

Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future

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Abstract

This paper is largely informed by the renewed efforts and measures by the Judiciary of Kenya and other stakeholders in the justice system to promote the use of ADR mechanisms in Kenya for management of conflicts. The author explores the question on whether Alternative Dispute Resolution (ADR) practice in Kenya should be regulated as a specialised area of practice or profession. This is against a background of increased need for more professionals to train and gain expertise in various ADR mechanisms. The growing numbers of practitioners from different professional backgrounds comes with the challenge of the need for regulation of this seemingly fast growing area of practice. The paper offers some thoughts on the way forward as far as the question of ADR practice is concerned. The aim is to ensure that ADR is not affected by procedural, ethical or practical issues in its roll out.

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1. Introduction

This paper critically explores the question on whether Alternative Dispute Resolution (ADR) practice in Kenya should be regulated as a specialised area of practice or profession. It is worth noting that the formal justice system in Kenya as we know it today was never part of the indigenous communities in Kenya, until the colonial masters introduced the same as a tool of colonization. Community based conflicts were dealt with using the traditional methods of conflict management and those who administered the same did so within the societal accepted ideals and were guided and regulated by the norms and traditions of the particular community. Notably, there were mostly organized forums where community members appeared for conflict management such as *Njuri Ncheke* among Meru and Council of Elders among the Kikuyu, and each of these had an accepted code of conduct and minimum qualifications for one to join as a member. As such, the members were expected to abide by the set guidelines all the time.¹

However, with the advent of the colonial masters, most of the ADR and traditional justice systems were relegated to an inferior position, with the main conflict management methods becoming the formal common law system, which went ahead to be established as a profession requiring specialised training and qualifications. A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life led to the introduction of the western ideals of justice which were not based on political negotiations and

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¹ See Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (2nd Ed., Glenwood Publishers Ltd, Nairobi, 2017), Chap.2, pp. 21-37.

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reconciliation.² Although certain minor disputes could be settled in the customary manner, the English Common Law was the ultimate source of authority.³

While there was no problem with some of these developments, the practitioners of the alternative and traditional justice systems were rarely recognized under the new system. Even where recognized, the system was to be used only for reference when dealing with a small section of disputes touching on a few issues such as community land, family law, amongst others. The political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African peoples, and the African customs and practices were allowed to continue ‘only if they were not repugnant to justice and morality’.⁴

A few of the ADR mechanisms such as arbitration and mediation, however, gained prominence even under the formal systems, as they were supported by mainly the international business community as forums to address arising commercial disputes. Thus, Kenya, in an attempt to be at par with its international business partners, developed laws on arbitration, which have been revised with time to reflect international best practices.⁵ There have also been a few organisations training professionals on mainly the two mechanisms and developing codes of conduct for those training or practicing under their umbrella. However, with the recognition of ADR under the current Constitution of Kenya 2010 and various statutes, there have been an increased need for more professionals to train and gain expertise in various ADR mechanisms. The growing numbers of practitioners from different professional backgrounds comes with the challenge of the need for regulation of this seemingly fast growing area of practice, hence the need for this paper.

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

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

⁴ The clause is still to be found in the *Judicature Act*, Cap 8, Laws of Kenya and Article 159(3), *Constitution of Kenya 2010*.

⁵ See Arbitration Act, No. 4 of 1995 (As amended in 2009), Laws of Kenya; Nairobi Centre for International Arbitration, No. 26 of 2013, Laws of Kenya (Government Printer, Nairobi, 2013).

2. Need for Regulation: ADR Practice as a Specialised Area

ADR and TDR mechanisms are now formally recognized in the Constitution of Kenya and provided for under various statutes.⁶ This has been led to increased application of these mechanisms by courts and tribunals, amongst other informal forums. The Judiciary has also since launched and rolled out the Court Annexed Mediation Project to especially deal with commercial and family matters.⁷ Therefore, it is expected that a good number of disputes that used to end up in court will be managed using these mechanisms.⁸ Courts have a constitutional obligation to promote their utilisation whether within the formal framework, that is, court-annexed ADR, or as informal mechanisms as envisaged in the various constitutional provisions.⁹

