 17 of 2012, *Government Printer*, Nairobi, 2012, at pp.1092-1097.

¹⁴ *Ibid*

¹⁵ Section 59 A (1) and (2) of the Civil Procedure Act.

¹⁶ Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348.

¹⁷ *Ibid*, Section 59B (3).

¹⁸ *Ibid*, Section 59B (4).

Judiciary ADR Pilot Scheme.¹⁹ This is expected to assist in dealing with backlog of cases in the courts.

This paper casts a critical look at court sanctioned mediation in Kenya. It also explores mediation's capacity to resolve conflicts.

4. Approaches to Mediation

There are basically two approaches to mediation namely mediation in the Legal and Political Processes. Mediation as a conflict management mechanism can be used as a legal or political process. In the legal process mediation is a settlement mechanism and hence does not have all the attributes of mediation while in the political perspective it possesses all the attributes of mediation and leads to resolution. A settlement is superficial addressing the issues of the conflict only and not the underlying causes of the conflict whereas resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied.²⁰ That is why it is arguable that only mediation in the political process leads to *resolution*. Consequently mediation in the political process is held out to be the true mediation. It has the true character of mediation: voluntariness, party autonomy in the choice of the mediator, over the process and the outcome.²¹

This dichotomy (legal and political process) is based on various variables. It is a typology founded on the differentiation between a dispute and a conflict.²² A dispute refers to issues which are not about values, and can therefore be negotiated and even bargained about. As such disputes are merely settled hence the phrase dispute settlement. On their part conflicts refer to issues about values which are non-negotiable and hence the phrase conflict resolution.²³

A conflict is about needs and values shared by the parties whereas a dispute is about interests or issues. Needs or values are inherent in all human beings and go to the root of the conflict while

¹⁹ W. Mutunga, Chief Justice & President Of The Supreme Court Of Kenya, 'Alternative Dispute Resolution And Rule Of Law' For East African –Prosperity,' remarks By The Chief Justice At The East African Arbitrators Conference September 25, 2014. pp. 3-4. Available at <http://www.judiciary.go.ke/portal/assets/files/CJ%20speeches/Cjs%20Speech%20ADR%20-%20Sept.%202014,%20Windsor.pdf> [Accessed on 28/03/2015]; "Judiciary to adopt alternative dispute resolution mechanism," People Correspondent, *People Daily Newspaper*, 10 March, 2015. Available at <http://mediamaxnetwork.co.ke/peopledaily/139823/judiciary-adopt-alternative-dispute-resolution-mechanism/> [Accessed on 28/03/2015].

²⁰ K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

²¹ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* P.48.

²² J. Burton, *Conflict: Resolution and Prevention*, (London: Macmillan, 1990), pp. 2-12.

²³ See generally M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

interests and issues are superficial and do not go to the root of the conflict.²⁴ Consequently conflict resolution is that approach which prescribes an out-come based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship whereas dispute settlement is an agreement over the issue(s) of the conflict which often involves a compromise and is power-based where the power relations keep changing thus turning the process into a contest of whose power will be dominant.²⁵

4.1 Mediation in the Political Process

Mediation in the political process is informed by resolution.²⁶ Resolution of a conflict is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. Since conflicts arise out of the non-fulfillment of the non-negotiable needs or values of the conflicting parties in the society, conflicts are well addressed through resolution where the role of mediation is to satisfy the mutual needs of the parties and removal of the underlying causes of the conflict.²⁷

Mediation in the political process allows the parties to have autonomy over the choice of the mediator, the process and the outcome. What makes mediation in the political process lead to a resolution is the fact that there is voluntariness, party autonomy over the process and of the outcome. Where the parties show a genuine desire to submit and commit themselves to mediation it is an indication that the parties are desirous of resolving the conflict. When one party only is willing to submit to mediation then the chances of resolving that conflict are slim.²⁸

The political process does not rely on coercion or enforcement, but rather on the basis of a common ground upon which to build enduring and long lasting solutions, never to revisit the conflict in future.²⁹

Mediation in the political process derives its legitimacy from the voluntariness to engage in the mediation process, fairness, and the autonomy exhibited by the parties over the choice of the

²⁴ D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), pp.152-153

²⁵ *Ibid*; See also generally M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, *op cit*.

²⁶ See K. Muigua, *Resolving Conflicts through Mediation in Kenya*, Chapter 4 (Resolution and Settlement), pp. 56-65. (Nairobi, Glenwood Publishers, 2012)

²⁷ K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005

²⁸ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, *op cit* p.300.

