

# **Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms**

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# Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms

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## Abstract

*This paper discusses the concept of empowerment in the context of the Constitution of Kenya 2010 with a view to demonstrating how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan People to boost their participation in conflict management, governance matters, and improve the socio-economic aspects of their lives.*

*The discourse conceptualizes empowerment in the context of Kenya, based on the various elements of the same. It highlights the main challenges hampering efforts to empower the Kenyan people and proposes the way forward. The paper ends by suggesting ways in which empowerment can be achieved for the Kenyan people, for the realisation of an environment based on the values of human rights, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010.*

## 1. Introduction

This paper explores how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan People through conflicts management and participation in governance matters touching on socio-economic aspects of their lives.

The author argues that if the aspirations of the Kenyan People are to be met, then it has to be in a secure and peaceful environment and one that allows people to make decisions regarding their own affairs and access justice. Such an environment would be based on the values of human rights, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the current Constitution of Kenya 2010<sup>1</sup>. The paper explores the viability of ADR mechanisms in empowering the Kenyan people.

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<sup>1</sup> Government Printer, Nairobi 2010.

## 2. Background

During the colonial period the political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples. In an attempt to safeguard own interests, the colonial masters suppressed the African customs and practices, only allowing them to continue 'only if they were not repugnant to justice and morality'.<sup>2</sup>

A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life saw the Europeans introduce the Western ideals of justice which were not based on political negotiations and reconciliation.<sup>3</sup> Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.<sup>4</sup> The effect of this was disempowerment of the Kenyan people as far as control of their lives was concerned.

Although the African States gained external self-determination in terms of independence and sovereignty from the Colonial masters, there was need to work towards achieving internal self-determination for its citizens. Internal self-determination is used refer to various political and social rights while external self-determination refers to full legal independence/secession for the given 'people' from the larger politico-legal state.<sup>5</sup> Even after independence, Kenyans and indeed the African people were not assured of self actualisation due to a number of factors which ranged from weak or non-existent legal and institutional frameworks for the empowerment of people, corruption, violation of human rights, poverty and illiteracy amongst others.<sup>6</sup>

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<sup>2</sup>The clause is retained in the *Judicature Act*, Cap 8, Laws of Kenya and Article 159(3), *Constitution of Kenya* 2010.

<sup>3</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.2, pp. 20-37, p.21.

<sup>4</sup>Cobbah, J.A.M., "African Values and the Human Rights Debate: An African Perspective", *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 309-331 at p.315.

<sup>5</sup>Cornell University Law School, Legal Information Institute, 'Self-determination (international law)'. Available at [https://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](https://www.law.cornell.edu/wex/self_determination_international_law) [Accessed on 25/02/2015].

<sup>6</sup> See generally, Forje, J.W., "Self-Determination, Nationalism, Development and Pan-Africanism Stuck on the Runway: Are Intellectuals to be Blamed?" *African Journal of International Affairs*, vol. 6 nos 1 & 2, 2003, pp.54–86; See also Obeng-Odoom, F., "Avoiding the Oil Curse in Ghana: Is Transparency Sufficient?" *African Journal of International Affairs*, Vol.13, Numbers 1&2, 2010, pp. 89–119; See generally, Dersso, S.A., "Post-Colonial Nation-Building And Ethnic Diversity In Africa" in Kenyan Section of the International Commission of Jurists, *Ethnicity, Human Rights And Constitutionalism In Africa*, 2008.

Available at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.icj-kenya.org%2Findex.php%2Fresources%2Fpublications%2Fbooks-dl%3Fdownload%3D15%3Aethnicity-human-rights-and-constitutionalism-in-kenya&ei=GOD9VNHtLdPYatCogtP&usg=AFQjCNGx3i7FgPXxxC27UBEi8b6SKYBeAg&bvm=bv.87611401,d.d2s>

In many other countries, internal conflicts amongst communities abound and these undermine internal self-determination. Conflict-torn areas around Kenya such as the Northern Kenya region, are faced with the challenges of human rights violations, inequality, constraint of freedom, diminished democracy, social injustice and absence of the rule of law.<sup>7</sup> The result of these is insecurity, lack of development and poverty amongst people, who are consequently disempowered by losing basic control of their lives. Ordinary citizens are unable to drive their own lives and it also becomes hard or impossible to access justice especially in the absence of the rule of law.<sup>8</sup>

### 3. Conceptualising Empowerment

Empowerment has been generally defined as a multi-dimensional social process that helps people gain control over their own lives, through fostering power (that is, the capacity to implement) in people, for use in their own lives, their communities, and in their society, by acting on issues that they define as important.<sup>9</sup> It is also seen as a social-action process that promotes participation of people, organizations, and communities towards the goals of increased individual and community control, political efficacy, improved quality of community life, and social justice.<sup>10</sup> It is the expansion of assets and capabilities of poor people to participate in, negotiate with, influence, control, and hold accountable institutions that affect their lives.<sup>11</sup>

Empowerment theory has been described as one that connects individual well-being with the larger social and political environment, and suggests that people need opportunities to become

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<sup>7</sup>See UNESCO, "Human Security and Human Development: A Deliberate Choice," *Kenya National Human Development Report*, 2006. Available at [http://planipolis.iiep.unesco.org/upload/Kenya/kenya\\_2006\\_en.pdf](http://planipolis.iiep.unesco.org/upload/Kenya/kenya_2006_en.pdf) [Accessed on 25/02/2015].

<sup>8</sup> Ibid, p. 25.

<sup>9</sup>Nanette Page, N. and Czuba, C.E., "Empowerment: What Is It?" *Journal of Extension*, October 1999, Volume 37, Number 5, Commentary, 5COM1.

<sup>10</sup> Wallerstein, N., "Powerlessness, empowerment and health: Implications for health promotion programs." *American Journal of Health Promotion*, 6(3), 197-205 (As quoted in Lord, J. and Hutchison, P., "The Process of Empowerment: Implications for Theory and Practice." *Canadian Journal of Community Mental Health*, 12:1, Spring 1993, Pages 5-22 at p. 4.)

