

ADR: The Road to Justice in Kenya

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Abstract

This paper critically examines how the right of access to justice, a constitutionally guaranteed right, can be actualized through Alternative Dispute Resolution (ADR) mechanisms. The author argues that although the right of access to justice is internationally and nationally recognized, the existing legal and institutional framework is not efficient in facilitating the realization of this right by all persons. The author looks at the philosophical underpinnings of justice and a conceptualization of justice, identifying various ingredients of justice that must be realized. The author evaluates litigation as well as ADR mechanisms and their effectiveness in actualizing the enjoyment of these aspects of justice, as conceived in this discourse. The discourse makes a case for ADR mechanisms as a viable option that can be explored as a complementary to litigation to facilitate full enjoyment of all the aspects of justice; Justice must demonstrate fairness, affordability and flexibility. ADR can provide the road to true justice in Kenya.

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1.0 Introduction

This paper critically examines how the right of access to justice, a constitutionally guaranteed right, can be actualized through Alternative Dispute Resolution (ADR) mechanisms. The author argues that although the right of access to justice is internationally and nationally recognized, the existing legal and institutional framework is not efficient in facilitating the realization of this right by all persons. To ease the understanding of this right of access to justice, the author looks at the philosophical underpinnings as put forward by some of the most prominent theorists on justice. The author evaluates litigation as well as ADR mechanisms and their effectiveness in actualizing the constitutionally guaranteed right of every person to access justice, as conceived in this discourse. The discussion revolves around which of the available channels is best suited to facilitate access to justice, while identifying the shortcomings of each of them.

The discourse makes a case for ADR mechanisms as a viable option that can be explored as a complementary to the existing legal frameworks on access to justice.

2.0 Access to Justice

The right of access to justice is one of the internationally acclaimed human rights which is considered to be basic and inviolable. It is guaranteed under various human rights instruments. Justice has been conceptualized as existing in at least four forms namely: Distributive justice (economic justice), which is concerned with fairness in sharing; Procedural justice which entails the principle of fairness in the idea of fair play; Restorative justice (corrective justice); and Retributive justice.¹This arises from the idea that justice does not apply in a blanket form and what is considered as justice to one person may be different from another.

The term 'access to justice' has been widely used to describe a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and

¹ 'Four Types of Justice' Available at http://changingminds.org/explanations/trust/four_justice.htm [8th March, 2014]

without discrimination, fear or favour and a greater role for alternative dispute resolution.² It refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It refers also to a fair and equitable legal framework that protects human rights and ensures delivery of justice.³

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.⁴ 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).⁵

The concept of 'access to justice' involves three key elements namely: Equality of access to legal services, that is, 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; National equity, that 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; and Equality before the law, that is, ensuring that all persons, regardless of race, ethnic origins, gender or disability, are entitled to equal opportunities in all fields, use of community facilities and access to services.⁶

It has further 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.⁷ It is noteworthy that access to justice is an essential component of rule of law.

² M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' A Paper Presented At: The Commonwealth Regional Conference On The Theme: - The 21st Century Lawyer: Present Challenges And Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010, Available at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF0Ao&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-> [Accessed on 20th March, 2014]

³ *Ibid.*

⁴ Global Alliance Against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> [Accessed on 9th March, 2014]

⁵ *Ibid.*

⁶ 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', p. 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 10th March, 2014]

⁷ 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.⁸The United Nations Secretary-General (A/59/2005)⁹ has been quoted as saying: "The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability."¹⁰

A comprehensive 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.¹¹Further, rule of law is said to encompass *inter alia*: a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; and transparent procedures for law enactment and administration.¹²Therefore, without the rule of law, access to justice becomes a mirage. If the rule of law fails to promote the foregoing elements, then access to justice as a right is defeated.

Realization of the right of access to justice requires an effective legal and institutional framework not only internationally but also nationally. 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.¹³

3.0 Philosophical Underpinnings of Justice

To understand the various dimensions of justice, it is important that we look at the philosophical foundations of the concept of justice, as discussed by various theorists.

http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/
[Accessed on 9th March, 2014]

⁸ *Ibid.*

⁹ Report of the Secretary-General (A/59/2005).

¹⁰ *Ibid.*

¹¹ D. 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 [9th March, 2014]

¹² *Ibid.*

¹³ 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 13th March, 2014].

3.1 The Naturalists' school

The naturalists hold that there is a certain order in nature from which humans can derive standards of human conduct through reasoning.¹⁴ Within natural law, humans have equal and unalienable rights which accrue to them by virtue of being human.¹⁵ It has been asserted that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.¹⁶ Traditional natural law theory argues for the existence of a higher law, elaborations of its content, and analyses of what consequences follow from the existence of a higher law (in particular, what response citizens should have to situations where the positive law – the law enacted within particular societies – conflicts with the “higher law”).¹⁷

It has been asserted that “natural law” can be characterized as follows: “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is not a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and

¹⁴ Oxford Companion to the US Supreme Court: *Natural Law*, available at <http://www.answers.com/topic/natural-law> [Accessed on 5th March, 2014] quoting Hadley Arkes, “Natural Law”, *Constitution* 4, no. 1 (Winter 1992): 13–20.

¹⁵ Hutchison, F., *Natural law versus social justice: The permanent conflict of modern democracy*, March 31, 2007, Available at <http://www.renewamerica.com/columns/hutchison/070331> [Accessed on 15th March, 2014] Hutchinson observes that the natural law definition of equality involves a metaphysical equality of humanness, that is, equality in terms of what it means to be human. He observes that though people may differ in many aspects including material possessions, they are all equal in possessing a human nature and are entitled to equal justice under the law and equal moral and legal accountability for their conduct.

¹⁶ Cicero, *De Legibus* bk.1 sec. 16 -17, as quoted in Z. Shah, ‘Shariah Law: Gods’ Law, Moral Law, the Natural Law or Man made Law?’ Available at <http://www.themuslimtimes.org/2012/10/law/shariah-law-gods-law-moral-law-the-natural-law-or-man-made-law> [Accessed on 5th March, 2014].

¹⁷ D. Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory*, p. 211, (2nd Ed., 2010, Blackwell Publishing Ltd), Available at <http://abookmedhin.files.wordpress.com/2010/10/a-companion-to-philosophy-of-law-and-legal-theory.pdf> [[Accessed on 10th March 2014].

denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.¹⁸

Positive law is believed to have derived from natural law, in that natural law dictates what the positive law should be: for example, natural law both requires that there be a prohibition of murder and settles what its content will be. At other times, natural law leaves room for human choice (based on local customs or policy choices).¹⁹

Positive laws that are just “have the power of binding in conscience.” A just law is one that is consistent with the requirements of natural law— that is, it is “ordered to the common good,” the lawgiver has not exceeded its authority, and the law’s burdens are imposed on citizens fairly.²⁰ Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust. He argues that there is no obligation to obey that an unjust law.²¹

In general, the proponents of the existence of natural law—and, by extension, natural law theories—believe that natural law provides an objective reference that allows us to determine whether our decisions and actions are right or wrong.²² The naturalists hold that there is a certain order in nature from which humans can derive standards of human conduct through reasoning.²³ They believe that there are natural law principles which are self-evident and do not require statutory validation. Within natural law, humans have equal and unalienable rights which accrue to them by virtue of being human.²⁴

3.1.1 Natural Law and Access to Justice

It has been asserted that justice and law derive their origin from what nature has given man, from what the human mind embraces, from the function of man and from what serves to unite humanity.²⁵

¹⁸ *Ibid*, p. 212, quoting from Cicero, 1928 , Republic III.xxii.33, at 211

¹⁹ *Ibid*.

²⁰ Aquinas, 1993, Qu. 96, art. 4, corpus, pp. 324 – 26, quoted in Patterson, D. (Ed.), ‘A Companion to Philosophy of Law and Legal Theory’ *Op. cit...*

²¹ Stanford Encyclopedia of Philosophy, ‘Aquinas’ Moral, Political, and Legal Philosophy’, Fri Dec 2, 2005; substantive revision Mon Sep 19, 2011, Available at <http://plato.stanford.edu/entries/aquinas-moral-political/> [20th March, 2014]

²² A.E. Wallin, ‘John Finnis’s Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods’, *Campbell Law Review*, Vol. 35, Iss. 1 [2012], Art. 2 p.12,

Available at <http://law.campbell.edu/lawreview/articles/35-1-59.pdf> [Accessed on 19th March, 2014]

²³ K. Einar Himma, ‘Natural Law’, *Internet Encyclopedias of Philosophy*,

Available at <http://www.iep.utm.edu/natlaw/> [Accessed on 20th March, 2014]

²⁴ *Ibid*.