²⁹ *Ibid*, pp.295-296.

mediator, the process and the outcome.³⁰ The other abstract concepts that also inform the political process enabling it to achieve better results than the legal process include *participant satisfaction, power, effectiveness and efficiency of the process* (emphasis ours). The success of mediation is thus gauged by reference to such abstract concepts.³¹

These concepts provide the threshold for determining whether a mediation process is successful or not. True mediation is the one that has all the above attributes and incorporates the aforesaid concepts in its process. Since the said attributes are interdependent the mediation process should have most of them in order to achieve an outcome that is enduring, long-lasting and acceptable to the parties.³² Mediation in the political process depicts the true character of mediation. Its adoption in Kenya would go a long way in resolving a wide range of conflicts including environmental conflicts.³³

4.2 Mediation in the Legal Process

Mediation in the legal process arises where the conflicting parties come into arrangements which they have been coerced to live with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. In the legal context mediation is a settlement mechanism which is much linked to the court system. This means that the root causes of the conflict are not addressed as it relies on the power relations which keep changing.³⁴

Mediation in the legal process focuses on the interests or issues of the conflict. Conflicts arising out of the interests of the parties are as a result of the power-capacities between the parties.³⁵ As a legal process mediation is linked to judicial settlement and arbitration and thus leads to a settlement. It is arguable that court annexed mediation is not really mediation. The voluntariness and the autonomy over the process and the outcome are not present in this kind of mediation because it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.³⁶ The notion that mediation in the legal sense is a settlement process has been restated in

³⁰ C. Baylis and R. Carroll, "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135

³¹ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* P.49.

³² J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, *op cit* p.293-294

³³ See K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit* pp. 147-155;

K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* P.67.

³⁴ *Ibid*; See also fig. 1 in 4.4 below.

³⁵ D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op cit*, p. 152.

³⁶ See fig. 1 in 4.4 below.

the international legal context where mediation has been seen to be linked to judicial settlement and arbitration such that, it is viewed as a process that supports the courts.³⁷

It has been said that in some jurisdictions including Kenya, mediation is being sacrificed at the altar of legalism, despite the fact that the courts are encouraging parties to choose other methods such as mediation rather than litigation. The argument is that the legal environment is unable to comprehend the structure and epistemology of mediation such that even after parties have been encouraged to mediate their conflict, the results of the mediation have to be tabled in court for ratification.³⁸

Some of the attributes of mediation in the legal process are that parties lack autonomy in the process, the decision is not mutually satisfying, the outcome is not enduring, parties cannot choose a judge (for example in a judicial settlement) and does not address the root causes of the conflict. Mediation in the legal process is not true mediation but is a legal process as it lacks the attributes of mediation which are: *voluntariness; autonomy over the forum; choice of the mediator; control over the process and the outcome* (emphasis added). It only leads to a settlement as opposed to a resolution.

It has been observed that mediation in the political process leads to resolution since it has all the attributes of a true mediation. Mediation in the legal process leads to a settlement since all the attributes of mediation are not present.³⁹ As already noted settlement is superficial addressing the issues of the conflict only and which may later flare up again when power balances change.⁴⁰

4.3 Attributes of Mediation

There are certain attributes that are associated with mediation. These include voluntariness, confidentiality, informality, flexibility, speed, cost-effectiveness, efficiency, autonomy and fostering of relationships. However there are attributes of mediation that are common to both the legal process and the political processes of mediation. The characteristics of mediation that ran across the board are: the presence of a third party (imposed or chosen), flexibility, confidentiality⁴¹, speed, and the

³⁷J. North, Court Annexed Mediation in Australia – An Overview, Law Council of Australia, 17th November, 2005, available at, www.lawcouncil.asn.au, (accessed on 7th July 2012).

³⁸ M. Mwangi, *op cit*, p. 119.

³⁹ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya op cit* P.53.

⁴⁰ M. Mwangi, *op cit*, p. 41.