<sup>11</sup> World Bank, *Chapter 2. What Is Empowerment?* p.11. Available at <http://siteresources.worldbank.org/INTEMPowerment/Resources/486312-1095094954594/draft2.pdf> [Accessed on 25/02/2015].

active in community decision making in order to improve their lives, organizations, and communities.<sup>12</sup>

There are basic aspects of empowerment: *participation, control and critical awareness*(emphasis ours) where participation is the individual's actions that contribute to community contexts and processes; control is the effective or the perception of ability to influence decisions; and critical awareness is the ability to analyze and understand the social and political environment.<sup>13</sup>

Based on the foregoing, empowerment is used in this paper to refer to the process where the Kenyan local communities are enabled to participate more productively in social, political and economic decision-making processes. This discourse is restricted to empowerment in the areas of natural resources and environmental management, conflicts management and participation in general governance matters. This is because these are the main areas that have a direct impact on the quality of the social, economic and cultural life of the local people. The author seeks to explore how the Alternative Dispute Mechanisms (ADR) can be utilised to achieve empowerment of the disempowered groups of persons into the socio-economic and political system. This is by way of inclusion, influence and representation of various disadvantaged or marginalised social groups within the governance structures in the country.

#### **4. Current challenges in Empowerment of the Kenyan People**

The search for a society based on the values of human rights, equality, freedom, democracy, social justice and the rule of law informed the promulgation of the current Constitution of Kenya 2010. This is because Kenya's history is one that is marked with human rights violation, inequality, curtailed freedom, autocracy, social injustice and lack of the rule of law. There have also been widespread ethnic, political and even inter-clan conflicts.<sup>14</sup> The effect of these has been underdevelopment or non-development in the country, despite the fact that it is richly endowed

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<sup>12</sup> Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," in Rappaport, J. and Seidman, E. (Eds.), *Handbook on Community Psychology*, New York: Plenum Press, 2000. p.52.

<sup>13</sup>Ibid.

<sup>14</sup> UNESCO, "Human Security and Human Development: A Deliberate Choice," *Kenya National Human Development Report*, 2006. P. 55.

with natural resources.<sup>15</sup> The local people find themselves struggling to meet their basic needs of right to life, shelter, health, food and water.<sup>16</sup>

#### 4.1 Violation of Human Rights

Human rights are the equal and inalienable rights, in the strong sense of entitlements that ground particularly powerful claims against the state, which each person has simply as a human being.<sup>17</sup> Individual human rights are increasingly viewed not merely as moral ideals, but as both objectively and subjectively necessary to protect and realize human dignity.<sup>18</sup>

Human rights abuses in Africa have been mainly attributed to racism, post-colonialism, poverty, ignorance, disease, religious intolerance, internal conflicts, debt, bad management, corruption, the monopoly of power, the lack of judicial and press autonomy and border conflicts.<sup>19</sup> It is noteworthy that among the list, conflicts feature prominently. As such, it is arguable that the creation of a peaceful and secure environment where every African enjoys human rights heavily relies on the management of these conflicts.

There has been widespread violation of social, cultural and economic rights which are vital for the empowerment of the ordinary people.<sup>20</sup>

The *Universal Declaration of Human Rights*<sup>21</sup> (UDHR 1948) affirms in its Preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Human dignity is indeed inviolable and it must be respected and protected.<sup>22</sup> In addition to the foregoing, UDHR 1948 states that everyone, as a member of society, has the right to social security and is entitled

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<sup>15</sup> Ibid, p. 4; Daily Nation, *Kakamega the poorest county in Kenya*, Monday, November 10, 2014. Available at <http://www.nation.co.ke/counties/Kakamega-Poverty-Devolution-Ministry-Report/-/1107872/2517956/-/gyj9g2z/-/index.html> [Accessed on 25/02/2015]; Government of Kenya, Ministry of State for Planning, National Development & Vision 2030, *Poverty & Environment Indicators Report*, February 2011. Available at [http://www.unpei.org/sites/default/files/e\\_library\\_documents/PEI\\_Indicators\\_report.pdf](http://www.unpei.org/sites/default/files/e_library_documents/PEI_Indicators_report.pdf)

<sup>16</sup> The Star, *Africa: Kenya Sixth Poorest in Africa, Report Says*, 19 February 2015. Available at <http://allafrica.com/stories/201502190545.html> [Accessed on 25/02/2015].

<sup>17</sup> Howard, R.E. and Donnelly, J., "Human Dignity, Human Rights, and Political Regimes," *The American Political Science Review*, Vol. 80, No. 3 (Sep., 1986), pp. 801-817 at p.802.

<sup>18</sup> Howard, R.E. and Donnelly, J., "Human Dignity, Human Rights, and Political Regimes," *op. cit.* p.805.

<sup>19</sup> Magnarella, P.J., "Achieving Human Rights in Africa: The Challenge for the New Millennium", *African Studies Quarterly*, Volume 4, Issue 2, Summer 2000, PP.17-27 at p. 17; See also generally, Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, Briefing No. 74, March 2012.

<sup>20</sup> See Kapindu, R.E., "Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities." *African Human Rights Law Journal*, (2013) 13 *AHRLJ* 125-151. p. 126.

<sup>21</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III),

<sup>22</sup> See also Art. 1, UDHR, 1948.

to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>23</sup> The Constitution of Kenya 2010 also guarantees that every person in Kenya has inherent dignity and the right to have that dignity respected and protected.<sup>24</sup>

Notwithstanding the comprehensive Bill of Rights in the current Constitution of Kenya, cases of violation of human rights still persist. A case in point is the *Endorois case*,<sup>25</sup> where the Kenyan community, Endorois was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people.

Despite the African Commission on Human and Peoples' Rights (ACHPR) Ruling that found Kenya to be in violation of the African Charter,<sup>26</sup> and urged Kenya to, *inter alia*, recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle, the Government of Kenya is yet to implement the decision of the Commission in the Endorois case.

It is evident that access to justice in Kenya especially for the poor and marginalised groups of persons is still a mirage. This is due to the fact that access to justice is not just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>27</sup> Arguably, this has not yet been achieved in our country and the result is a poor people who are often condemned to a life of misery without any viable recourse to alleviate the injustices.

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<sup>23</sup> Art. 22.

<sup>24</sup> Art. 28.

<sup>25</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, No. 276 / 2003.

<sup>26</sup> Arts. 1, 8, 14, 17, 21 and 22. the Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22).

<sup>27</sup> Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 09/03/2015).