Natural rights theory is said to play an important role in the promotion of human rights. It identifies with and provides security for human freedom and equality, from which other human rights flow. It also provides properties of security and support for a human rights system, both domestically and internationally.²⁶

Naturalists believe justice is fairness and this principle transcends natural justice and social justice. Natural justice requires adherence to due process. The rules of natural justice form the underlying principles in adjudication of dispute. For example, the right to be heard, rule against bias and justice should not only be done but should be seen to be done.²⁷ It has been observed that natural justice is part of political justice and good governance could be achieved through distributive and corrective justice.²⁸ Justice is believed to be a part of human virtue and the bond which joins human beings together in a state or society.²⁹

Justice has been stated as the first virtue of social institutions, as truth is of systems of thought.³⁰ Justice is said to entail: maximization of liberty and respect of rights such as right to hold property and freedom of speech; equality for all through elimination of inequalities; and doing what is fair. The theory is founded on the naturalist belief that justice is a universal and absolute concept and exists independently from human interventions.³¹ From this universal and absolute justice, persons, societies and institutions derive laws, principles, codes, conventions, charters and religious creeds.³² However, the human stipulations of justice sometimes and often fail to codify the absolute justice.

²⁶ J. J. Shestack, 'The Philosophic Foundations of Human Rights' *Human Rights Quarterly*, Vol. 20, No. 2 (May, 1998), pp. 201-234, p. 208, The Johns Hopkins University Press, Available at <http://www.jstor.org/stable/762764> [Accessed on 18th March, 2014]

²⁷ V. Ramakrishnan, 'Natural Justice' Available at <http://www.answeringlaw.com/php/displayContent.php?linkId=563> [Accessed on 5th March 2014].

²⁸ *Ibid*, Corrective justice is said to be objective as it does justice between parties without reference to the entire society. Distributive justice demands for a society in which goods should be distributed to people on the basis of their claims.

²⁹ D.R. Bhandari, 'Plato's Concept of Justice: An Analysis' *Ancient Philosophy*, Paideia, Available at <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> [Accessed on 5th March 2014].

³⁰ See Alyssa R. Bernstein, 'A Human Right to Democracy? Legitimacy and Intervention' p. 3 Available at <http://www.philosophy.ohiou.edu/PDF/HRtoDemocracy08July20051.pdf> [Accessed on 5th March, 2014]

³¹ Reflected in the Preamble to the UDHR of 1948 which stipulates *inter alia* "whereas 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...."

³² See generally, The International Forum for Social Development, 'Social Justice in an Open World: The Role of the United Nations' ST/ESA/305, United Nations, New York, 2006, Available at <http://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf> [Accessed on 15th March 2014].

It has been asserted that every person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot override.³³ It has also been argued that justice anchors and safeguards rights of a person and the same are not politically or socially granted.³⁴ Thus, there is no political or social justification for the perpetration of injustice on a person.³⁵ A legal system that does not recognize basic principles such as justice is no different from the Nazi law.³⁶

For effective safeguarding of a person's rights, it has been argued that the channels of seeking justice should be readily accessible. The state should not make the courts and other justice institutions bureaucratic and expensive. The legal framework should envisage provisions to facilitate access to justice.³⁷ Courts should be given discretion to ensure justice is served. Where courts are faced with hard cases,³⁸ the judges should look beyond the law on the fundamental principle given the facts.³⁹ In effect, where there is a gap in the law, it is not the end to justice; the courts should resort to underlying principles of justice.⁴⁰

Enforcement of rights is fundamental to their protection. It has been contended that for justice to be served there should be institutions entrusted with the mandate of ensuring that basic rights of citizens are protected.⁴¹ The overall objective of protection of basic rights of the people is the fundamental consideration and that in light of the conception of justice as fairness, the various institutions that a community creates at the constitutional level are chosen in the spirit of perfect rather than procedural justice. They are chosen with eyes on the outcomes. The principles of justice establish the basic priorities and the question to be decided at the constitutional stage is an instrumental one: which scheme of institutions is best suited to protect those liberties?⁴² Essentially, the argument is that an error in procedure should not defeat the

³³ J. Rawls, *A Theory of Justice* (Revised Edn, Oxford: Oxford University Press, 1999), *Op. cit.*... p.1.

³⁴ Preamble to the UDHR of 1948, *Op. cit.*...

³⁵ Rawls bases his argument on social contract theory where a society is made up of individuals who have come together and agreed on minimum rules and standards to regulate their relations. In such a setting there is a collective ultimate goal greatest advantage to all and it is possible to see injustice being perpetrated on a few for the good of the greatest number.

³⁶ *Ibid*, P.3.

³⁷ J. Rawls, *A Theory of Justice*, *op.cit*

³⁸ Defined in Ronald M. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) as cases in which there is no pre-existing rule that governs the situation on which a judge is called upon to adjudicate or where a pre-existing rule would produce a result that seems manifestly

³⁹ R. M. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977)

⁴⁰ See the US cases, *Riggs vs. Plamer* {115 NY 506, 22 NE (1889)} and *Henningsen vs. Bloomfield* {(1960)32 NJ 358.} as examples of hard cases.

⁴¹ J. Rawls, *A Theory of Justice*, *op.cit*

⁴² R. Dworkin, *Justice in Robes*, p.256 quoting John Rawls in *A Theory of Justice op.cit*

fundamental goal of justice. The legal framework of a country should promote both substantive and procedural justice. Indeed, it has been argued that the rule of law should limit the governments from perpetrating injustice on the citizens.⁴³ Further, justice is realized only from good laws.⁴⁴ Unjust laws are doomed to fail. Justice cannot be done until good laws have been made capturing the genuine aspirations of the people.⁴⁵

From the foregoing, it is apparent that naturalists advocate for a just world where everyone is treated equally and they have equal protection by the law. Any law put in place should be for the promotion of the interests of all. If the existing legal framework does not achieve this, then it ought to be replaced or the better option adopted. The Constitution of Kenya 2010 adopts a naturalists' approach by guaranteeing the rights of all members of society, including the right of access to justice by various groups such as persons with disabilities⁴⁶, Minorities and marginalized groups,⁴⁷ amongst others.

3.2 The Positivists' School

Positivists contend *inter alia* that law is man-made and that there is nothing like natural law.⁴⁸ Utilitarians such as Jeremy Bentham and John Stuart Mills assert that justice has been overrated and that it is not as basic and important as thought to be. Justice is a derivative of other more basic notions such as rightness and consequentialism. Utilitarians hold that there is a nexus between justice and the greatest welfare principle such that what is just is that which produces the greatest happiness or welfare for the largest group which can best be achieved through legislature.⁴⁹

⁴³ C. Murphy, 'Lon Fuller and the Moral Value of the Law' (Springer 2005: Law and Philosophy (2005) 24:239-262) p.1. Available at <http://faculty.las.illinois.edu/colleenm/Research/Murphy-%20Fuller%20and%20the%20Rule%20of%20Law.pdf> [Accessed on 18th February 2014].

⁴⁴ Lon Fuller, *Morality of the Law* (new haven: Yale University Press, rev.edn. (1969). Lon Fuller identifies the eight principles of a good legal system as follows: law should be general, specifying rules prohibiting or permitting behavior of certain kinds; law must be widely promulgated or publicly accessible; law should be prospective as opposed to retrospective; law must be clear; law should not be contradictory; law must not ask the impossible; law should be relatively constant; there should be congruency between written laws and how they are enforced.

⁴⁵ J. Finnis also agrees to the importance of good law in pursuit of justice and by saying that good law should be founded on certain basic values and consists of requirements for practical reasonableness.

⁴⁶ Article 54, Constitution of Kenya 2010.

⁴⁷ *Ibid*, Article 56

⁴⁸ See generally Marmor, A., 'Legal Positivism: Still Descriptive And Morally Neutral', Available at <http://lawweb.usc.edu/users/amarmor/documents/DescriptivePositivismfinalms.pdf> [Accessed on 17th March, 2014].

⁴⁹ R. Dworkin, *Justice in Robes*, criticizing the utilitarian concept of justice by Jeremy Bentham. The same belief was held by another utilitarian scholar Oliver Wendell Holmes.

The social contract theorists argue for social justice and hold that there is a social dimension in defining justice.⁵⁰ They maintain that justice is one of terms or rules of the social contract agreed upon through legislative enactments, judicial decisions or social customs.⁵¹ As such, justice is derived from everyone concerned or from what they would agree to under hypothetical situation. It has been averred that principles of justice are found by moral reasoning and actual justice cannot be achieved except within a sovereign state.⁵² Under social contract theory, justice is highly weighed on a fairness scale. When justice is served, the seeker of justice is happy and feels it was fairly done.⁵³ Thus, justice is fairness to everyone.⁵⁴ Modern analytical positivists advance the social contract approach to justice and argue that law and justice is a creation of man through consensus. In “theory of sources’ the argument is that there are no legal principles of law beyond the ‘sources’.⁵⁵

3.2.1 Positive Law and Access to Justice

It has been observed that the term ‘access to justice’ refers to judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue. It is also used to refer to a fair and equitable legal framework that protects human rights and ensures delivery of justice.⁵⁶ Without an effective and working legal framework, access to justice remains a mirage and subsequently, there is no legal protection of human rights. It is noteworthy that Article 48 of the Constitution of Kenya, 2010⁵⁷ places an obligation on the State to ensure access to justice by all persons. They have a positive duty to facilitate this and one can indeed compel them to do so.⁵⁸ Further, Article 47 thereof guarantees the right to fair administrative action while Article 50 guarantees the right of every person to fair hearing.