⁴¹ It is however noteworthy confidentiality may be compromised especially where the outcome has to be recorded in Court.

fostering of relationships. However, the legal process is less autonomous as the parties may not choose the forum and the third party.⁴²

4.4 Court Sanctioned Mediation

Since the promulgation of the current constitution of Kenya 2010, new laws have been enacted and others amended. To bring them into conformity with Article 159 of the constitution which introduces the notion of justice being done to all irrespective of status and without delay, alternative forms of dispute including reconciliation, mediation and traditional dispute resolution mechanisms have been incorporated in the legal framework.⁴³

The law requires reference of all suits, which in the court's opinion are not among those exempted by law and are suitable for mediation.⁴⁴ Such reference is, however, subject to the availability of mediation services and is to be conducted in accordance with the mediation rules.⁴⁵ Mediated agreements entered into with the assistance of qualified mediators are to be in written form and as such, may be registered and enforced by the court.⁴⁶

The aforesaid amendments to the *Civil Procedure Act* are not really introducing mediation *per se* but merely a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for 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. Court Sanctioned Mediation may take the form of Court-Annexed Mediation or Court-Mandated Mediation.

Court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court encourages them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification.

Court-annexed mediation may arise where parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a

⁴² *Ibid*, P.60.

⁴³ See also Section 20, *Environment and Land Court Act* 2011; section 15(4), *Industrial Court Act*, 2011; Section 34, *Intergovernmental Relations Act*; section 4, *Land Act* 2012; Section 17(3), *Elections Act*, 2011; Rule 11, Supreme Court Rules, 2011.

⁴⁴ *Ibid*, Section 59B (1).

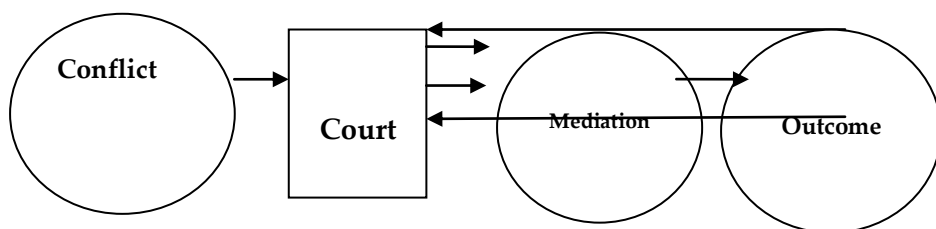
⁴⁵ *Ibid*, Section 59B (3).

⁴⁶ *Ibid*, Section 59D of the *Civil Procedure Act*.

matter make an attempt to settle the matter by way of mediation before the first case management conference).⁴⁷

It is noteworthy that both court-annexed and court mandated forms of mediation have the court playing a major role either in their take off as in the case of court mandated or in ratification of the outcome as in the case of court annexed mediation. As such, the current formal framework on mediation envisages both Court-Annexed Mediation and Court-Mandated Mediation.

Mediation in the Court Process



Source: The author.

Fig. 1 shows mediation in the Court process. Mediation becomes formalized and may lose certain aspects such as confidentiality and voluntariness.

5. Court Sanctioned Mediation in Kenya-An Appraisal

5.1 Voluntariness of the Process

Voluntariness exists if both parties are making real and free choices based on effective participation in the mediation.⁴⁸ Mediation laws are generally based on either the voluntary or compulsory approach. Mediation may either be dependent on a party’s unfettered will possibly with suggestion by the court or it may be imposed compulsorily by a court.⁴⁹ Both approaches have their advantages and reasons why they are attractive to parties. For instance, parties’ voluntary submission to mediation impacts on the success of mediation as they are, in such a case, willing to find a win-win solution for all of them. If parties fail to submit to mediation voluntarily and it is imposed on them, the mediator will find it hard to get the parties to contribute to the resolution process and the result may not be a solution generated by the parties themselves.

Parties also tend to highly identify with mediated agreements reached voluntarily and which invariably enjoy unprecedented durability. But when the aim is to decongest the court system, as is

⁴⁷ Kathy, “What is court-annexed mediation?” Available at <http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/> [Accessed on 27/03/2015].

⁴⁸ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, *op cit* p.48.

⁴⁹ B. Knotzl & E. Zach, “Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act”, 23(4) *Arbitration International*, 666, (2007). p. 665.

the case with the amendments, compulsory mediation offers the advantage that it can be implemented immediately and does not depend on unpredictable factors such as parties' interests.⁵⁰

There has been a long debate as to whether mediation should be compulsory. Those against compulsion say that mediation is a voluntary process; that compulsion is anathema and that some cases are unsuitable for mediation. Those in favour of compulsion say that mediation has a good success rate and should be compulsory subject to an opt-out clause. They opine that nothing is lost by attempting and that subjectively mediators feel that the rate of success is no different where cases have been vigorously pushed (but not ordered) by judges into mediation.⁵¹

When the law provides, that the court may on the request of the parties concerned or where it deems it appropriate to do so, direct any dispute before it be referred to mediation, it shuns voluntariness which is a cardinal principle of mediation in the political process.⁵² As such the very essence of the mediation - party autonomy in the process and the outcome - is lost. This is the nature of mediation in the Kenyan context. The fact that voluntariness is lost in court mandated mediation means that the process cannot *resolve* conflicts.