It has been observed that marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.<sup>28</sup> It has been observed that loss of land does not only lead to hunger, but loss of property, livelihoods, water scarcity and related issues such as children dropping out of schools and social unrest, with the overall effect being characterized by gross violation of human rights.<sup>29</sup>

## 4.2 Lack of Access to Justice and Inequality

Although the concept of access to justice does not have a single universally accepted definition, usually the term is used to refer to opening up the formal systems and structures of the law to disadvantaged groups in society and includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.<sup>30</sup> Access to justice is said to have two dimensions to it namely: procedural access (fair hearing before an impartial tribunal) and substantive justice (fair and just remedy for a violation of one's rights).<sup>31</sup>

The concept of 'access to justice' involves three key elements namely: *Equality of access to legal services, national equity and equality before the law* (emphasis ours).<sup>32</sup> Equality of access to legal services, means ensuring that all persons, regardless of means, have access to high quality legal services or effective dispute resolution mechanisms necessary to protect their rights and interests.<sup>33</sup> National equity is ensuring that all persons enjoy, as nearly as possible, equal access to legal services and to legal service markets that operate consistently within the dictates of competition policy.<sup>34</sup> Equality before the law means ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of

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<sup>28</sup>Gibson, C., et. al., "Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy", Volume 3713, *Policy research working papers*, World Bank Publications, 2005. P.1.

<sup>29</sup> Uganda Land Alliance, "Campaign against Land Grabbing".

Available at <http://ulaug.org/data/smnu/34/Campaign%20against%20Land%20Grabbing.html> [Accessed on 06/03/2015].

<sup>30</sup>Global Alliance against Traffic in Women (GAATW), op. cit.

<sup>31</sup> Ibid.

<sup>32</sup> Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, Canberra, 1994. See also Louis Schetzer, et. al., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', page 7, Background Paper, August 2002, available at [www.lawfoundation.net.au/ljf/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf) [Accessed on 24/02/2015].

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

community facilities and access to services.<sup>35</sup> A framework that does not guarantee these may therefore not facilitate access to justice.

The *United Nations Universal Declaration of Human Rights* 1948 provides that all persons are equal before the law and are entitled without any discrimination to equal protection of the law.<sup>36</sup> Further, it guarantees everyone's right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.<sup>37</sup> This includes full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of a person's rights and obligations and of any criminal charge against them.<sup>38</sup>

In Kenya, this right is guaranteed under the Constitution of Kenya 2010,<sup>39</sup> although the actual implementation or realisation is yet to be seen due to various factors that hinder its effective implementation. The Judicial system in Kenya has been affected by various barriers to accessing justice which include high legal fees, complex rules of procedure, geographical location of Courts that does not reflect the demographic dynamics, cultural, economic and socio-political orientation of the society and selective application of laws.<sup>40</sup>

It is difficult for Kenyans to seek redress from the formal court system. The end result is that these disadvantaged people harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been the causes of ethnic or clan animosity in Kenya.<sup>41</sup>

### 4.3 The Rule of Law

It has been argued that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.<sup>42</sup> It is noteworthy that access to justice is an essential component of rule of law.

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<sup>35</sup> Ibid.

<sup>36</sup> Art. 7.

<sup>37</sup> Art. 8.

<sup>38</sup> Art. 10.

<sup>39</sup> Art. 27.

<sup>40</sup> Muigwa, K., *Resolving Conflicts through Mediation in Kenya*, op. cit., p.22; *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29, p. 29.

<sup>41</sup> See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission'), published in 1999. Government Printer, Nairobi.

<sup>42</sup> United Nations Development Programme, 'Access to Justice and Rule of Law'

Available at

Rule of law has been said to be the foundation for both justice and security.<sup>43</sup> A comprehensive system of rule of law is said to be inclusive in that all members of a society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law and it is believed that rule of law is measured against the international law in terms of standards of judicial protection.<sup>44</sup> Therefore, without the rule of law, access to justice becomes a mirage.

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. It has been rightly noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.<sup>45</sup>

In some instances, non-governmental organisations have come to the aid of some few communities in assisting them access justice through the judicial system. As observed earlier, access to courts is often difficult for the Kenyans due to the problems of high court fees, illiteracy, and geographical location of the courts, amongst many other hindrances.<sup>46</sup>

#### 4.4 Poverty

In Kenya, there has been contestation of unjust or illegal distribution of resources especially with regard to land and/or natural resource extraction since some communities feel discriminated and sidelined in the management of these resources.<sup>47</sup> This also bleeds tribal animosity.<sup>48</sup> They

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[http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/)  
[Accessed on 24/02/2015]

<sup>43</sup> Ibid.

<sup>44</sup> Dag Hammarskjöld Foundation, 'Rule of Law and Equal Access to Justice', p.1, Discussion Paper, January 2013. Available at [http://www.sida.se/PageFiles/89603/RoL\\_Policy-paper-layouted-final.pdf](http://www.sida.se/PageFiles/89603/RoL_Policy-paper-layouted-final.pdf) [Accessed on 26/02/2015]

<sup>45</sup> The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4, Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 26/02/2015].

<sup>46</sup> The Danish Institute for Human Rights, "Access to Justice and Legal Aid in East Africa: A comparison of the legal aid schemes used in the region and the level of cooperation and coordination between the various actors." *A report by the Danish Institute for Human Rights, based on a cooperation with the East Africa Law Society, 2011.* Available at

[http://www.humanrights.dk/files/media/billeder/udgivelser/legal\\_aid\\_east\\_africa\\_dec\\_2011\\_dihhr\\_study\\_final.pdf](http://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihhr_study_final.pdf) [Accessed on 06/03/2015].

<sup>47</sup> See *Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Njonjo Report), November, Government Printer, Nairobi, 2002; *Commission of Inquiry into the Illegal and Irregular Allocation of Public Land* (Ndung'u Commission), Government Printer, Nairobi, June, 2004.

<sup>48</sup> See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, the 'Akiwumi Commission', published in 1999. Op.cit.

continue suffering in abject poverty despite the presence of natural resources in their areas of residence.<sup>49</sup>

The Constitution outlines the principles of landholding and management in Kenya which include: sustainability, efficiency, equity and productivity. These principles are to be realised by ensuring equitable access to land; security of land rights; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices related to land and property in land; and *encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution* (emphasis ours).<sup>50</sup> These principles are meant to help in combating poverty, promote the values of human rights, equality, freedom, democracy, social justice and the rule of law as envisaged in the preamble to the Constitution of Kenya. They are meant to achieve this through ensuring active participation of the local communities in the management of their land and other land based natural resources.

Despite the foregoing, the local people are yet to benefit from the new governance approaches as introduced by the current Constitution of Kenya. They have continued to be sidelined in the decision making processes relating to the management of the land based resources. The debate has been who between the national Government's bodies and the County Governments has the Constitutional mandate to manage the resources. Even where the Constitution requires public participation in such governance matters<sup>51</sup>, there has been little or no regard to the views of the people. In the end, the affected communities are relegated to mere spectators as the supremacy battles persist.