Alongside this is the fact that in the last few years, ADR practice has emerged as an area of specialisation with both lawyers and non-lawyers becoming ADR practitioners. Thus, seeking to cash in on the consequently increased demand for trained practitioners, ADR centres have been set up to offer training and continuing professional development courses for the trained.¹⁰ This paper grapples with the question as to whether or not ADR and TDR practice should formally be regulated. It examines various arguments by writers and practitioners who believe that ADR, just like lawyers in the court process, should be regulated by an overall body or at least under a centralized policy framework. On the other hand, there are those who believe that

⁶ See Art. 60, 67, 159 of the Constitution of Kenya, 2010; see also Muigua, K., “Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya”, Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.

⁷ Cf. Muigua, K., Court Sanctioned Mediation in Kenya-An Appraisal, available at

<http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf> .

⁸ See generally Muigua, K., ‘Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,’ Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, (2015), pp. 64-108; See also Muigua, K., ‘Effective Justice for Kenyans: is ADR Really Alternative?’ *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

⁹ Article 67(2) (f), Constitution of Kenya; See also sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012. The National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.

¹⁰ See generally, Muigua, K., “Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya”, Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.

ADR practice should be left within the ambit of private regulation by private bodies. This debate is far from being finalised and the discourse herein thus explores only a number of related issues.

The law, as it is, does not specify whether courts should deal with institutional-affiliated ADR practitioners only or even those practicing independently, for instance, in ad hoc arbitrations. Unlike the legal profession where lawyers or advocates wishing to practice law in Kenya must be affiliated to a professional body, namely, the Law Society of Kenya, ADR practice does not have such requirements. It is for this reason that the question on regulation of ADR practitioners should be addressed, especially within the current constitutional dispensation.

3. To Regulate or Not To Regulate?

Regulation of ADR is a subject wrought with contentious discourse. There are those who strongly advocate for ADR to be deregulated, while others argue for strong state regulation. On one end, the regulation of ADR carries with it the advantages of encouraging its adoption nationally; establishing standards of ADR practitioner's competence; developing systems of compliance and complaints;¹¹ addressing weaknesses of ADR such as ensuring the fairness of the procedure and building capacity and coherence of the ADR field. Proponents of regulation have argued that regulation of ADR will increase the use and demand of services and create or enhance an ADR "market".¹²

There are those who believe that the regulation of ADR may have its value in assuring that the parties employ qualified, neutral and skilled mediators and arbitrators in resolving a wide variety of disputes.¹³ However, this is countered by the argument that in mediation where the

¹¹Syme, D. & Bryson, D., 'A Framework for ADR Standards: Questions and Answers on NADRAC's Report,' *The ADR Bulletin*, Vol. 4, No. 1.

¹²Robert, J.M., 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium*, available at <http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf> [Accessed on 10/21/2015].

¹³ Zack AM, 'The Regulation of ADR: A Silent Presence at the Collective Bargaining Table,' p.4, *Seventh Annual Conference of the ABA Dispute Resolution Section Los Angeles*, California, April 15, 2005, available at <http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/The%20Regulation%20of%20ADR-ABA%207th%20conference.pdf> [Accessed on 1/12/2015].

parties select private non-government mediators, monitoring is complimented by the fact that the parties share in the compensation of such neutrals, better assuring their freedom from bias.¹⁴

This assertion may be relevant to Kenya considering that private mediators are also appointed and compensated the same way. It is therefore possible to argue that the mediator may be compelled by this fact to act fairly. Contention would, however, arise where there are allegations of corruption. It is not clear, at least in Kenya, how the parties would deal with the same. This is because, unlike in arbitration where parties may seek court's intervention in setting aside the otherwise binding arbitral award, mediation outcome is non-binding and wholly relies on the goodwill of the parties to respect the same. Therefore, faced with the risk of corruption and the potential non-acceptance of the outcome by the parties, it is arguable that the foregoing argument of the compensation being a sufficient incentive may not be satisfactory. This may, arguably, call for better mechanisms of safeguarding the parties' interests. In arbitration, the argument advanced is that whether of interests or rights disputes, the same process of joint selection and joint funding coupled with mutual selection of neutral from a tried and experienced cadre of professional arbitrators further assures their independence and neutrality, with protection of their integrity as their only ticket to future designations.¹⁵ Again, the issue of independent practitioners would arise. For instance, in Kenya, there has been increased number of professionals taking up ADR. Professional bodies and higher institutions of learning have increased their rate of teaching ADR, as professional course and academic course respectively.