Since the aim is to resolve conflicts, mediation in the Kenyan context should have all the attributes of the political process as outlined above. What is needed in Kenya is a framework that allows parties to make the decision to negotiate, to progress with the process by inviting a third party to continue with the negotiations and the outcome to be their own. The order by the court calling for mediation interferes with a fundamental quality of mediation - its voluntary nature.

5.2 Composition of Mediation Accreditation Committee

The Chief Justice of Kenya Dr. Willy Mutunga appointed twelve members to the Mediation and Accreditation Committee.⁵³

The Committee is chaired by a serving Judge and it is responsible for determining the criteria for the certification of mediators, proposing rules for the certification of mediators, maintaining a register of qualified mediators, enforcing such code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.⁵⁴

The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance;

⁵⁰ *Ibid.*

⁵¹ D. Cornes, "Commercial Mediation: the Impact of the Courts", 73 (1) *Arbitration* 12, (2007), p. 13.

⁵² Section 59B of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, *op.cit.*

⁵³ As per Section 59 A (1) and (2) of the Civil Procedure Act.

⁵⁴ *Ibid.*

Institute of Certified Public Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions.⁵⁵ The Chief Justice also appointed a Member of the Judiciary as the Acting Registrar of the Committee.⁵⁶

It is commendable that the foregoing membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Accreditation becomes tricky considering that the current membership of the Committee may not be well versed with particular traditional knowledge and may therefore leave out those who hold such knowledge when it comes to accrediting mediators. Such mediators may not need any formal training as they may have gained expertise and experience from long practice and their knowledge of traditions and customs of a particular community. Again, if they are to be considered untrained in certain aspects of that community, the question that comes up is whether the Mediation Accreditation Committee has the expertise or capacity to set the relevant level of requisite expertise or even offer training for subsequent accreditation.

The Constitution of Kenya 2010 requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.⁵⁷ If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court.

It is also noteworthy that the Committee was appointed based on their professional qualifications and this may be out of touch with the relevant expertise that would be necessary to

⁵⁵ Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348.

⁵⁶ *Ibid*, *Gazette Notice No. 1087*.

⁵⁷ Article 60 (1) (g); 67(2) (f).

deal with customary or community matters. The criteria to be used in picking out and allocating such matters to the Community initiatives are also not clear.

Arguably, the use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others. This assertion is in fact buttressed by the constitutional provisions that call for the utilisation of ADR to deal with natural resource conflicts and particularly community land.⁵⁸ It is suggested that the current framework on ADR in Kenya and specifically the court sanctioned mediation is narrow and does not capture the true spirit of the Constitution on the practice of ADR in the country.

These are concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community context as contemplated under Article 60⁵⁹ of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as they carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through the formal training.

Kenya can learn and benefit from the case of Rwanda's mandatory mediation framework where carrying the agenda of local ownership of conflict resolution, the Rwandan government passed *Organic Law No. 31/2006* which recognises the role of *abunzi* or local mediators in conflict resolution of disputes and crimes.⁶⁰ The Constitution of Rwanda provides for the establishment in each Sector a "Mediation Committee" responsible for mediating between parties to certain disputes involving matters determined by law prior to the filing of a case with the court of first instance.⁶¹ The Mediation Committee comprises of twelve residents of the Sector who are persons of integrity and are acknowledged for their mediating skills.⁶²

They are elected by the Executive Committee and Councils of Sectors from among persons who are not members of decentralized local government or judicial organs for a term of two years which may be extended.⁶³ The *abunzi*⁶⁴ deal with civil and penal cases that occur in present-day

⁵⁸ Articles 60 and 67, Constitution of Kenya 2010.