## 5. Towards Empowerment

It has been argued that Africa needs to inculcate in its people a culture of peace, tolerance and respect of human rights, to energetically fight poverty, illiteracy and intolerance, to strive to overcome the scourge of conflicts and ensure that human rights violations are not only condemned but also effectively opposed and eliminated.<sup>52</sup>

There is need to explore means of ensuring that there is actual empowerment of the Kenyan people to enable them take advantage of the gains brought about by the current Constitution of

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<sup>49</sup> Daily Nation, *Kakamega the poorest county in Kenya*, Monday, November 10, 2014. *Op cit*.

<sup>50</sup> Art. 60(1).

<sup>51</sup> See Articles 10, 69, 118 and 196.

<sup>52</sup> *Ibid*, p. 24; See also "Protection of Human Rights Concerns OAU," African News Service, 15 April 1999. Available at <http://allafrica.com/stories/199904150006.html> [Accessed on 25/02/2015].

Kenya, including the devolved system of governance. Even though we have the legal framework for the devolved system of governance in place, more needs to be done to equip the ordinary *Mwananchi*<sup>53</sup> to enable them participate in governance matters and enable them have more say in how the allocated resources should be used to improve their lives. In the absence of this, the politicians continue to take advantage of the disempowered and ignorant people to misuse resources and perpetrate bad governance. An empowered people are also able to participate in addressing the inevitable conflicts that arise from time to time.

### 5.1 ADR and Empowerment

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a "voice"); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.<sup>54</sup> ADR is mainly concerned with enabling parties take charge of their situations and relationships.

The *United Nations Declaration on the Rights of Indigenous Peoples* guarantees that indigenous peoples have the right to access to and prompt decision through just and fair procedures for the management of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision is to give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.<sup>55</sup> This provision contemplates conflicts and disputes management mechanisms that give the indigenous peoples control over the processes and to a large extent the outcome of the process. The role of the local people in empowerment is crucial and it has actually been argued that that even in the face of extreme

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<sup>53</sup> Mwananchi means the Kenyan citizen.

<sup>54</sup> Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1 (2009), p.121. Available at <http://www.ajol.info/index.php/ejc/article/view/52661/41265> [Accessed on 26/02/2015].

<sup>55</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 40.

poverty, conflict and crisis, civilians often play a critical role in responding to threats to their safety and dignity and violations of their fundamental rights.<sup>56</sup>

The desire for dignity is said to be a motivating force behind all human interaction and when it is violated, the response is likely to involve aggression, even violence, hatred, and vengeance.<sup>57</sup> The United Nations observes that today, some of the most serious threats to international peace and security are armed conflicts that arise, not among nations, but among warring factions within a State.<sup>58</sup> Further, the human rights abuses prevalent in internal conflicts are said to be now among the most atrocious in the world.<sup>59</sup>

On the other hand, when people treat one another with dignity, they become more connected and are able to create more meaningful relationships.<sup>60</sup> It is thus essential to devise ways of eradicating these problems that undermine human dignity for purposes of eradicating poverty and ultimately empowering people.

Although conflicts are part of any society, any mechanisms employed in dealing with them ought to, as much as possible, help in creating an environment that fosters development, peace, social justice amongst other positive values. It has been stated that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as Ubuntu in South Africa and Utu in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>61</sup> It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.<sup>62</sup>

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<sup>56</sup>Eby, J., et. al., "Exploring the role of community partnerships and empowerment approaches in protection", *Humanitarian Exchange Magazine*, Issue 46, March 2010. Available at <http://www.odihpn.org/humanitarian-exchange-magazine/issue-46/exploring-the-role-of-community-partnerships-and-empowerment-approaches-in-protection> [Accessed on 26/02/2015].

<sup>57</sup>Hicks, D. and Tutu, D., *Dignity: The Essential Role It Plays in Resolving Conflict*. Yale University Press, 2011.

<sup>58</sup>United Nations, Human Rights and Conflicts: A United Nations Priority. Available at <http://www.un.org/rights/HRToday/hrconfl.htm> [Accessed on 25/02/2015].

<sup>59</sup>Ibid.

<sup>60</sup>Hicks, D., *Dignity: Its Essential Role in Resolving Conflict*, Yale University Press; Reprint edition (January 29, 2013)

<sup>61</sup>Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa", Available at [www.payson.tulane.edu](http://www.payson.tulane.edu).

<sup>62</sup>McConaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, p.23.

Conflict management mechanisms may either result in settlement or resolution. Settlement is an agreement over the issue(s) of the conflict which often involves a compromise.<sup>63</sup> Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.<sup>64</sup> Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.<sup>65</sup> Examples of such mechanisms are litigation and arbitration.

Courts can only handle a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as noted one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties.<sup>66</sup>

In litigation, the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to manage conflicts where relationships matter. ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement.

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The

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<sup>63</sup> Bloomfield, D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164.

<sup>64</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *Op cit.*, Page 81.

<sup>65</sup> Ibid, p. 80; See also Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management* Centre For Conflict Research, Nairobi, 2006.

<sup>66</sup> Waddell, G.G. and Keegan, J.M., "Christian Conciliation: An Alternative to Ordinary ADR - Part 1". *The Institute for Christian Conciliation*.

Available at

[http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5369217/k.9B7D/Christian\\_Conciliation\\_An\\_Alternative\\_to\\_Ordinary\\_ADR\\_Part\\_1.htm](http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5369217/k.9B7D/Christian_Conciliation_An_Alternative_to_Ordinary_ADR_Part_1.htm)

outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.<sup>67</sup>

As such, ADR mechanisms are seen as viable for conflicts management because of their focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by common law and statutory measures on disputes and conflicts management.<sup>68</sup> They are also advocated for as an effective vehicle for mobilizing community talent, for preventing unnecessary violence and for revitalizing the self-help capacities of ordinary citizens.<sup>69</sup>

Traditional approaches to justice and reconciliation are also preferred due to their focus on the psycho-social and spiritual dimensions of violent conflicts.<sup>70</sup> They are also often inclusive, with the aim of reintegrating parties on both sides of the conflict into the community.<sup>71</sup>

This is however not to say that litigation is not always useful. Where there are power imbalances and need for protection of human rights, then courts are the most viable channel to seek redress. In instances of gross violation of human rights, ADR or even traditional justice systems cannot work. Examples of these are the *Endorois case*<sup>72</sup> and the *Ogiek case*<sup>73</sup> where the two communities separately sought the intervention of the African Court on Human and Peoples Rights to compel Kenya respect their rights by refraining from evicting them from their ancestral lands.

It is noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. It cannot be overstressed that some of the traditional practices have negative impacts such as discrimination of women and

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<sup>67</sup>Cloke, K., "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>.