⁵⁰ These include *inter alia* John Locke, Immanuel Kant and Rousseau.

⁵¹ L. Green, “Legal Positivism” in the Stanford Encyclopedia of Jurisprudence.

⁵² Thomas Hobbes, *Summa Theologica*.

⁵³ “Brain Reacts to Fairness as it Does to Money and Foods” *UCLA Studies*, 2008, available at http://newsroom.ucla.edu/portal/ucla/brain-reacts-to-fairness-as-it-49042.aspx?link_page_rss=49042 [accessed on 17th February, 2014].

⁵⁴ However, there is a division with some saying that justice is created by all humans whereas others say it’s is a command of a dominant class. Closely tied to this theory is the belief that justice varies from one culture to another. Thus, just like culture is dynamic so is the concept of justice.

⁵⁵ H.L.A Hart, *The Concept of the Law* (New York: Oxford University Press 2 edn, 1994)

The ‘sources’ means materials or documents which serve as sources of law. He does not recognize an inherent sense of law.

⁵⁶ M.T. Ladan, ‘Access To Justice As A Human Right Under The Ecowas Community Law’ *Op. cit...* p. 3

⁵⁷ Government Printer, Nairobi

⁵⁸ Under Article 22, Constitution of Kenya, one can institute legal proceedings in Court to compel the State ensure enforcement and protection of rights.

A report on the English civil justice system it was highlighted a number of principles which the justice system should meet in order to ensure access to justice and these are: be just in the result it delivers; fair treatment of litigants; appropriate procedures at a reasonable cost; deal with cases with reasonable speed; understandable to those who use it; be responsive to the needs of those who use it; provide as much certainty as the nature of the particular case allows; and be effective, adequately resourced and organized.⁵⁹ Those principles of access to justice are believed to be of general application to all systems of justice, civil and criminal.⁶⁰ It has been rightly postulated that rule of law abiding societies should guarantee the rights embodied in the Universal Declaration of Human Rights including *inter alia* the right to equal treatment and the absence of discrimination and the right to the due process of the law.⁶¹

To wrap up this section, it is important to underscore that natural law and positive law are complementary when it comes to the field of human rights. This is because while the fundamental rights and freedoms are neither obtained, nor granted by any man-made law (positive law)⁶², they need a system or institutions charged with enforcing them. These rights derive from inherent dignity of human beings and are also inalienable.⁶³ The fundamental human rights and freedoms are not therefore related to the duly adopted legal norms, but adoption of the appropriate norms is postulated to protect human rights and to determine the ways of their realization. Legal norms (human rights law) do not establish fundamental rights and freedoms but only guarantee them.⁶⁴ Whether the two classes of theorists agree with each other or not is not of much importance to this discourse; it matters that the two inform the Constitution of Kenya 2010 and especially the Bill of Rights. We must therefore seek to work with the two without discriminating as any meaningful realization and enjoyment of the right of access to justice for all in Kenya would rely on the two approaches.

⁵⁹ *Access To Justice Final Report*, By The Right Honourable the Lord Woolf, Master of the Rolls, July 1996; Final Report to the Lord Chancellor on the civil justice system in England and Wales, Available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec3a.htm#c9> [Quoted in M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' *Op. cit.* p. 3].

⁶⁰ *Ibid.*

⁶¹ 'Fundamental Rights' The Just World Project, Available at <http://worldjusticeproject.org/factors/fundamental-rights> . [Accessed on 20th March, 2014].

⁶² Universal Declaration of Human Rights, 1948.

⁶³ Article 19, Constitution of Kenya, 2010.

⁶⁴ M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' *Op. cit.* p. 6.

3.3 Emerging Conceptions of Justice

Over time, there have been emerging conceptions of justice which do not subscribe to either the positivists or naturalists schools. These include the realists' school and the feminist's theories. Unlike naturalists and positivists, realists take a different approach to law as they claim to be practical, pragmatic and real.⁶⁵ They claim that they look at law with open eyes. For this reason, realists say law is not rules but law is what judges say it is. Therefore law is not solely based on rules but on judge's mindset which can be influenced by other factors rather than rules. They argue that justice is with the judges and depends on illusive factors such as the mood, mindset or religious views of the judge hence the fallacy that justice depends on what the judge had for breakfast. Critics of the realists say that even the judges are bound by rules and cannot overlook them in decision making and if that happens, the decision can be challenged through appeal.⁶⁶

Feminist scholars attribute justice to the manner in which power is shared between men and women in the society and argue that there is unjust power sharing in that men have been given more power than women.⁶⁷ Feminists contend that a just society is one with equal power relations between men and women. They call this social justice.⁶⁸

Justice thus takes various forms but the underlying factor is that regardless of the various groups at which the same may be directed, justice requires equal treatment of all persons. It should not be dependent on the perceptions of particular judges but should instead be informed by the inherent dignity of all humans.

3.4 Choosing a Conception of Justice

From the foregoing discussion, the naturalists' theory seems better suited in advancing realization of the right of access to justice in society for all as it seeks to treat all people equally regardless of any social stratification; humans have equal and unalienable rights which accrue to them by virtue of being human. Though technically positivist, the Constitution of Kenya 2010

⁶⁵ See J. L. Dodd, et. al., 'The Case for Judicial Appointments' *Judicial Appointments White Paper Task Force*, January 1, 2003, available at <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>. [Accessed on 19th March, 2014]

⁶⁶ *Ibid*

⁶⁷ V. Mahajan, *Women Empowerment and Social Justice: A Socialist Feminist Social Work Approach (2012 International Conference on Humanity, History and Society IPEDR vol.34 (2012, IACSIT Press, Singapore)*. Available at <http://www.ipedr.com/vol34/014-ICHHS2012-H10020.pdf> [accessed on 25th February 2014].

⁶⁸ *Ibid*.

takes the naturalists' position of promoting the rights of all persons. Article 48 of the Constitution of Kenya which guarantees the right of every person to access justice is anchored on this theory of natural law. Indeed, the Constitution goes ahead to specifically entrench the rights of various groups including women, children and persons with disabilities.⁶⁹

From the foregoing discussion on the philosophical foundations of justice, it is important to highlight the major components of justice. Justice must demonstrate fairness, affordability and flexibility. Fairness includes both substantive and procedural fairness. Procedural fairness, also known as rules or principles of natural justice, is said to consist of two elements namely: The right to be heard which includes- the right to know the case against them; the right to know the way in which the issues will be determined; the right to know the allegations in the matter and any other information that will be taken into account; the right of the person against whom the allegations have been made to respond to the allegations; the right to an appeal, and the right to an impartial decision which includes- the right to impartiality in the investigation and the decision making phases; the right to an absence of bias in the decision maker.⁷⁰ Lord Hewart, in the English case of *Rex v Sussex Justices; Ex parte McCarthy* rightly held that "... it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."⁷¹

⁶⁹ See Articles 53-57, Constitution of Kenya.

⁷⁰ *Rex v Sussex Justices; Ex parte McCarthy*, ([1924] 1 KB 256, [1923] All ER Rep 233); See also Articles 47 and 50, Constitution of Kenya, 2010

⁷¹ ([1924] 1 KB 256, [1923] All ER Rep 233) ; In the English case of *Ridge v. Baldwin*, [1964] AC 40, (1964) HL., it was held that: (i) Chief Constable dismissible only for cause prescribed by statute was impliedly entitled to prior notice of the charge against him and a proper opportunity of meeting it before being removed by the local police authority for misconduct, and that (ii) the duty to act in conformity with natural justice could in some situations simply be inferred from a duty to decide 'what the rights of an individual should be'. In the Kenyan case of *David Onyango Oloo Vs The Attorney General* [1987] K.L.R. 711, In this case, the appellant had been convicted by a Magistrate's Court for the offence of Sedition under Section 57(1) and (2) of the Penal Code and sentenced to five years' imprisonment. Under the Prison's Act (Cap 90), S. 46(2), the appellant was entitled to remission. The Commissioner of Prisons later purporting to exercise the powers conferred upon him by Section 46(3A) (a) of the Prison's Act, ordered that the appellant be deprived of all remission granted to him under Section 46(1) of the Act. The appellant had indeed not committed any Prison offence, and he had not been informed what wrong he had done or given an opportunity to state why he should not be deprived of his remission. The High Court nonetheless found in favour of the Respondent hence prompting an appeal to the Court of Appeal. the Court of Appeal Judge, Nyarangi J.A. (as he then was) stated:

"The Commissioner's decision was an administrative act. Nevertheless, rules of natural justice apply to the act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release from prison some 20 months earlier that if he had to serve the full sentence of imprisonment....I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions, which will affect others to act fairly. In this instant case, reasonable people would expect the Commissioner to act fairly in considering whether or not to deprive an inmate of his right of remission earned in accordance with the provisions of the Prisons Act. Reasonable people would expect the Commissioner to act on reports, containing information concerning the appellant. The reports will obviously have been prepared by the Officer – in – charge of the Kamiti Main Prison.