⁵⁹ One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

⁶⁰ M. Mutisi, "Local conflict resolution in Rwanda: The case of *abunzi* mediators", in M. Mutisi and K. Sansculotte-Greenidge (eds), *Integrating Traditional and Modern Conflict Resolution: Experiences from selected cases in Eastern and the Horn of Africa*, pp. 41-74 at p.41, African Centre for the Constructive Resolution of Disputes (ACCORD), Africa Dialogue Monograph Series No. 2/2012

Available at <http://accord.org.za/images/downloads/monograph/ACCORD-monograph-2012-2.pdf> [Accessed on 28/03/2015]

⁶¹ Article 159, Constitution of Rwanda, 2003.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Literally translated, *abunzi* means 'those who reconcile'. Mandated by Article 159 of the Constitution of Rwanda, and the Organic Law No. 31/2006 and further by Organic Law No. 02/2010/OL on the Jurisdiction, Functioning and

Court Sanctioned Mediation in Kenya-An Appraisal

Rwanda, hence genocide cases are outside their jurisdiction. Any party to the dispute who is dissatisfied with the settlement may refer the matter to the Courts of law. Such matter is however not be admissible by the court of first instance without prior production of the minutes of the settlement proposal of the mediators.⁶⁵ Like *gacaca*⁶⁶, the *abunzi* is inspired by Rwandan traditional dispute resolution systems which encourage local capacity in the resolution of conflicts.⁶⁷ It is observed that in a way, *abunzi* can be seen as a hybrid between state-sponsored justice and traditional methods of conflict resolution, popularised by the Government of Rwanda in the post-2000 era based on the objective to decentralise justice, making it affordable and accessible.

Despite the reduced backlog of cases in Rwandan Courts and other benefits from the *abunzi* system, it has been argued that with excessive state oversight in the *abunzi* processes, there is always the possibility of *abunzi* becoming just another state-mandated mediation where local Rwandans participate not out of will or choice, but out of need.⁶⁸ The argument is that the ultimate result could be a dramaturgical representation of reconciliation and community building while deep seated reservations, divisions and frustrations remain latent.⁶⁹ Although *abunzi* mediation committees are local just like the *gacaca* courts, the *abunzi* function according to codified laws and established procedures although their decisions often remain inspired by custom. They encourage disputing parties to reach a mutually satisfying agreement but if necessary they will issue a binding decision.⁷⁰

Kenya can benefit from the foregoing model in incorporation of informal mediators as well as customs and rules applicable to a particular community or group of people.⁷¹

Competence of Abunzi Mediation Committees, the *abunzi* is defined as ‘an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first degree courts.’

⁶⁵ Article 159, Constitution of Rwanda.

⁶⁶ GACACA are traditional community courts in Rwanda set up. Sourced from “Gacaca Courts,” <http://www.kigalicity.gov.rw/?article71> [Accessed on 26/03/2015]; In Rwandan context, or local language, Gacaca means, “judgment on the grass”. Gacaca’s main objective was reconciliation through restoration of harmony, social order by punishing, shaming and requiring reparations from the offenders..... as well as giving everyone in the community an opportunity to participate in the deliberation of justice, for example on how to punish the violators as well as having a say in the reintegration of the perpetrators back into the community. Sourced from P. Manyok, “Gacaca Justice System: Rwanda Quest for Justice in the post Genocide Era,” *Peace and Collaborative Development Network*, February 28, 2013. Available http://www.internationalpeaceandconflict.org/profiles/blogs/gacaca-justice-system-rwanda-quest-for-justice-in-the-post#.VRI_XvCP_FQ [Accessed on 26/03/2015].

⁶⁷ M. Mutisi, “Local conflict resolution in Rwanda: The case of *abunzi* mediators,” *op cit* p.41.

⁶⁸ *Ibid*, p.42.

⁶⁹ *Ibid*, p. 42.

⁷⁰ *Ibid*, p. 49.

⁷¹ Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation can also be considered for the Kenyan Judiciary.

5.3 Enforcement of Mediation Outcome

While the formal mediation processes requires written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.⁷² Arguably, it should be possible under the legal framework to report back to court albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is therefore how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.

A case in point is *Republic V Mohamed Abdow Mohamed*⁷³ where the accused person was charged with murder. However, the deceased's family had written to the Director of Public Prosecutions requesting that the charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. The two families had sat and some form of compensation had taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family. Actually one of the rituals that were performed was said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families performed the said rituals, the family of the deceased was satisfied that the offence committed had been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they did not wish to pursue the matter any further be it in court or any other forum. The trial was thus terminated. Evidently, there was no written agreement in this matter and it relied on the good faith and voluntariness of the parties to resolve it.