<sup>68</sup> Idornigie, P.O., "Overview of ADR in Nigeria", 73 (1) *Arbitration* 73, (2007), p. 73.D.

<sup>69</sup>Merry, S.A. and Milner, NA. (Eds), *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States*, University of Michigan Press, 1995. p.67.

Available at

[http://books.google.co.ke/books?hl=en&lr=&id=guIG64KCttYC&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eIL1rqu5Nub5v18daDEqojg7c&redir\\_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false](http://books.google.co.ke/books?hl=en&lr=&id=guIG64KCttYC&oi=fnd&pg=PA67&dq=adr+and+political+empowerment&ots=I4QWemArtq&sig=B2eIL1rqu5Nub5v18daDEqojg7c&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false) [Accessed on 25/02/2015].

<sup>70</sup>Haider, H., "Community-based Approaches to Peace building in Conflict-affected and Fragile Contexts", *Governance and Social Development Resource Centre Issues Paper*, November 2009, p. 6. Available at <http://www.gsdr.org/docs/open/EIRS8.pdf> [Accessed on 28/02/2015].

<sup>71</sup>Ibid.

<sup>72</sup>276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*.

<sup>73</sup>*African Commission on Human and Peoples Rights V Republic of Kenya*, Application 006/2012.



disabled persons.<sup>74</sup> In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.<sup>75</sup> This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.<sup>76</sup>

### 5.1.1 Legal and Institutional Framework on ADR Mechanisms in Kenya

The Constitution of Kenya guarantees the right of every person access justice.<sup>77</sup> To facilitate this, it provides that in exercising judicial authority, the courts and tribunals are to be guided by the principles of *inter alia*: justice is to be done to all, irrespective of status; justice is not to be delayed; alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms* are to be promoted, subject to clause(3)<sup>78</sup> (emphasis ours); justice is to be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution are to be protected and promoted.<sup>79</sup>

Access to justice could also include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.<sup>80</sup> ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.

The Constitution of Kenya 2010 recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>81</sup> The traditions, customs and norms of a particular community have always played a pivotal role in conflict resolution and they were highly valued and adhered to by the members of the community.<sup>82</sup>

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

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<sup>74</sup> See generally, Muigua, K., “Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya”. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, *World Report 2013*, available at [http://www.hrw.org/sites/default/files/wr2013\\_web.pdf](http://www.hrw.org/sites/default/files/wr2013_web.pdf) [Accessed on 28/02/2015].

<sup>75</sup> Art. 159(3).

<sup>76</sup> Art. 23.

<sup>77</sup> Art. 48.

<sup>78</sup> Art. 159(3) “*Traditional dispute resolution mechanisms shall not be used in a way that—(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.*”

<sup>79</sup> Art. 159(2).

<sup>80</sup> See Muigua, K. and Kariuki F., ‘ADR, Access to Justice and Development in Kenya’. Paper Presented at Strathmore Annual Law Conference 2014 held on 3<sup>rd</sup> & 4<sup>th</sup> July, 2014 at Strathmore University Law School, Nairobi.

<sup>81</sup> Art. 11(1).

<sup>82</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, p. 35.

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.<sup>83</sup>

Article 159(1) echoes the right of all persons to have access to justice and also reflects the constitutional spirit of every person's equality before the law and the right to equal protection and equal benefit of the law.<sup>84</sup>

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies*(emphasis ours).<sup>85</sup>

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.<sup>86</sup>

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution.<sup>87</sup> ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.<sup>88</sup>

As such, these mechanisms provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.

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<sup>83</sup> Article 159(2) (d).

<sup>84</sup> Article 27.

<sup>85</sup> See Maiese, M., "*Principles of Justice and Fairness*," in Burgess, G. and Heidi Burgess, H. (Eds.) "Conflict Information Consortium", *Beyond Intractability*, University of Colorado, Boulder (July 2003).

<sup>86</sup> Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6.

Available at

<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>

<sup>87</sup> Art. 11.

<sup>88</sup> See Shantam, S. K., et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair>

### a. Negotiation

Negotiation is an informal process that involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has been hailed as one of the most fundamental methods of conflict resolution, offering parties maximum control over the process.<sup>89</sup>

The Constitution requires cooperation between national and county governments.<sup>90</sup> The two levels of government are to *inter alia*, assist, support and consult and, as appropriate, implement the legislation of the other level of government; and liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.<sup>91</sup> In case of any dispute between the governments, they are to make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Such national legislation are to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.<sup>92</sup>

It is worth noting that the Governments are to ensure participation by the public in conducting their affairs.<sup>93</sup> Negotiation offers a viable avenue for such consultations and exchange of information especially when seeking the views of the residents on development projects. Where community members feel aggrieved by the actions of their county governments, they can seek to engage them through negotiation before exploring any other means, in case of a deadlock. Armed with the relevant information, such members are able to appreciate the work of their governments and also feel a sense of ownership and belonging. They are able to have their concerns addressed in a way that leaves them satisfied.

Negotiation has been used since time immemorial among African communities and it is still applied widely in Kenya today.<sup>94</sup> It can be used as a powerful empowering tool to assist the Kenyan people to manage their conflicts effectively.

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<sup>89</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, p.11.

<sup>90</sup> Art. 189.

<sup>91</sup> Art. 189(1) (b) (c).

<sup>92</sup> Art. 189(3) (4).

<sup>93</sup> Art. 196.

<sup>94</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*, *op. cit.*, chapter 2; Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

## b. Mediation

Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>95</sup> Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.<sup>96</sup> It is also defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.<sup>97</sup> Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process. Mediation in the political process is informed by resolution as against settlement. It allows parties to have autonomy over the choice of the mediator, the process and the outcome. The process is also 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.

Mediation in the legal process is a process where the conflicting parties come into arrangements which they have been coerced to live or work with while exercising little or no autonomy over the choice of the mediator, the process and the outcome of the process. This makes it more of a settlement mechanism that is attached to the court as opposed to a resolution process and defeats the advantages that are associated with mediation in the political process.<sup>98</sup>

The central quality of mediation is its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship.<sup>99</sup> In conflict resolution processes like mediation, the goal, then, is not to get parties to accept formal rules to govern their relationship, but to help them to free themselves from the encumbrance of rules and to accept a relationship of mutual respect, trust, and understanding that

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<sup>95</sup> Makumi, M., *Conflict in Africa: Theory Processes and Institutions of Management*. Op.cit. P. 15.

<sup>96</sup>Fenn, P., "Introduction to Civil and Commercial Mediation", In Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002), p. 10.

<sup>97</sup>Bercovitch, J., "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289, p. 290.