It is worth mentioning that whether or not the power being exercised is statutory, the rules of natural justice must be observed in exercising such power that could affect the rights, interests or legitimate expectations of individuals.⁷² People's perceptions of outcome fairness are influenced by how they felt they were treated during the resolution process.⁷³ It has been asserted that people who believe that they have been treated in a procedurally fair manner are more likely to conclude that the resulting outcome is substantively fair, whether favourable to them or not.⁷⁴ Further, it is argued that people's perceptions of decision maker's procedural fairness affect the respect and loyalty accorded to that decision maker and the institution that sponsored the decision-making process.⁷⁵ Since power is closely associated with the concept of fairness, for any process to satisfy the parties' sense of fairness, it must be deemed to have neutralized any power imbalances; giving the parties a feeling of autonomy over the process or at least being given a chance to fully state their case.⁷⁶

The criteria for determining procedural fairness has been identified as: First, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story (i.e., an opportunity for voice); second, people care about the consideration that they receive from the decision maker, that is, they receive assurance that the decision maker has listened to them and understood and cared about what they had to say; Third, people watch for signs that

..... in order to act fairly, the Commissioner is expected to hear the inmate on whatever reports he has on him. As was said in *Fairmount Vs Environment Sec* [1976] 1 WLR 1255 at p. 1263, For it is to be implied unless the contrary appears, that parliament does not authorize the exercise of powers in breach of the principle of natural justice There is a presumption in the interpretation of statutes that the rules of natural justice will apply and therefore that in applying the material subsection the Commissioner is required to act fairly and so to apply the principles of natural justice."

For a discussion on the recent Kenya's court practice on right to fair hearing, see generally Ongoya Z. Elisha & Wetang'ula S. Emanuel, 'From David Onyango oloo vs Attorney General To Charles Kanyingi Karina Vs The Transport Licensing Board: A Step In The Reverse?'

Available at http://www.kenyalaw.org/Downloads_Other/A%20Step%20in%20Reverse.pdf

⁷²Natural Justice/Procedural Fairness, Fact Series No. 14, p. 1, NSW Ombudsman, August 2003,

Available at

http://www.utas.edu.au/__data/assets/pdf_file/0011/434486/FS_PublicSector_14_Natural_Justice1.pdf

[Accessed on 14th March, 2014]; See also Articles 10, 20 and 159 of the Constitution of Kenya 2010

⁷³ Fairness: It Is All About Perception, PGP Mediation,

Available at <http://www.pgpmediation.com/blog/2013/02/fairness-it-is-all-about-perception.shtml> [Accessed on 14th March, 2014]

⁷⁴N.A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review*, Vol. 87, 2004, pp. 753-767, at pp. 761-762.

Available at <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1196&context=mulr> [Accessed on 14th March, 2014]

⁷⁵ *Ibid.* at p. 762; See also generally Brockner, J., *et.al.*, 'Procedural fairness, outcome favorability, and judgments of an authority's responsibility'. (2007). *Journal of Applied Psychology.* , 92(6), 1657-1671. Research Collection Lee Kong Chian School of Business. Available at: <http://www.rccbs.lk/> [Accessed on 18th March, 2014]

⁷⁶ *Ibid.*

the decision maker is trying to treat them in an even-handed and fair manner; and finally, people value a process that accords them dignity and respect.⁷⁷

The principal constitutional provisions concerning to procedural claims within the administrative process are; Article 47 of the Constitution of Kenya 2010⁷⁸ which provides for an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 48 which obligates the State to ensure access to justice for all persons and, if any fee is required, that it shall be reasonable and shall not impede access to justice; and Article 50(1) thereof which guarantees the right to a fair hearing by stating that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

It is against this background that this paper examines how this right of access to justice, as conceptualized herein, can be actualized for all persons, as access to justice is arguably strongly dependent on the effectiveness of the available legal framework. Indeed, it has been argued that people's evaluations of legal procedures, both formal and informal, are strongly shaped by issues of procedural justice, which issues are also central to the discussion on the rule of law. People evaluate both their own experience and views about the general operation of the legal system against a guide of fair procedures that involves neutrality, transparency, and respect for rights, issues that also form the basis for the rule of law.⁷⁹ Procedural justice in general legal language is used to refer to the fairness of a process by which a decision is reached. In contrast, procedural justice in psychology entails the *subjective* assessments by individuals of the fairness of a decision making process.⁸⁰

The author in this discussion uses access to procedural justice in the context referred to in the psychological definition of the concept. Justice must demonstrate *inter alia* fairness, affordability, and flexibility, rule of law, and equality of opportunity, even-handedness, procedural efficacy, party satisfaction, non-discrimination and human dignity. Any process used

⁷⁷N.A. Welsh, 'Perceptions of Fairness in Negotiation' *Op. cit.* at pp.763-764.; See also generally D. B., Rottman, 'How to Enhance Public Perceptions of the Courts and Increase Community Collaboration' *NACM'S 2010-2015 NATIONAL AGENDA PRIORITIES*, Available at <http://www.proceduralfairness.org/Resources/~media/Microsites/Files/proceduralfairness/Rottman%20from%20Fall%202011%20CourtExpress.aspx> [Accessed on 18th March, 2014].

⁷⁸ Government Printer, Nairobi.

⁷⁹ R. Hollander-Blumoff and T. R. Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', *Journal of Dispute Resolution*, Vol. 2011, Issue 1 [2011], Article. 2, p. 3. Available at: <http://scholarship.law.missouri.edu/jdr/vol2011/iss1/2> [Accessed on 14th March, 2014].

⁸⁰*Ibid* at p. 3.

in facilitating access to justice must be able to rise above parties' power imbalances to ensure that the right of access to justice is enjoyed by all and not dependent on the parties' social status.

4.0 International Legal and Institutional Framework

The concept of 'access to justice' features prominently in the international discourse and framework on human rights. Although there are also other legal instruments guaranteeing the right of access justice by women, children and groups with special needs, the scope of this paper will not highlight all of them but instead will focus on the main legal instruments on human rights that are applicable across the board.

4.1 The Universal Declaration of Human Rights of 1948 (UDHR)

The *Universal Declaration of Human Rights of 1948*(UDHR) was a proclamation for the recognition, protection and promotion of human rights the world all over. In its Preamble, the Declaration captured important concepts that include *inter alia*: recognition of the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world; faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and determination to promote social progress and better standards of life in larger freedom; States co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms; and a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.⁸¹ It is noteworthy that this Declaration recognized and indeed acknowledged that recognition of the equality of all people forms the foundation of justice, freedom and peace in the world. Thus, access to justice is not a mutually exclusive concept but it is one that is greatly dependent on the human rights law framework for its actualization. Article 7 is to the effect that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination. Article 8 stipulates that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 10 further states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights

⁸¹ Preamble.

and obligations and of any criminal charge against him. These provisions are designed to promote the right of all persons to access justice.

4.2 The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Civil and Political Rights*⁸², in its preamble, reiterates the contents of the preamble to the UDHR. This is also captured in the *International Covenant on Economic, Social and Cultural Rights*⁸³, in its preamble.

4.3 United Nations Principles on Access to Legal Aid in Criminal Justice Systems

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*⁸⁴ provides for Principles and Guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.⁸⁵ The right of access to justice is not purely restricted to the criminal justice only and it is important to note that the foregoing UN principles on access to legal aid in the criminal justice system are important in creating avenues that can facilitate access to justice in all areas of law through facilitating access to legal knowledge and information by all. A society with information is empowered and can easily access justice without much of a problem since they are able to understand their rights. Legal aid has been broadly defined to include 'legal advice, assistance and representation for persons suspected, arrested, accused or charged with a criminal offence, detained and imprisoned and for victims and witnesses in the criminal justice process. The definition includes the concept of legal education and mechanisms for alternative dispute resolution and restorative justice processes.'⁸⁶

⁸² Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976, in accordance with Article 49.

⁸³ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27.

⁸⁴ Resolution A/RES/67/187, December 2012.

⁸⁵ *Ibid.*

⁸⁶ 'Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' p. 1, Available at <http://www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidelines-and-Principles-April-20131.pdf> [Accessed on 10th March, 2014].

4.4 The African (Banjul) Charter on Human and Peoples' Rights

The *African (Banjul) Charter on Human and Peoples' Rights*⁸⁷ provides in its preamble that it was adopted in consideration of the Charter of the Organization of African Unity, stipulation that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples".

One of the most outstanding features of all the foregoing legal instruments is their fundamental foundations of creating an environment in which all persons can access justice. However, it is noteworthy that they are just guidelines for the contracting States on putting in place frameworks to facilitate access to justice and other fundamental rights and freedoms.