The net effect of this will be increased number of ADR practitioners in the country. As part of professional development, not all of those who get the academic qualifications may enroll with the local institutions for certification as practitioners. There are also those who may obtain foreign qualifications and later seek such certification. However, there are those who are not affiliated to any institution or body. In such instances, it would only be hoped that they would conduct themselves in a professional manner, bearing in mind that any misconduct or unfair conduct may lead to setting aside of the award or even removal as an arbitrator by the High Court. The court process obviously comes with extra costs and it would probably have been more effective to have a supervisory body or institution to report the unscrupulous practitioner

¹⁴ Ibid.

¹⁵ Zack AM, 'The Regulation of ADR : A Silent Presence at the Collective Bargaining Table,' p.4.

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for action, without necessarily involving the court. Such instances may thus justify the need for formal regulation, especially for the more formal mechanisms.

Currently, there are attempts to make referral to ADR mandatory in Kenya. This is especially evidenced by the gazetted *Mediation (Pilot Project) Rules, 2015*, which provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.¹⁶ Thus, there is no choice as to whether one may submit the matters voluntarily or otherwise. While this may promote the use of mediation where the parties are generally satisfied with the outcome, the opposite may also be true. Caution ought to be exercised in balancing the need for facilitating expeditious access to justice through ADR and retaining the positive aspects of the processes. For instance, in other jurisdictions where there is provision for mandatory promotion of ADR processes, the use of those processes has not necessarily become common.¹⁷ Among the reasons given for this reluctance towards the adoption of ADR include lack of education and training in the field, lack of court-connected programs, whether voluntary or mandated and insufficient legislation.¹⁸ The argument is thus made that when introducing ADR for the first time, there may be a need for some element of compulsion or legislative control, as this can support its growth.¹⁹ This is the path that the Kenyan Judiciary has taken. The Judiciary mediation programme is on a trial basis and the outcome will inform future framework or direction. The pilot program (having been rolled out to other stations outside Nairobi in May 2018²⁰) will define how the practitioners as well as the general public perceive court-annexed mediation and ADR in general. It is therefore important that the concerned drivers of this project use the opportunity to promote educational

¹⁶ *Mediation (Pilot Project) Rules, 2015*, Rule 4(1).

¹⁷ Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, Vol. 5, No. 2, (2005).

¹⁸ *Ibid.*

¹⁹ NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (November, 2006), Commonwealth of Australia, p. 14.

²⁰ Ochieng, F. (Justice), Judiciary in bold move to entrench mediation as a means of dispute resolution, *The Star*, April, 2018. Available at https://www.the-star.co.ke/news/2018/04/13/judiciary-in-bold-move-to-entrench-mediation-as-a-means-of-dispute_c1742375

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programming, with the efforts including workshops and seminars among the local practicing lawyers to enhance their understanding of ADR and the services provided by the pilot project.²¹ This, it is argued, may enable them to assist their clients in making informed decisions about whether or not to use ADR.²²

On the other end, it has been argued that legislative regulation, no matter how well meaning, inevitably limits and restrains.²³ The regulation of ADR is feared to hamper its advantages.²⁴ The developing country's experience with court-annexed ADR indicates that when a judge imposes a conciliator or mediator on the parties, it does not provide the proper incentive for the parties to be candid about the case.²⁵ ADR advantages such as low cost, procedural flexibility, enhanced access for marginalized groups and a predictable forum for conflict management tend to disappear when there is discretionary power with court personnel, procedural formalities within the ADR process or an artificial limit to competition within the ADR market.²⁶

Court mandated mediation has been argued to negate the fundamental aspects of voluntariness and party control that distinguish it from litigation, the very aspects attributed to its success in a vast number of cases.²⁷ In addition, the "one size fits all" approach taken by legislation that encourages or requires all to use ADR, without regard to needs in various contexts and to the distinctions among the various processes, is another reason why ADR

²¹ Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', op cit, p. 414.