<sup>98</sup> Muigua, K., "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, Chapter 4; See also sec.59A,B,C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

<sup>99</sup> Fuller, L.L., *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971) [Quoted in Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socio-economic Rights Cases' *Utah Law Review*, (2009) [NO. 3] op. cit. pp. 802-803]

will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.<sup>100</sup>

The salient features of mediation (in the political process) are that it emphasizes on interests rather than (legal) rights and it can be cost - effective, informal, private, flexible and easily accessible to parties to conflicts. These features are useful in upholding the acceptable principles of justice: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis ours), thus making mediation a viable process for the empowerment of the parties to a conflict.<sup>101</sup>

Mediation as practised by traditional African communities was informal, flexible, voluntary and expeditious and it aimed at fostering relationships and peaceful coexistence. Inter-tribal conflicts were mediated and negotiated in informal settings, where they were presided over by Council of Elders who acted as ‘mediators’ or ‘arbitrators’.<sup>102</sup> It was customary and an everyday affair where people sat down informally and agreeing on certain issues, such as allocation of resources.<sup>103</sup>

### c. Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems.<sup>104</sup> The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. For instance, in relation to women, it has been argued that for Kenyan women, custom is particularly important as it defines their identity within society, and mediates their family relationships, entitlements and access to resources.<sup>105</sup> In addition, informal justice systems which constitute the most accessible forms of dispute resolution utilize localized norms derived from customary law.<sup>106</sup>

Culture has been identified as an essential component of sustainable development and a critical element of human rights-based approaches as it represents a source of identity,

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<sup>100</sup> Ibid.

<sup>101</sup> See generally Muigua, K., “Resolving Environmental Conflicts through Mediation in Kenya” Ph.D Thesis, 2011, *Unpublished*.

<sup>102</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya, op. cit.*, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965).

<sup>103</sup> Ibid, p. 20.

<sup>104</sup> Ibid, pp.20-21. Art. 159 (2) treats traditional justice systems as part of ADR.

<sup>105</sup> Kamau, W., “Customary Law and Women’s Rights in Kenya.” p. 1. Available at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf> [Accessed on 27/02/1015].

<sup>106</sup> Ibid.

innovation and creativity for the individual and community and is an important factor in building social inclusion and eradicating poverty, providing for economic growth and ownership of development processes.<sup>107</sup> Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.<sup>108</sup> Indeed, this has been recognised in the current Constitution of Kenya and it provides that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>109</sup> It also obligates the state to recognise the role of science and indigenous technologies in the development of the nation and to promote the intellectual property rights of the people of Kenya.<sup>110</sup>

Effective application of traditional conflict resolution mechanisms in Kenya and across Africa can indeed strengthen access to justice for all including those communities who face obstacles to accessing courts of law, and whose conflicts, by their nature, may pose difficulties to the court in addressing them.<sup>111</sup> Restorative justice in the field of criminal justice is lauded especially in relation to young offenders since it is seen as a paradigm shift in criminal justice, away from dominant punitive and therapeutic paradigms, emphasizing instead the reintegration of offenders and potential offenders into their communities.<sup>112</sup>

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.<sup>113</sup> It has been observed that in Tanzania, customary and religious laws are both recognised alongside state law, an indication of the decisive role of state

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<sup>107</sup> United Nations Development Group, *Delivering The Post-2015 Development Agenda: Opportunities At The National And Local Levels*, 2014. p. 28.

Available at <http://www.undp.org/content/dam/undp/library/MDG/Post2015/UNDP-MDG-Delivering-Post-2015-Report-2014.pdf> [Accessed on 28/02/2015].

<sup>108</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, Preamble.

<sup>109</sup> Art. 11(1).

<sup>110</sup> Art. 11(2).

<sup>111</sup> See the Kenyan case of *Republic v. Mohamed Abdow Mohamed*, Criminal Case No. 86 of 2011 (May, 2013), High Court at Nairobi,

<sup>112</sup> Johnstone, G., *Restorative Justice: Ideas, Values, Debates*, Willan, 2002.

Available at

[http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs\\_citations\\_module\\_r&cad=5](http://books.google.co.ke/books?id=Fu5GKPqVUnAC&printsec=references&dq=adr+and+political+empowerment&lr=&vq=%22The+Possibility+of+Popular+Justice%22&source=gbs_citations_module_r&cad=5) [Accessed on 25/02/2015].

<sup>113</sup> Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at [www.payson.tulane.edu](http://www.payson.tulane.edu). [Accessed on 24/02/2015].

in validating each body of law while attempting to reconcile customary laws with national laws and international laws.<sup>114</sup>

The traditional justice systems can effectively be used alongside the formal systems in giving people a voice in decision-making.

#### **d. Arbitration**

Arbitration is a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. A third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.<sup>115</sup>

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.<sup>116</sup>

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the In Africa, there existed the customary arbitration which was used in a wide array of disputes. In some States, arbitration was the highest level of dispute resolution at the village level. The proceedings were formalized and paid public officials used to guide them in settlement of both civil and criminal cases.<sup>117</sup>

In disputes involving parties with equal bargaining power and with the need for faster settlement of disputes, especially business related, arbitration offers the best vehicle among the ADR mechanisms to facilitate access to justice. Arbitration can be useful in helping parties take control of their disputes and help in saving costs, time and emotional stress that may come with courts. However, arbitration, as practised today still requires courts for enforcement of awards.<sup>118</sup>

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<sup>114</sup>Derman, Bill, *et. al.* (Eds), *Worlds of Human Rights: The Ambiguities of Rights Claiming in Africa*, BRILL, 2013. p. 198. Available at

[https://books.google.co.ke/books?id=lv8qTTsBocC&pg=PA198&lpg=PA198&dq=adr+and+political+empowerment&source=bl&ots=47tIVGJoSS&sig=vrAEzhGPcL8r7UheFyC4GWwRo30&hl=en&sa=X&ei=VhbWVKjqA4fraL3LgrAP&redir\\_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false](https://books.google.co.ke/books?id=lv8qTTsBocC&pg=PA198&lpg=PA198&dq=adr+and+political+empowerment&source=bl&ots=47tIVGJoSS&sig=vrAEzhGPcL8r7UheFyC4GWwRo30&hl=en&sa=X&ei=VhbWVKjqA4fraL3LgrAP&redir_esc=y#v=onepage&q=adr%20and%20political%20empowerment&f=false)  
[Accessed on 27/02/1015].

<sup>115</sup> R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworths, London, 1998), p.123.

<sup>116</sup> Muigua, K., *Settling Disputes Through Arbitration in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012).