4.5 The United Nations Charter

To promote realization of access to justice by all in instances of dispute, the UN Charter recognizes various methods that can be used to deal with the same. Article 33 of the Charter of the United Nations⁸⁸ outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.⁸⁹ It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* [Emphasis ours].⁹⁰ The use of ADR mechanisms in disputes between parties be they states or individuals is thus recognized as a viable means that will manage conflict between parties.

5.0 Access to Justice in Kenya

The actualization of the right of access to justice in Kenya relies on several instruments and institutions, including: - Judicial, Constitutional, Legislative, Policy and International human rights amongst others.

⁸⁷ Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

⁸⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI,

⁸⁹ See generally E. R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm>. Accessed on 17 April, 2013; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/e-commerce/ip_survey/chap4.html Accessed on 17th April, 2013

⁹⁰ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Article 22(1) of the constitution of Kenya provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22(3) thereof further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that: formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.⁹¹ Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

Further, Article 48 thereof is to the effect that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.⁹² It echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law*” [Emphasis ours].⁹³ Despite these provisions, access to justice especially through litigation is usually hampered by some challenges as discussed in the next section.

6.0 Challenges facing Actualization of Access to Justice

It has been pointed out that among the most significant obstacles to rule of law are lack of infrastructure (i.e., the presence of legal institutions), high costs of advocacy, illiteracy and/or lack of information.⁹⁴ Any interference with the rule of law (in the context of promoting justice for all) greatly affects people’s ability to access justice.

⁹¹ Article 22(3) (b)(d) *Constitution of Kenya*, 2010.

⁹² *Ibid.*, Article 159(2) (d).

⁹³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁹⁴ Dag Hammarskjöld Foundation, ‘Rule of Law and Equal Access to Justice’, *Op. cit.* p. 1; See also J. B. Ojwang’, “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29.

The challenges facing access to justice encompass: legal, institutional and structural challenges; Institutional and procedural obstacles; Social barriers; and Practical and economic challenges.⁹⁵ Closely related to these are high court fees, geographical location, complexity of rules and procedure and the use of legalese.⁹⁶ Justice has for the longest time been perceived to be a privilege reserved for a select few in society, who had the financial ability to seek the services of the formal institutions of justice. This is because many people have always taken litigation to be the major conflict management channel widely recognized under the laws as a means to accessing justice. The absence of an efficient system to facilitate the rule of law also contributes to this situation as people are usually out of touch with the existing legal and institutional frameworks on access to justice.⁹⁷

Sometimes litigation does not achieve fair administration of justice due to a number of factors as highlighted above. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.⁹⁸ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is often slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.⁹⁹ Litigation should however not be harshly judged as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict,

⁹⁵ Access to Justice–Concept Note for Half Day General Discussion Endorsed by the Committee on the Elimination of Discrimination against Women at its 53rd Session, p. 9, Available at <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/ConceptNoteAccessToJustice.pdf>

⁹⁶ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

⁹⁷ See S. J. Toope, "Legal and Judicial Reform through Development Assistance: Some Lessons", *McGill Law Journal / Revue De Droit De McGill*, [Vol. 48, 2003] , pp. 358-412, p. 358, Available at

http://pdf.aminer.org/000/266/603/bringing_it_support_for_legislative_drafting_one_step_further_from.pdf [Accessed on 21st March, 2014]

⁹⁸ J.B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit.

⁹⁹ *Ibid*, p. 7; See also P.K. Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> [Accessed on 7th March, 2014].

uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).¹⁰⁰ Litigation can also be useful in advancing the human rights including the right of access to justice.¹⁰¹ It is noteworthy that the civil Rights Movement would not have prospered without recourse to litigation. Further, the outcome of ADR mechanisms such as arbitral awards relies on the court system for enforcement. However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not necessarily a process of solving problems; it is a process of winning arguments.¹⁰²

7.0 Towards Actualization of the Right of Access to Justice

For the constitutional right of access to justice to be actualized, 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].¹⁰³ 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.¹⁰⁴

In a report on access to justice in Malawi, the authors appropriately noted that '*access to justice* does not mean merely access to the institutions, but *also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives*' (emphasis ours).¹⁰⁵ If the foregoing is anything to go by, then litigation cannot score highly especially in terms of access to fair procedures and affordability.

¹⁰⁰ Chartered Institute of Arbitrators, Litigation: Dispute Resolution, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> [Accessed on 7th March, 2014]

¹⁰¹ See Articles 22, 70, Constitution of Kenya 2010.; See also generally, O. Fiss, "Against Settlement" 93 *Yale Law Journal* 1073 (1984). Fiss argues that litigation is the most viable channel for fighting for civil rights.; See also Moffitt, Michael L., Three Things to Be Against ('Settlement' Not Included) - A Response to Owen Fiss (May 30, 2009). *Fordham Law Review*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1412282> [Accessed on 18th March, 2014]

¹⁰² Advantages & Disadvantages of Traditional Adversarial Litigation, Available at <http://www.beckerlegallgroup.com/a-d-traditional-litigation> [Accessed on 7th March, 2014]

¹⁰³ See M. Michelle. "*Principles of Justice and Fairness, Beyond Intractability*, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003)

¹⁰⁴ K. Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6

¹⁰⁵ Wilfried Schärf, et al., *Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums*, p. 4, Available at <http://www.gsdrc.org/docs/open/SSAJ99.pdf> [Accessed on 08th March, 2014]

On the contrary, ADR mechanisms can be flexible, cost-effective, expeditious; may 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.¹⁰⁶ The net benefit to the court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.¹⁰⁷ Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.¹⁰⁸

Courts have been depicted as being capable of delivering justice according to law and not what may be considered to be fair by the judge or any other person, especially if such conception would depart from statutes or any other established legal principles.¹⁰⁹ It has been observed that the perceived legitimacy of law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. Further, the idea of justice for most people is said to be larger than "justice according to law"-going beyond allocation of rights, duties, liabilities and punishments and the award of legal remedies.¹¹⁰ It is remarkable that litigation aims at promoting and achieving all these for the people but justice requires more than that in that it also entails a psychological aspect that needs to be addressed for full satisfaction.

To ensure that the constitutionally guaranteed right of access to justice is fully achieved and enjoyed by all, it is therefore important to explore the potential and the extent to which ADR mechanisms serve this purpose, as most of them have been applied to achieve even the psychological aspect of justice.

¹⁰⁶ See S.S. Khadka, *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> [Accessed on 08th March, 2014]

¹⁰⁷ *Ibid*

¹⁰⁸ A. Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?*, p. 1, Available at <http://www.adrbarbados.org/docs/ADR%Nicholls> [Accessed on 08th March, 2014]

¹⁰⁹ French, R., "Justice in the Eye of the Beholder" in 'The Commonwealth Lawyer' *Journal of the Commonwealth Lawyer's Association*, Vol. 22, No.3, December, 2013, pp. 17-20, at p. 19

¹¹⁰ *Ibid*, pp. 19-20

7.1 Actualizing Access to Justice through ADR

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.¹¹¹ Generally, proponents of ADR submit that its methods address many systemic problems in litigation and offer several benefits not available through traditional litigation. ADR could relieve congested court dockets while also offering expedited resolution to parties. Second, ADR techniques such as negotiation, mediation and party conciliation could give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation. ADR mechanisms are likely and do often achieve party satisfaction in terms facilitating achievement of psychologically satisfying outcomes. By offering the opportunity for consensus-based resolution, ADR also is arguably better suited than litigation to preserving long-term relationships and solving community-based disputes.¹¹² Most of the ADR mechanisms offer resolution of conflicts as against settlement, with the exception of a few such as arbitration. It is noteworthy that although ADR generally promotes access to justice, not all of the mechanisms achieve this by resolution; others are dispute settlement, much the same way as litigation.

7.1.1 Settlement versus Resolution

Settlement is said to be an agreement over the issues(s) of the conflict which often involves a compromise.¹¹³ A settlement process “seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute”. Settlement is said to be power-based in that the outcome majorly relies on the power that is possessed by the parties to the conflict. Due to the changing nature of power the process becomes a contest of whose power will be dominant. Parties have to come to accommodations which they are forced to live with due to the

¹¹¹ K. Muigua, “*Alternative Dispute Resolution and Article 159 of the Constitution of Kenya*” Op cit. p. 2; See also *Alternative Dispute Resolution*,

Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution [accessed on 07th March, 2014]

¹¹²B. Ray, ‘Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases’ *Utah Law Review*, (2009) [NO. 3] PP. 801-802.