It has been observed that informal mediation results in a non-binding agreement reached from mutual participation in the designing of the agreement, where through mutual participation and self-determination, it is anticipated that both parties will adhere to the stipulations of a settlement without

⁷² See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965); See also H.O. Ayot, *A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940*, (Kenya Literature Bureau, 1979, Nairobi).

⁷³[2013] eKLR, Criminal Case 86 of 2011.

the need for a ‘binding’ agreement.⁷⁴ As such, there may be need to relook at the law to accommodate such informal agreements and recognise them under the law for purposes of ensuring matters come to an end where it is the parties’ wishes to do so.

There is a need for the guarantee of enforceability of the mediated agreement to ensure that mediation competes meaningfully with formal and binding dispute settlement methods, like litigation and arbitration. It has been argued that enforcement of the mediated agreement should not be left to the goodwill of the parties, but should be conferred on a public authority and be de-linked from requirements of form or process.⁷⁵ The Civil Procedure Act provides for registration and enforcement of mediated agreements resulting from mediations presided over by *qualified* mediators.⁷⁶ In effect, the law excludes enforcement of mediated agreements entered into without the assistance of ‘qualified’ mediators. Indeed, this exclusion would also affect enforcement of mediated agreements entered into with assistance of ‘unqualified’ mediators.⁷⁷

5.4 Addressing the Legal Framework for ADR

There are mainly two options that applicability of mediation can assume. Mediation could be given wide application so that the law provides that it applies to every dispute in commercial and civil law. The other approach is to institute mediation procedures connected to competence of particular courts. The mediation law in Kenya seems to adopt the first approach with some variations.

The amendment to the Civil Procedure Act defined mediation and mediator very precisely and also defined the role of the mediator. The definition of mediation is narrow and has restricted the mediation only to a facilitative approach. The Act is also silent on whether or not mediation carried informally and conducted by ‘unqualified’ mediators is included in the definition. But nothing seems to exclude such mediation as the definitions of mediator and mediation are wide and all encompassing. However, even then, registration of mediated agreements and enforcement by the court is restricted to only those entered with assistance of qualified mediators.⁷⁸ This leaves

⁷⁴ J. Rifleman, *Mandatory Mediation: Implications and Challenges*, December 2005. Available at <http://www.mediate.com/articles/riflemanJ1.cfm> [Accessed on 27/03/2015]

⁷⁵ B. Knotzl & E. Zach, “Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act”, *op. cit.*, p. 683.

⁷⁶ Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, *op.cit.*

⁷⁷ The question of who a ‘qualified’ mediator is a hotly contested one and has no clear answer.

⁷⁸ Section 59D of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, *op.cit.*

uncertainty as to the status of informally entered mediation, which arguably form the basis of mediation use in Kenya.

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution.

Development in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.⁷⁹ Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping. At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized Traditional Justice Systems (TJS) would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.⁸⁰ The current land mediation system in East Timor for example, creates a bridge between traditional dispute management mechanisms and the courts.⁸¹ The need for greater connectivity between the traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in conflict resolution.

The author recommends the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be “top-down”. It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation in the political perspective for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

An Alternative Dispute Resolution Act would provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out.⁸² Care has to

⁷⁹ B. Brainch, *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

⁸⁰ See Penal Reform International, “Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems”, *PRI*, (2000), pp. 1 – 196. Sourced from <http://www.gsdr.org/docs>, (accessed on 03/06/2012).

⁸¹ D. Fitzpatrick, “Dispute Resolution; Mediating Land Conflict in East Timor”, in Aus AID’s *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, (accessed on 24/03/2015).

⁸² All ADR processes need to meet the Constitutional threshold envisaged in Article 159(3). They should not offend the Bill of Rights or be repugnant to justice or morality or be inconsistent with the Constitution.

be taken however to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be addressed such as providing appropriate training and building transparency and accountability into the mediation system.⁸³ Local administration officials involved in peace committees for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation process. There should also be more resources devoted to capacity building programs for mediators.

5.5 Ethics in Mediation

Considering that mediators may come from different backgrounds, it may be important to come up with a code of ethics to regulate the mediation practice. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.⁸⁴ The Mediation forums and community mediators as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators.

Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.⁸⁵

5.6 Maintenance of Quality Standards in Mediation

The need for quality in any proposed mediation exercise cannot be gainsaid. In other jurisdictions, concern has been expressed on the lack of quality control and uniformity of practice in

⁸³ D. Fitzpatrick, "Dispute Resolution; Mediating Land Conflict in East Timor", *op. cit.*, p. 196.

⁸⁴ See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.