<sup>117</sup> Osei-Hwedie, K. and Rankopo, M.J., *Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana*. Available at <http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf>[Accessed on 27/02/1015].

<sup>118</sup> S. 36, Arbitration Act, No. 4 of 1995 (2009), Laws of Kenya. Government Printer, Nairobi.

#### e. Conciliation

Conciliation is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions and pointing out misperceptions. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. Conciliation works well in labour disputes.<sup>119</sup> A conciliator who is more knowledgeable than the parties can help parties achieve their interests by proposing solutions, based on his technical knowledge that the parties may be lacking in. This may actually make the process cheaper by saving the cost of calling any other experts to guide them.

The Constitution provides for *reconciliation* (emphasis added) which is believed to connote a deeper implication.<sup>120</sup> While conciliation is concerned with finding peace and harmony by putting an end to a conflict, reconciliation seeks to reestablish relations. As such, it can be said to be a restorative process which is desirable in building lasting peace and ensuring that competing interests are balanced.

Conciliation and reconciliation can play a significant role in empowering parties to a dispute by giving them substantial control over the process.

## 5.2 Human Rights Protection and Empowerment

The *United Nations Declaration on the Rights of Indigenous Peoples* provides for the indigenous peoples right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>121</sup> Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.<sup>122</sup>

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<sup>119</sup> International Labour Office, “Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives.” *High-Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts*. Nicosia, Cyprus October 18th – 19th, 2007; S. 10 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya.

<sup>120</sup> Comment by Commissioner Otiende Amollo, during the 1st NCMG East African ADR Summit held at the Windsor Golf Hotel, Nairobi on 25th & 26th September, 2014; Art. 159(2) (c).

<sup>121</sup> *Ibid*, Article 5.

<sup>122</sup> Miller, B., “Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement”, *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, Pages 393–406. Available at <http://www.sciencedirect.com/science/article/pii/S0962629894900493> [Accessed on 26/02/2015].



The Constitution of Kenya 2010<sup>123</sup> spells out the Bill of Rights for the Kenyan people and states it is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.<sup>124</sup> It goes further to state that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. As such, the Constitution envisions a country where all the citizens fully enjoy the human rights and are empowered to realise their full potential for their self-development and ultimately the whole country in general.

Indeed, as a way of ensuring that this is achieved, the Constitution outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>125</sup> These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people* (emphasis ours); human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>126</sup>

Further, the Constitution of Kenya tasks the State and every State organ with the duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.<sup>127</sup> It also gives every person 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.<sup>128</sup> The problem however arises where the aggrieved person is not even aware of their rights or the redress available to them.

Courts ought to actively take up their role of upholding and enforcing the Bill of Rights as envisaged in the Constitution.<sup>129</sup> The Court's role is especially important where the application of ADR risks perpetrating violation of human rights such as discrimination.<sup>130</sup>

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<sup>123</sup>Government Printer, Nairobi 2010.

<sup>124</sup> Art. 19(1).

<sup>125</sup> Art. 10(2).

<sup>126</sup> Art. 10(2).

<sup>127</sup> Art. 21(1).

<sup>128</sup> Art. 22(1).

<sup>129</sup> Art. 23.

<sup>130</sup> Art. 159(3)(c)

The Constitution provides for specific application of rights to specific groups of persons. These groups include children, persons with disabilities, youth, minorities and marginalised groups, and the older members of society.<sup>131</sup> The Constitution advocates for pro-poor changes to policy, law and regulation of resource allocation and service delivery in different sectors of the economy through such means as requiring the State to put in place affirmative action programmes designed to ensure that the above-mentioned groups of persons are empowered to participate in the development agenda of the country as well as self actualisation.<sup>132</sup> These measures are also meant to facilitate redress for rights violations and injustices perpetrated against the vulnerable groups in the society.

With all persons enjoying their rights and having the guarantee that they are being treated equally before the law, it is possible to achieve national cohesion, unity, peace and cooperation in development activities to boost the socio-economic status of the citizens. Where human rights are upheld and enforced by the national courts, even the so called marginalised groups in the society will have a sense of self-pride and a sense of belonging and will be able to participate in the governance matters of the country.

### **5.3 Accountability/Public Participation and Empowerment**

One of the national values and principles of governance as outlined in the current Constitution of Kenya 2010 is accountability.<sup>133</sup> It also provides for accountability to the public for decisions and actions as one of guiding principles of leadership and integrity.<sup>134</sup> There have been problems of accountability from the Kenyan leaders, with the local people being sidelined in the political decision making on matters that affect their leaders. There has been inequitable benefit sharing, exclusion of the poor and the marginalised in decision making system and indiscriminate environmental degradation.<sup>135</sup>

The effect of this has been massive poverty on the citizenry since the available resources are not properly utilized to empower the people. Indeed, this informed the formation of the current devolved system of governance in Kenya.<sup>136</sup> Devolution is expected to improve the performance

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<sup>131</sup> Part 3 (Articles 52-57)

<sup>132</sup> Ibid.

<sup>133</sup> Art. 10(2).

<sup>134</sup> Art. 73(2) (d).

<sup>135</sup> Yatich T, et al. 'Policy and institutional context for NRM in Kenya: Challenges and opportunities for Landcare.' *ICRAF Working paper-no. 43*, 2007. Nairobi: World Agro forestry Centre.

<sup>136</sup> Chapter 11, Constitution of Kenya 2010.

of government by making it more accountable and responsive to the needs and aspirations of the Kenyan people and secondly, to facilitate the development and consolidation of participatory democracy.<sup>137</sup> This is because it entails moving away from the state-centric resource control towards approaches in which the local people and authorities play a much more active role in managing the resources around them.<sup>138</sup> Their involvement increases resource user participation in natural resource management decisions and the accruing benefits.<sup>139</sup> Transparency and accountability with regard to government management of natural wealth and the revenues it generates are crucial.<sup>140</sup> People are able to voice their views and engage the authorities through *negotiation* (emphasis ours) especially in relation to their most preferred use of the resources in their area for purposes of coming up with economic investments that will ultimately benefit most people and in a better way. The Government's priority development projects may not always necessarily be the most beneficial to the targeted groups of persons at least in addressing their immediate needs. There arises a need to consider the implications of these projects on the social, cultural, political and economic aspects of the affected communities.

As such, the use of ADR mechanisms such as *negotiation, convening, facilitation or dispute resolution panels* (emphasis ours) can go a long way in enabling the State authorities and the local communities work together in development projects that have the social acceptability in those particular areas. The overall effect of this may be eradication of poverty as a result of the all-round empowerment of people in social, cultural, political and economic aspects of their lives.