Available at <http://epubs.utah.edu/index.php/ulr/article/viewFile/244/216> [Accessed on 12th March, 2014]

¹¹³ B. Bloomfield, “Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland”, *Journal of Peace Research*, Vol. 32, No. 2(May, 1995), P.152.

anarchical nature of society and the role of power in the relationship. Basically, power is the defining factor for both the process and the outcome.¹¹⁴

Settlement may be an effective immediate solution to a violent situation but will not thereof address the factors that instigated the conflict. The unaddressed underlying issues can later flare up when new issues or renewed dissatisfaction over old issues or the third party's guarantee runs out.¹¹⁵ Settlement practices miss the whole point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Thus, the real causes of conflict remain unaddressed with possibilities of erupting in future.¹¹⁶ Dispute settlement mechanisms remain highly coercive allowing parties limited or no autonomy. To this end, settlement mechanisms may not be very effective in facilitating satisfactory access to justice (which relies more on people's perceptions, personal satisfaction and emotions). The main dispute settlement mechanisms are litigation or judicial settlement and arbitration.¹¹⁷

Conflict resolution refers to a process where the outcome is based on mutual problem-sharing with the conflicting parties cooperating in order to redefine their conflict and their relationship.¹¹⁸ Resolution is non-power based and non-coercive thus enabling it achieve mutual satisfaction of needs without relying on the parties' power.¹¹⁹ This outcome is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and it is also not zero-sum since gain by one party does not mean loss by the other; each party's needs are fulfilled.¹²⁰ Such needs cannot be bargained or fulfilled through coercion and power. These advantages make resolution potentially superior to settlement. Conflict resolution mechanisms include negotiation, mediation in the political process and problem solving facilitation.

¹¹⁴C. Baylis and R. Carroll, "Power Issues in Mediation", *ADR Bulletin*, Vol. 1, No.8 [2005], Art.1, p. 135

¹¹⁵ D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op.cit* p. 153

¹¹⁶A.B. Fetherston, "From Conflict Resolution to Transformative Peace building: Reflections from Croatia", *Centre for Conflict Resolution-Department of Peace Studies: Working Paper 4* (April, 2000), pp. 6-8; See also generally K. Muigua, "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, University of Nairobi.

¹¹⁷ See generally M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, *Op. cit.*

¹¹⁸ D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op.cit.* p. 153.

¹¹⁹ K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> [Accessed on 08th March, 2014];

¹²⁰ See generally M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, *Op. cit.*...

It is therefore arguable that resolution mechanisms have better chances of achieving parties' satisfaction when compared to settlement mechanisms. However, each of the two approaches has their own distinct advantages thus making them complementary of each other. The argument thus is not for the exclusive application of one but rather the synergetic application of the two approaches. Each of them has success stories where they have been effectively applied to achieve the desired outcome. For realisation of justice, there is need to ensure that the two are engaged effectively where applicable.

7.1.2 Access to Justice through Negotiation

Negotiation is a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.¹²¹The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation thus allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR posits four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.¹²²As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.

It has been said that negotiators rely upon their perceptions of distributive and procedural fairness in making offers and demands, reacting to the offers and demands of others,

¹²¹ Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm [Accessed on 08th March, 2014]; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. p. 2

¹²² R. Fisher and W. Ury, *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 p. 43

and deciding whether to reach an agreement or end negotiations.¹²³The argument is that if no relationship exists between negotiators, self-interest will guide their choice of the appropriate allocation principle to use in negotiation. A negotiator who does not expect future interactions with the other person will use whatever principle-need, generosity, equality, or equity-produces the better result for them. Relationships apparently matter in negotiators' definitions of fair outcomes.¹²⁴

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.¹²⁵ Negotiation can be interest-based, rights-based or power-based and each can result in different outcomes.¹²⁶ However, the most common form of negotiation depends upon successfully taking and the giving up a sequence of positions.¹²⁷

It has been noted that positional bargaining is not the best form of negotiation due to a number of reasons namely: arguing over positions results in unwise agreements because when negotiators bargain over positions, they tend to lock themselves into those positions; argument over positions is inefficient as it creates incentives that stall settlement, with parties stubbornly holding onto their extreme opening positions; it endangers an ongoing relationship-anger and resentment often result as one side sees itself bending to the rigid will of the other while its own legitimate concerns go unaddressed; and where there are many parties involved, positional bargaining leads to the formation of coalition among parties whose shared interests are often more symbolic than substantive.¹²⁸

Interest-based negotiation shifts the focus of the discussion from positions to interests, raising a discussion based on a range of possibilities and creative options, for the parties to

¹²³N. A. Welsh, 'Perceptions of Fairness in Negotiation', *Marquette Law Review*, Vol. 87, pp. 753-767, *Op. cit...* at p. 753.

¹²⁴ *Ibid*, p. 756.

¹²⁵ Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, Available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> [Accessed on 08th March, 2014]; See also K. Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, p. 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

¹²⁶B. Ury, B. & Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict" *Program on Negotiation at Harvard Law School Cambridge, Massachusetts* 1993, available at www.williamury.com, [Accessed on 08th March, 2014]

¹²⁷R. Fisher and W. Ury, *Getting to Yes-Negotiating Agreement Without Giving in*, *Op cit.*, p. 4.

¹²⁸ *Ibid*, pp. 4-8

arrive at an agreement that will satisfy the needs and interests of the parties.¹²⁹ This way, both parties do not feel discriminated in their efforts for the realization of the right of access to justice.

There can be either soft bargaining or hard bargaining. Soft bargaining as a negotiation strategy primarily emphasizes on the preservation of friendly relationships with the other side. However, while the strategy is likely to reduce the level of conflict, it can also increase the risk that one party would be exploited by the other, who uses hard bargaining techniques.¹³⁰ Hard bargaining on the other hand emphasizes results over relationships with insistence by hard bargainers being that their demands be completely agreed to and accepted before any agreement is reached at. This approach avoids the need to make concessions, reduces the likelihood of successful negotiation and harms the relationship with the other side.¹³¹

It is noteworthy that the most effective form of negotiation is principled negotiation. This form of negotiation is pegged on some basic principles, touching on the point of focus of the parties as well as the people's attitude and behaviour.¹³²

People tend to become personally involved with issues and with their own side's positions and thus they take responses to those issues and positions as personal attacks. This arises from differences in perception, emotions and communication. Thus, separating people from the issues allows the parties to address the issues without damaging their relationship and also helps them to get a clearer view of the substantive problem.¹³³ This way, perceptions of actualized access to justice becomes a reality to the parties, who walk away satisfied with the outcome.

It has been postulated that when a problem is defined in terms of the parties' underlying interests it is often possible to find a solution which satisfies both parties' interests. Indeed, it has

¹²⁹ UNESCO-IHP, "Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building" Abridged version of Yona Shamir, *Alternative Dispute Resolution Approaches and their Application*, Accessible at <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> [Accessed on 9th March, 2014]

¹³⁰ Conflict Research Consortium, University of Colorado, available at http://www.colorado.edu/conflict/peace/treating_core.htm [Accessed on 15th March, 2014]

¹³¹ See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' Available at http://shodhganga.inflibnet.ac.in/bitstream/10603/10373/11/11_chapter%205.pdf [Accessed on 15th March, 2014]

¹³² See Conflict Research Consortium, "Principled Negotiation at Camp David" as described in *Getting to Yes*, Roger Fisher and William Ury. New York: Penguin Books, 1981; See also generally R. N. Cutts, 'Conflict Management:

Using Principled Negotiation to Resolve Workplace Issues',

Available at http://nl.walterkaitz.org/rnicolecutts_principlednegotiation.pdf[Accessed on 19th March, 2014]

Available at <http://www.colorado.edu/conflict/peace/treatment/pricneg.htm>[Accessed on 15th March, 2014]

¹³³ R. Fisher. and W. Ury, *Getting to Yes-Negotiating Agreement Without Giving in*, Op cit., pp. 10-11

been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.¹³⁴

Parties may generate a number of options before settling on an agreement. However, there exist obstructions to this: parties may decide to take hard-line positions without the willingness to consider alternatives; parties may be intent on narrowing their options to find the single answer; parties may define the problem in win-lose terms, assuming that the only options are for one side to win and the other to lose; or a party may decide that it is up to the other side to come up with a solution to the problem.¹³⁵ The assertion is that by focusing on criteria rather than what the parties are willing or unwilling to do, neither party needs to give in to the other; both can defer to a fair solution.¹³⁶

In conclusion, negotiation can be used in facilitating access to justice. What needs to be done is ensuring that from the start, parties ought identify their interests and decide on the best way to reach a consensus.¹³⁷ The advantages therein defeat the few disadvantages of power imbalance in some approaches to negotiation, as already discussed. However, where parties in a negotiation hit a deadlock in their talks, a third party can be called in to help them continue negotiating. This process now changes to what is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.¹³⁸ It is also a mechanism worth exploring as it has been successfully used to achieve the right of access to justice for parties.

¹³⁴ See Chapter 2 'Strategy and Tactics of Distributive Bargaining' p. 23, Available at http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf [Accessed on 19th March, 2014]

¹³⁵ *Ibid*, pp. 24-25

¹³⁶ See generally, Dawson, R., '5 Basic Principles for Better Negotiating Skills' Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> [Accessed on 19th March, 2014]

¹³⁷ See generally, F.A. Andrew, 'Combating Adversarialism In Negotiation: An Evolution Towards More Therapeutic Approaches' *Nujs Law Review* 4 *Nujs L. Rev.* (July - September, 2011) pp. 347-370, Available at http://www.nujslawreview.org/pdf/articles/2011_3/andrew-f-amendola.pdf [Accessed on 19th March, 2014].