⁸⁵ See B. Brainch, *ADR/Customary Law, op cit.*

relation to the rapidly expanding number of commercial and voluntary organisations who are nurturing mediators and offering mediation services to the public and to the courts in England and Wales.⁸⁶ While discussing court – annexed mediation, Judge Kirkham observes that some judges have expressed concerns over the arrangement in place in England and Wales, where some court centres offer a court – annexed mediation service and trained lay mediators provide the service. The parties pay a nominal sum to the court and it is the court that provides the administration and the accommodation.⁸⁷

Some judges express concern that this proximity gives rise to the perception on the part of the parties that the court in some way exercises control over the process. If a mediator is incompetent or if the process goes off the rails, the reputation of the court will suffer, yet the judges have no control at all over the process.⁸⁸ Hence, though courts are equipped with powerful weapons to help persuade parties to mediate, the concerns raised by the judge should be addressed if the benefits mediation has to offer are to be reaped.

The law now provides for the establishment of an Accreditation Committee to regulate the quality and accreditation of mediation and mediators in Kenya.⁸⁹ Listing registered mediators promises to ensure the implementation of the quality standards by the accreditation committee. A Code of Ethics for Mediators should substantively address matters of quality of mediation practice. There is, however, a need to introduce elements of self-regulatory processes for mediators and to further promote the proliferation of mediation centers and institutions in Kenya.

5.6 Costs of Mediation

The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives.⁹⁰ Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. The lack of a

⁸⁶ A. Brandy, *Alternative Dispute Resolution (Mediation) Development for Non-Family Civil Disputes in England and Wales*, a paper presented at the World Jurist Association's 21st Biannual Conference on Law of the World (Sydney/Adelaide: WJA Publication, August 17 – 23rd 2003).

⁸⁷ F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) *Arbitration* 53, (2006).

⁸⁸ *Ibid*, p. 56.

⁸⁹ Section 59A of the Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, *op cit*.

⁹⁰ B. Knotzl & E. Zach, "Taking the Best from Mediation Regulation-The EC Mediation Directive and the Austrian Mediation Act", *op cit*, p. 683.

reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the parties and there might be no provision for taxation of costs even where a mediated agreement is reached. The best starting point would have been to allow parties to reclaim court fees or part of it. Generally, much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

6. Mediating the Kenyan Way

Apart from the formal mediation provided for by the Civil Procedure Act and Rules, there are informal home-grown mechanisms at community level for the resolution of conflicts, including environmental conflicts. These mechanisms include but are not limited to negotiation, mediation in the political process and reconciliation as practised in the Kenyan context. They are highly accessible and recognized at the grassroots and often compete with the formal mechanisms. They are now recognized under the constitution as some of the mechanisms that will enhance access to justice in Kenya.⁹¹ These mechanisms are highly dynamic and tend to adapt in structure to meet the demands of the conflict at hand and their description is therefore not easy.⁹² The informal systems such as the council of elders possess some attributes of mediation in the political process in that: parties have a choice of the mediator; the outcome is enduring; they are flexible; speedy; non-coercive; mutually satisfying; foster relationships; are cost effective; addresses the root causes of the conflict; the parties have autonomy about the forum and reject power-based outcomes.⁹³

Conflict resolution especially the use of negotiation and mediation was customary and is an everyday affair. It was thus common to see people sitting down informally and agreeing on certain issues. These practices foster broken relationships and enhance peaceful coexistence among the people ensuring conflicts were managed.⁹⁴

The process of mediation refers to what takes place at the mediation table. Mediation is successful if the parties to the conflict have autonomy over the process. If the parties in conflict feel empowered or that their concerns are addressed in a respectful manner, then the outcome will be acceptable and enduring. Mediation as a conflict management episode is thus successful if it is fair

⁹¹ Article 159 (2) (c); Article 60(1) (g); Article 67(1).

⁹² P. Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *International Environmental Law Research Center (IELRC) Working Paper 2005-1*, available at <http://www.ielrc.org/content/w0501.pdf> [accessed on 12/03/2015].

⁹³ See discussion in K. Muigua, *Resolving Conflicts through Mediation in Kenya*, Chapter Two, *op cit* pp. 20-35.

⁹⁴ See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, *op cit*.

and effective.⁹⁵ Success in mediation can therefore be attributed to both the process and the outcome of the mediation.⁹⁶

Mediation in the African social setting was conducted as a political process leading to resolution and not a settlement.⁹⁷ Kenyans can still engage in this process and resolve conflicts.