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<sup>137</sup>Oloo, O.M., 'Devolving Corruption? Kenya's Transition to Devolution, Experiences and Lessons from the decade of Constituency Development Fund in Kenya'. *Paper Presented at Workshop on Devolution and Local Development in Kenya*, June 26th 2014 Nairobi. p.5.

<sup>138</sup> See generally, Muigua, K. & Kariuki, F., ADR, 'Access to Justice and Development in Kenya', Paper Presented At *Strathmore Annual Law Conference 2014* held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi. Available at <http://caselap.uonbi.ac.ke/sites/default/files/chss/law/law/ADR%20access%20to%20justice%20and%20development%20in%20Kenya%20-%20STRATHMORE%20CONFERENCE%20PRESENTATION.pdf>

<sup>139</sup>Sheona Shackleton, *et al.* 'Devolution and community based natural resource management. *Natural Resource perspectives (ODI)*, Number 76, March 2002. P. 1

<sup>140</sup> Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, op.cit. p.3.

## 5.4 Environmental Justice and Empowerment

Natural resources play a key role in triggering and sustaining conflicts.<sup>141</sup> The Constitution of Kenya 2010 recognises the environment as the heritage of the people of Kenya and it calls for environmental protection for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69 thereof. Article 69(1) obligates the State to *inter alia*: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and encourage public participation in the management, protection and conservation of the environment. These provisions are aimed at achieving environmental justice for the Kenyan people.

Broadly defined, environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making.<sup>142</sup>

It has been suggested that if decision-making regarding use of local resources is owned at the local level, it can potentially equalize leverage or negotiation power and thus resource sharing equalized which would in turn promote poverty reduction.<sup>143</sup> Empowering people is deemed critical for achieving poverty eradication through making them aware of their rights and entitlements, equipped with skills to make informed choice and *negotiate* (emphasis ours) for their rights and have access to resources for their development.<sup>144</sup>

Increasing the local people's access to resources is useful in increasing their control over those resources. The element of control in empowerment is used to refer to participation in collective processes and is the effectiveness or perception of the ability to influence decisions, mobilize resources and solve problems, building an effective personal and group participation.<sup>145</sup>

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<sup>141</sup> Maphosa, S.B., "Natural Resources and Conflict: Unlocking the economic dimension of peace-building in Africa". *Africa Institute of South Africa Policy Brief*, op. cit. p.2.

<sup>142</sup> R. Ako, 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in F.N. Botchway (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

<sup>143</sup> United Nations Department of Economic and Social Affairs, *Online Survey on Promoting Empowerment of People in achieving poverty eradication, social integration and full employment integration and full employment and decent work for all*. p. 6. Available at <http://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf> [Accessed on 05/03/15].

<sup>144</sup> *Ibid*, p. 8.

<sup>145</sup> Aguiar, J., "Empowerment – a relational challenge", *Global Journal of Community Psychology Practice*, Vol. 3 Issue 4 Jan 15, 2013.

Control enables the participation process to be gradual and coherent to people's critical awareness which implies a redistribution of power, so the process can be meaningful and real, and participation can boost an empowerment process.<sup>146</sup>

This comes with increased economic empowerment which in turn affects many other areas. Improved communication and flow of information amongst communities help them gain more control over the economic resources and they contribute to the development agenda in their counties.

The end result of the implementation of the elements of environmental justice would be empowerment of people to enable them utilize the resources at their disposal to better their lives.<sup>147</sup>

## 5.5 Education and Empowerment

Education is a fundamental human right and one that is essential for the exercise of all other human rights since it promotes individual freedom and empowerment and yields important development benefits.<sup>148</sup> Education is important for promoting sustainable development and improving the capacity of people to address environment and development issues.<sup>149</sup> It promotes the realisation of the basic aspects of empowerment namely participation, control and critical awareness.<sup>150</sup>

Environmental education is thus important in empowering people to participate in finding viable solutions for environmental protection and conservation.<sup>151</sup> This education would include traditional knowledge which plays an important role in enabling communities appreciate such concepts as sustainable development in environmental management and conservation as well as

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<sup>146</sup> Ibid.

<sup>147</sup> See generally, Muigua, K., "Utilizing Africa's Natural Resources to Fight Poverty". Available at <http://www.kmco.co.ke/attachments/article/121/Utilizing%20Africa%27s%20Natural%20Resources%20to%20Fight%20Poverty-26th%20March,2014.pdf>

<sup>148</sup> UNESCO, 'The Right to Education', visit <http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/right-to-education/> [Accessed on 28/02/2015].

<sup>149</sup> UNESCO, 1992, para. 36.3, p. 2 (as quoted in Tilbury, D., 'Environmental Education for Sustainability: Defining the New focus of Environmental Education in the 1990's', *Environmental Education Research*, Vol. 1, No. 2, 1995, 195-212 at p.198.

<sup>150</sup> Zimmerman, M.A., "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis," op. cit. p. 52.

<sup>151</sup> Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya". P.6. Available at <http://www.kmco.co.ke/index.php/publications/139-realising-the-right-to-education-for-environmental-and-social-sustainability-in-kenya-by-kariuki-muigua>

using this knowledge in coming up with decisions that work within their socio-cultural contexts.<sup>152</sup>

Advocacy and lobbying by individuals, communities and civil society have been effective tools to push for social justice and equity in Kenya. These tools are so useful in the human rights agenda that the Constitution of Kenya recognises their legality. It guarantees the right of every person, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.<sup>153</sup> Armed with knowledge, it is possible for the local people to engage the relevant stakeholders in governance matters.

## 6. Conclusion

Although the current Constitution of Kenya holds hope for the Kenyan people, there is urgent need for putting in place measures that will facilitate implementation of the constitutional provisions aimed at empowering the Kenyan people. This calls for an integrated approach to deal with the challenges impeding their empowerment. The various ADR mechanisms such as *negotiation, mediation, facilitation* and *convening* can be useful tools for the different sections of society to mount pressure on both the national and devolved Governments for reforms in natural resources management and general governance in the country.

The recommendations herein can go a long way in achieving empowerment for the Kenyan people. Empowerment for the people will translate into better lives, improved economy and generally a better country for everyone. Empowering the Kenyan people through Alternative Dispute Resolution is an ideal that is achievable.

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<sup>152</sup> See Puri S.K., “Integrating Scientific With Indigenous Knowledge: Constructing Knowledge Alliances for Land Management in India.” *MIS Quarterly*, Vol. 31 No. 2, pp. 355-379/June 2007; United Nations University, “Why Traditional Knowledge Holds the Key to Climate Change.” 2011.

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<sup>153</sup> Art. 37.

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