¹³⁸ M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

7.1.3 Mediation and Justice

Mediation is defined as the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.¹³⁹ Within this definition mediators may play a number of different roles, and may enter conflicts at different levels of development or intensity.¹⁴⁰ Mediation can be classified into two forms namely: Mediation in the political process and mediation in the legal process.

(a) Mediation in the political 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. With these perceived advantages, the process is more likely to meet each party's expectations as to achievement of justice through a procedurally and substantively fair process of justice.¹⁴¹

(b) Mediation in the legal process

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.¹⁴²

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

¹³⁹ C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996), p. 14.

¹⁴⁰ C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at <http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ> [Accessed on 08th March, 2014].

¹⁴¹ See generally K. Muigua, "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished, op.cit.*

¹⁴² *Ibid*, Chapter 4; See also sec.59A,B,C& D of the Civil Procedure Act on Court annexed mediation in Kenya.

their relationship.¹⁴³In 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 will enable them to meet shared contingencies without the aid of formal prescriptions laid down in advance.¹⁴⁴

Rules have been defined as requiring, prohibiting or attaching specific consequences to acts and place them in the realm of adjudication. By contrast, mediation is seen as one concerned primarily with persons and relationships, and it deals with precepts eliciting dispositions of the person, including a willingness to respond to somewhat shifting and indefinite 'role expectations. 'Mediation is conceived as one that has no role to play in the interpretation and enforcement of laws; that is the role of courts and the function of adjudication. Conflict resolution processes, in their focus on people and relationships, do not require impersonal, act-prescribing rules" and therefore are particularly well-suited for dealing with the kinds of "shifting contingencies" inherent in ongoing and complex relationships.¹⁴⁵

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 actualization of the right of access to justice.¹⁴⁶

One criticism however is that in mediation, power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his or her concerns or interests at the expense of the other.¹⁴⁷Nevertheless, in any type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an

¹⁴³ L.L. Fuller, *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 Socioeconomic Rights Cases' *Utah Law Review*, (2009) [NO. 3] *Op. cit.*. pp. 802-803].

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, p. 803.

¹⁴⁶ See also generally K. Muigua, "Resolving Environmental Conflicts Through Mediation in Kenya" Ph.D Thesis, 2011, *Unpublished*, op.cit.

¹⁴⁷ See generally, O. Fiss, "Against Settlement", *op.cit*; See also Kariuki Muigua, "Court Annexed ADR in the Kenyan Context" p. 5. Available at <http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf>[Accessed on 8th March, 2014]

exercise of that power to the other party's disadvantage.¹⁴⁸ Another weakness of mediation is that it is non-binding. It is thus possible for a party to go into mediation to buy time or to fish for more information.

Thus, mediation, especially mediation in the political process indeed broadens access to justice for parties, when effectively practised.

7.1.4 Justice via Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. 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 works best in trade disputes. For instance, Section 10 of *the Labour Relations Act*,¹⁴⁹ provides that if there is a dispute about the interpretation or application of any provision of Part II of the Act dealing with freedom of association, any party to the dispute may refer the dispute in writing: to the Minister to appoint a conciliator as specified in Part VIII of the Act; or if the dispute is not resolved at conciliation, to the Industrial Court for adjudication.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.¹⁵⁰ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.¹⁵¹

¹⁴⁸S.H. Abadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, p. 3, *Effectius Newsletter*, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at http://effectius.com/yahoo_site_admin/assets/docs/Effectius_TheRoleofdisputeresolutionmechanisms [Accessed on 8th March, 2014].

¹⁴⁹No. 14 of 2007, Laws of Kenya

¹⁵⁰Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. p. 49

¹⁵¹Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html [Accessed on 08th March, 2014].

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.

7.1.5 Seeking Justice through Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

The *Arbitration Act*, 1995 defines arbitration to mean —any arbitration whether or not administered by a permanent arbitral institution. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.¹⁵²

Lord Justice Raymond defined who is an arbitrator some 250 years ago and which definition is still considered valid today, in the following terms:

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.¹⁵³

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).

Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the Arbitration Rules, the *Civil Procedure Act* (Cap. 21) and the *Civil Procedure Rules* 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the *Civil Procedure Rules*, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court

¹⁵²F. Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

¹⁵³B. Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*. (Sweet & Maxwell, London, 2003) p. 21.

for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

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.

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.

7.1.6 Justice through Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.¹⁵⁴ This is likely to make the process faster and cheaper for them thus facilitating access to justice.

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.¹⁵⁵

7.1.7The Arb-Med Justice Option

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a

¹⁵⁴Mediation-Arbitration (Med-Arb), Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> [Accessed on 08th March, 2014]

¹⁵⁵ E. Sussman, Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, p. 73, Available at <http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf> [Accessed on 08th March, 2014].

person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *GaoHai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 (“Keeneye”), the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would “cause a fair-minded observer to apprehend a real risk of bias”.¹⁵⁶ Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.¹⁵⁷

Arb-med can be used to achieve justice where it emerges that the relationship between the parties needs to be preserved and that there are underlying issues that need to be addressed before any acceptable outcome can be achieved. Mediation, a resolution mechanism is better suited to achieve this as opposed to arbitration, a settlement process.

7.1.8 Adjudication and expedited Justice

Adjudication is defined under the Chartered Institute of Arbitrators (CIArb) (K) *Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules. Due to the limited time frames, adjudication can be an effective tool of actualizing access to justice for disputants who are in need of addressing the dispute in the shortest time possible and resuming business to mitigate any economic or business losses.

¹⁵⁶ M. Goodrich, Arb-med: ideal solution or dangerous heresy? P. 1, March 2012, Available at <http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation> [Accessed on 08th March, 2014]

¹⁵⁷ *Ibid*

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and that it does not enhance relationships between the parties.¹⁵⁸

7.1.9 Traditional Justice Systems

It is noteworthy that there is an overlap between the forms of ADR mechanisms and traditional justice systems. The Kenyan communities and Africa in general, have engaged in informal negotiation and mediation since time immemorial in the management of conflicts. 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’.¹⁵⁹

Their inclusion in the Constitution of Kenya 2010 is a restatement of these traditional mechanisms.¹⁶⁰ However, before their application, they need to be checked against the Bill of Rights to ensure that they are used in a way that promotes access to justice rather than defeating the same as this would render them repugnant to justice or morality.¹⁶¹ Effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for all including those communities whose areas of living poses a challenge to accessing courts of law, and whose conflicts may pose challenges to the court in addressing them.

However, the scope of application of these traditional mechanisms, especially in the area of criminal law is not yet settled. For instance, in the case of *Republic v. Mohamed Abdow Mohamed*¹⁶² the accused was charged with murder but pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP) requesting to have the murder charge withdrawn on grounds of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the State on behalf of the DPP made an oral application to have the matter marked

¹⁵⁸ K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at P. 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation_ [Accessed on 08th March, 2014]

¹⁵⁹ K. Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter two, pp. 20-37; See also generally, Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu*, (Vintage Books, New York, 1965)

¹⁶⁰ Articles 159 (2) (3) and 189(4), Constitution of Kenya, *op.cit*

¹⁶¹ *Ibid.*

¹⁶² Criminal Case No. 86 of 2011 (May,2013), High Court at Nairobi

as settled, contending that the parties had submitted themselves to traditional and Islamic laws which provide as avenue for reconciliation. He cited Article 159 (1) of the Constitution which allowed the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The issues were whether a murder charge can be withdrawn on account of a settlement reached between the families of an accused and the deceased; and whether alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 extended to criminal matters. It was held that under article 157 of the Constitution of Kenya, 2010, the Director of Public Prosecutions is mandated to exercise state powers of prosecution and may discontinue at any stage criminal proceedings against any person; and that the ends of justice would be met by allowing rather than disallowing the application. The Application was thus allowed and the accused person discharged.

This case has however drawn criticism and approval in equal measure and thus the legal position is far from settled.¹⁶³ The debate on the applicability of ADR mechanisms in criminal justice is a worldwide one. For instance, it has been observed that criminal justice may either be retributive or restorative. It has been argued that while retributive theory holds that the imposition of some form of pain will vindicate, most frequently deprivation of liberty and even loss of life in some cases, restorative theory argues that “what truly vindicates is acknowledgement of victims’ harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behavior.”¹⁶⁴ Further, the conventional criminal justice system focuses upon three questions namely: What laws have been broken?; Who did it?; and what do they deserve? From a restorative justice perspective, it is said that an entirely different set of questions are asked: Who has been hurt?; What are their needs?; and Whose obligations are these?¹⁶⁵

The answers to the foregoing questions may have an impact on how the whole process is handled and further the decision on which one to use depends on such factors as other laws that may only provide for retributive justice in some of the criminal cases while at the same time

¹⁶³ See P. Bowry, ‘High Court opens Pandora’s Box on criminality’, *Standard Newspaper*, Wednesday, June 12th 2013, Available at <http://www.standardmedia.co.ke/?articleID=2000085732> [Accessed on 20th March, 2014]

¹⁶⁴ M. S. Umbreit, *et.al.*, ‘Restorative Justice In The Twenty first Century: A Social Movement Full Of Opportunities And Pitfalls’ *Marquette Law Review*, [89:251, 2005] pp. 251-304, p. 257, Available at http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/Marquette%20RJ%2021st%20Century%20Social%20Movement%20Full%20of%20Pitfalls%20and%20%20Opportunities.pdf [Accessed on 21st March, 2014]

¹⁶⁵ *Ibid*, p. 258

limiting use of restorative justice. Whichever the case, what remains clear is that restorative justice in criminal matters considered serious, which may involve use of ADR more than use of litigation may have to wait a little longer.