Societal norms, traditions, customs, religious and other practices forming part of the culture of a people do serve as a powerful force that motivates disputants to seek assistance from third parties. Before the advent of contemporary conflict management mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others. These were based on solid community institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.⁹⁸

Traditional African communities had traditions, customs and norms that were pivotal in conflict management. Such traditions, customs and norms were highly valued and adhered to by members of the community. Indeed, these customs and norms still play a pivotal role in the lives of communities and have even been recognised in the constitution as such.⁹⁹ It is noteworthy that Kenyans can and still use negotiation and mediation in their communities either amongst themselves or while engaging other communities.¹⁰⁰

7. Towards Access to Justice Through Mediation

Article 159 of the constitution of Kenya aims at easing access to justice through the use of reconciliation, mediation and traditional conflict management mechanisms. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level.

⁹⁵ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, *op.cit.*, pp.291-292

⁹⁶ B. Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 RES. ORG. BEHAV.226, 226-275 (1984)

⁹⁷ See J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, *op cit*; See also K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya*, *op cit* at p.58.

⁹⁸ C. Chapman and Alexander Kagaha, "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009, p.1.

⁹⁹ Article 11, Constitution of Kenya 2010. The Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation; See also Article 44 thereof.

¹⁰⁰ See R. Triche, "Pastoral conflict in Kenya: Transforming mimetic violence to mimetic blessings between Turkana and Pokot communities." *African Journal on Conflict Resolution*, AJCR Volume 14 No. 2, 2014, pp. 81-101 at pp. 96-97.

The constitution now guarantees access to justice for all.¹⁰¹ This can be achieved through enhanced application of informal forms of conflict management. Access to justice imperatives to wit: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present in mediation in the political perspective.¹⁰²

Reforming the judiciary to conform to the spirit of the constitution has been timely and vital. 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. This is essential in not only ensuring access to justice but more importantly in promoting peace.¹⁰³ The Kenyan homegrown conflict management mechanisms can achieve both. They are still the first port of call for the majority of the Kenyan society and hence the need for greater recognition and integration into the justice system while preserving the informal approaches perceived advantages over the formal system.

Cultural, kinship and other ties that have always tied Kenyans together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, and respect for one another and to the environment.

Mediation in the informal context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. These positive attributes of mediation can only be realized if mediation is conceptualized as an informal process as it was in the customary, communal and informal context and not as a legal process.

In the informal set up mediation is seen as an everyday affair and an extension of a conflict management process on which it is dependent. Conflict management is thus heavily embedded in the

¹⁰¹ Article 48, Constitution of Kenya.

¹⁰² K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya*, *op cit* at p.48.

¹⁰³ See Speech by Hon. Uhuru Kenyatta, President and Commander In Chief of the Defence Forces of the Republic of Kenya during 'The State Of The Nation' Address At Parliament Buildings, Nairobi On Thursday, 26th March, 2015, paragraphs 81 and 82. The President, while commenting on the use of restorative justice to address the plight of the victims of 2007/2008 post election violence observed that the available options are not limited to retributive justice as there also exists the promise of restorative justice. He further stated that in many ways, Kenyans and humanity overall, have benefited from restorative justice, an approach that is deeply rooted in people's cultural and historical realities, particularly when such conflicts have a communal and political dimension. This was supported by the fact that many thousands of Kenyans have already reached out to reconcile with one another. Available at <http://www.kara.or.ke/Speech%20by%20H.E.%20Hon%20Uhuru%20Kenyatta%20During%20the%20State%20of%20the%20Nation%20Address%20at%20Parliament%20Buildings.pdf> [Accessed on 26/03/2015].

way of life of most Kenyan communities. Mediation in the customary, communal and informal setting has operated and functioned within the wider societal context in which case it is influenced by factors such as the *actors, their communication, expectations, experience, resources, interests, and the situation in which they all find themselves* (emphasis ours). It is thus not a linear cause-and-effect interaction but a reciprocal give-and-take process. Legislation should not kill mediation by annexing it to the court system and making it a judicial process. Informal mediators may still have a big role to play in making mediation work in Kenya.

8. Conclusion

Successful utilisation of mediation in Kenya requires a customized approach where community values, traditional knowledge and modernity come together in search of true resolution of conflicts.

Court Sanctioned Mediation is now part of the law of Kenya. However, a lot needs to be done to ensure that such mediation remains a vehicle through which true justice can be achieved.

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