8.0 The Road to Justice

So far, the discussion in this paper has traced the philosophical foundations of access to justice, identifying the major attributes of justice in an attempt to conceptualize the real meaning of access to justice. One thing that emerges is that access to justice as a right is perceived in diverse ways by the persons concerned. This depends on the unique circumstances of the case and what the parties in that case really need to see addressed for them to feel satisfied. It therefore follows that one general approach to addressing these needs, like litigation only, can turn out to be very ineffective and often unsuccessful in addressing the unique needs of justice of each party. While litigation would be useful in addressing some of the needs, especially if a party was seeking retributive justice, it may fail to address the needs of a party who were more after achieving restorative justice rather retributive justice depending on the nature of the dispute in question.

It is against this background that the discourse herein now focuses on how true or real justice, as perceived by the parties can be achieved through diversification of the means used to address the dispute.

It has been argued by various scholars that there may be many roads to justice and that different justice needs may be addressed through different institutional setups. Further, an Equal Access to Justice (EA2J) intervention may be directed at customary, traditional or religious justice systems provided that the intervention's primary purposes to increase their compliance with international human rights norms and to reaffirm through dialogue or others means that the state is ultimately responsible to ensure that they conform to such norms.¹⁶⁶

The UN Secretary-General has indicated that justice is: "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional

¹⁶⁶H. Alffram, 'Equal Access to Justice A Mapping of Experiences', sida, April 2011, Available at <http://www.sida.se/Publications/Import/pdf/sv/Equal-Access-to-Justice-A-Mapping-of-Experiences.pdf> [Accessed on 9th March, 2014]

mechanisms.” Indeed, most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.

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.¹⁶⁷ Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that ‘Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues’.¹⁶⁸

The Constitution of Kenya 2010, under article 159, provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.¹⁶⁹

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 one author notes ‘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. Again, as already discussed elsewhere justice is a multi-faceted concept that requires the satisfaction of various concerns for any process to be deemed effective. Courts cannot address some of the ingredients of justice as conceived in this paper. For instance, courts will not address the real problem or allow parties to air their genuine expectations especially when they are not legally conceivable. Courts will seek to settle the disputes by striking a balance between the conflicting interests. ADR on the other hand seeks to achieve more than that; some of the mechanisms seek to come up with a mutually satisfying outcome. In fact, ADR has been successfully employed in addressing matrimonial causes, inter-community conflicts, business related disputes, amongst others. Indeed, the *Civil*

¹⁶⁷ K. Mkangi, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu,

¹⁶⁸ K. E. Ikenga Oraegbunam, “The Principles and Practice of Justice in Traditional Igbo Jurisprudence,” *African Journal Online*, p. 53, Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> [Accessed on 08th March, 2014]; See also generally M. Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), *op.cit* 40-42.

¹⁶⁹ Article 159(3).

procedure Act and *Rules*, which govern the conduct of litigation in the Kenyan courts have provisions for encouraging the use of mediation and other ADR in place of trials before a judge.¹⁷⁰ This is just one of the many laws in Kenya that promotes the use of ADR mechanisms in the formal sector.¹⁷¹ However, it is important to keep in mind the possible shortcomings of mediation in the legal process, as already discussed elsewhere in this paper.

8.1 Addressing Root Causes of Conflict

ADR mechanisms such as negotiation and mediation seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement. 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.¹⁷² Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.¹⁷³ It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.¹⁷⁴

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.¹⁷⁵ Examples of such mechanisms are litigation and

¹⁷⁰ See sec. 59 of the *Civil Procedure Act*, Cap 21 and Order 46, rule 20 of the Civil Procedure Rules, 2010

¹⁷¹ *The Environment and Land Court Act*, 2011 provides under section 20 thereof that the court may adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional dispute resolution mechanisms in accordance with Article 159(2)(c); *The Industrial Court Act*, 2011, section 15(3)(4), gives the Court to stay proceedings and refer the matter to conciliation, mediation or arbitration. It can adopt any of the ADR mechanisms in accordance with Article 159 of the Constitution; *Intergovernmental Relations Act*, section 34; the *Land Act* 2012 under section 4 encourages communities to settle land disputes through recognised local community initiatives and using ADR mechanisms (See also Articles 60 & 67 of *the Constitution of Kenya*, 2010); Sec.17(3) of the *Elections Act* 2011 establishes Independent Electoral and Boundaries Commission (IEBC) Peace Committees which are to use mediation in management of disputes between political parties; *The Supreme Court Rules* 2011 empowers the Supreme Court to refer any matter for hearing and determination by ADR mechanisms.

¹⁷² *Ibid*, p. 80

¹⁷³ See generally Chapter-V, 'Non Adjudicatory Methods of Alternative Disputes Resolution' *op.cit* p. 165

¹⁷⁴ D. Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> [Accessed on 8th March, 2014]; See also generally M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), *op.cit* pp.36-41

¹⁷⁵ K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op.cit.*, P. 81

arbitration. 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 resolve conflicts where relationships matter.

If the parties are to express real satisfaction in their quest for true justice needs in the conflict management mechanism used, then there must be a paradigm shift from focusing on the artificial issues of the dispute to seeking to deal with the real problem so as to avoid future problems, depending on the nature of the dispute and the nature of the parties' relationship. Further, some conflicts would require resolution as against settlement especially if relationships are at stake. Any approach settled for should be chosen on the basis of the actual needs of the parties in regard to justice. This way, the particular method would achieve its chief objective of promoting a just society, where access to justice does not rely on economic or political factors but the real needs of the persons concerned.

8.2 Resolving Conflicts

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 outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.¹⁷⁶ A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.¹⁷⁷ Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.¹⁷⁸ Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.¹⁷⁹

¹⁷⁶ K. Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, *op.cit*; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, *op.cit.* p. 7

¹⁷⁷ M. Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), *op.cit* p. 42; See generally D. Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op.cit.*, p. 153.

¹⁷⁸ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

¹⁷⁹ *Ibid*

Furthermore, resolution is arguably more effective in facilitating realization of justice than settlement. This is tied to the fact that in resolution focus is more on addressing the problem than the power equality or otherwise. This ensures that a party's guarantee to getting justice is not tied to their bargaining power. ADR mechanisms that are directed at conflict resolution should therefore be encouraged. The major selling point of the ADR approaches of conflict management is their attributes of flexibility, low cost, lack of complex procedures, mutual problem solving, salvaging relationships and their familiarity to the common people. ADR is also arguably more 'appropriate' rather than alternative in the management of some of the everyday disputes among the people of Kenya.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may be aware of their right of access to justice but with no means of realizing the same, as well as consolidating and harmonizing the various statutes relating to ADR including the Arbitration Act with the constitution to ensure access to justice by all becomes a reality. There is also a need for continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large so as to support ADR mechanisms in all possible aspects.

9.0 Conclusion

It is not enough that the right of access to justice is guaranteed both under the international and national frameworks on human rights. Making the enjoyment of these rights a reality requires the efforts of all concerned stakeholders, in reforming the existing frameworks as well as taking up new measures to facilitate the same. The ability to access justice is of critical importance for the enjoyment of all other human rights.¹⁸⁰ As already noted litigation plays an important role in disputes management and must therefore be made available for clients. However, this should not be the only available option since it may not be very effective in facilitating realization of the right of access to justice in some other instances. The application of ADR to achieve a just and expeditious resolution of conflicts should be actively promoted since it is a very viable option for parties whose conflict's nature requires either specialized expertise or requires preservation of relationships.

¹⁸⁰ Access to Justice (UN CRPD Article 13), Available at <http://www.futurepolicy.org/5789.html> [Accessed on 20th March, 2014]

The prospect of ADR in Kenya as a conflict management option is brilliant and actually one capable of bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Parties should find solace in the understanding that whoever wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts if the type of particular dispute so requires.

It is possible to actualize this right of access to justice through the use of ADR in Kenya. ADR offers a viable route to achievement of a just society for all, where there is something for everyone in terms of the available mechanisms for achieving justice, regardless of their social status in the society. Indeed, ADR can provide the road to true justice in Kenya.

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