²² Ibid, p. 414.

²³ Bryan, K. & Weinstein, M., 'The Case against Misdirected Regulation of ADR,' *Dispute Resolution Magazine*, (Spring, 2013).

²⁴ Shasore, O., 'Why Practitioners Are Unanimous against Passage of New ADR Bill, (3rd March 2015), *This Day Live* <http://www.thisdaylive.com/articles/-why-practitioners-are-unanimous-against-passage-of-new-adr-bill-/203138/> [accessed on 10/22/2015].

²⁵ Edgardo, B., 'The Comparative Advantage of Mediation in Ecuador' (1998a), Washington D.C., U.S. Agency for International Development, (Unpublished Study, as quoted in Edgardo, B.&William, R., 'Law and Economics in Developing Countries', (Hoover Institution Press, Stanford University, Stanford, California, 2000).

²⁶ Ibid.

²⁷ Spencer D, 'Court given power to order ADR in civil actions' (2000) 38(9) *Law Society Journal* 71 at 72; NADRAC, above note 3 (as referenced in Green, Cameron, 'Where did the 'alternative' go? Why Mediation should not be a Mandatory Step in the Litigation Process, *DR Bulletin*, Vol. 12, No. 3, Art. 2, 2010.

legislation should be undertaken with caution.²⁸ For instance, in the Kenyan situation, while the *Mediation (Pilot Project) Rules, 2015*²⁹ require screening of civil matters for possible submission for mediation, it is possible for the Registrar to realise that some of the cases may be appropriate for arbitration instead of mediation. The programme only takes care of mediation process with no reference to arbitration or any other process, well, apart from litigation. The question that would, therefore, arise is whether the Registrar has powers to force parties into arbitration as well. Further, if they have such powers, the next question would be who would pay for the process, bearing in mind that it is potentially cost-effective but may be expensive as well. On the other hand, if the Registrar lacks such powers, it is also a question worth addressing what the Court would do if it ordered the parties to resort to arbitration but both parties fail to do so due to such factors as costs.

It is, therefore, worth considering whether the Mediation Accreditation Committee, established under the Civil Procedure Act³⁰, should have its mandate expanded to deal with all processes, or whether there should be set up another body to deal with the other processes.

4. A Case for a Multi-Layered Approach

It has been argued that ‘deregulation’ does not in fact refer to the absolute lack of regulation, but rather the lack or removal of one particular type of regulation which is legislation. In real sense, deregulation or market regulation is regulated by market forces, in which competition results in private regulation or self-regulation.³¹

²⁸ See Syme, D. & Bryson, D., ‘A Framework for ADR Standards: Questions and Answers on NADRAC’s Report,’ *op cit*.

²⁹ *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015).

³⁰ S. 59A, S.59B, Cap 21, Laws of Kenya.

³¹ Baetjer, Howard Jr., ‘There’s No Such Thing as an Unregulated Market,’ (Wednesday, January 14, 2015), The Freeman, Foundation of Economic Education. <http://fee.org/freeman/theres-no-such-thing-as-an-unregulated-market/> [last accessed on 10/23/2015].

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According to some proponents, the benefits of industry self-regulation are apparent: speed, flexibility, sensitivity to market circumstances and lower costs.³² It is argued that because standard setting and identification of breaches are the responsibility of practitioners with detailed knowledge of the industry, this will arguably lead to more practicable standards, more effectively policed.³³ Yet, in practice, say critics, self-regulation often fails to fulfill its theoretical promise, more commonly serving the industry rather than the public interest.³⁴ Self-regulation refers to the mechanisms used by companies or organisations, both individually and in conjunction with others, to raise and maintain standards of corporate conduct.³⁵

Contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change in regulated markets. Experts further suggest that reflexive and responsive processes –often associated with self-regulatory approaches and even formal framework approaches – encourage performance beyond compliance.³⁶ It has been argued that participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate professional standards are maintained and enforced.³⁷ Currently, the main practice in Kenya is that majority of ADR practitioners are regulated by their respective accrediting professional bodies. While there exists institutional rules for the various institutions in the country, statutory law, such as Arbitration Act, 1995, has provisions that are meant to regulate some of the critical issues such as confidentiality, ethics, enforceability of awards or outcomes of ADR mechanisms. It is, however, important to point out that while the court plays a

³² Gunningham, N. & Rees, J., 'Industry Self-regulation: An Industry Perspective', (October 1997) *Law & Policy*, Vol. 19, No. 4.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Sarker, T.K., 'Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?' *Asian J Bus Ethics*, 2013, Vol. 2, pp.205–224, p. 210.

³⁶ See Edgardo, B., 'The Comparative Advantage of Mediation in Ecuador' (1998a), Washington D.C., U.S. Agency for International Development, (Unpublished Study, as quoted in Edgardo, B. & Wiliam, R., 'Law and Economics in Developing Countries', (Hoover Institution Press, Stanford University, Stanford, California, 2000); Nadja Alexander, et al, *Smart Regulation* (Clarendon Press, 1998) 391.

³⁷ See Sarker, T.K., 'Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?' *Asian J Bus Ethics*, *op cit.*

significant role in upholding professional ethics of ADR practitioners, especially mediators and arbitrators, the same is limited in effectiveness. This is because the statutory provision on the court's power to remove an arbitrator on grounds of misconduct is vague on what exactly entails misconduct. This is where institutional rules or statutory regulations would come in handy to clearly spell out the code of ethics. For the practitioners that are affiliated to institutions, reference can be made to the institutional rules. A problem, however, arises when the ADR practitioners in questions are independent practitioners. This may therefore require a multi-layered approach to regulation, where we should have private regulation coupled with statutory regulation to ensure that there are gaps.

5. Processes or type of ADR

With regard to legislating the definition and scope of ADR processes³⁸, Kenyan lawmakers should take much caution. While legislating ADR terms would come with the advantage of clarity and consistency, it would also result in lack of flexibility in the ADR processes. It is, however, on the foundation of consistent terminology that obligations and protections can be mandated by law.

Section 159(2) (c) of the Constitution of Kenya makes mention of reconciliation, mediation, arbitration and traditional justice systems.³⁹ The Civil Procedure Act⁴⁰, which provides for court-mandated mediation, defines mediation as 'an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.'⁴¹ Notably, the Mediation (Pilot Project) Rules, 2015 also adopt this definition.⁴²

³⁸ See Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

³⁹ Constitution of Kenya, 2010, S. 159(2) (c).

⁴⁰ Cap 21, Laws of Kenya.

⁴¹ Civil Procedure Act, Chapter 21, Section 59B &D & S. 2.

⁴² Rule 3, Mediation (Pilot Project) Rules, 2015.

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The Act also provides for the referral of matters to other alternative dispute resolution mechanisms where the parties decide or the court sees it suitable,⁴³ only making reference to arbitration in a separate section.⁴⁴ It conspicuously does not define ADR, nor does it give the list of mechanisms which would fall under its umbrella. Although, this broad provision covers under it a number of terms, policy makers would do well to specifically set out these mechanisms, as this is the foundation of the regulation of ADR such as setting standards for ADR practitioners.

Using consistent terms serves important functions:⁴⁵ To begin with, it ensures those who use, or are referred to conflict management services receive consistent and accurate information and have realistic and accurate expectations about the processes they are undertaking.⁴⁶ This will enhance their confidence in, and acceptance of, conflict management services. It also helps courts and other referrers to match processes to specific disputes and different parties. Better matching improves outcomes from these processes.⁴⁷ Furthermore, it helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about conflict management services. In addition to the foregoing, it provides a basis for policy and program development, data collection and evaluation.⁴⁸ The flipside to outlining an exhaustive list would however be that some of the TDR mechanisms, that the policy makers would be unaware of, risk being left out and consequently be undermined.

It is important to also be aware of the diverse contexts in which ADR is used. Thus, definition or outlining an exhaustive list may impede access to justice through locking out some useful yet unlisted mechanisms. National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia, advocates for the ‘description’ of terms as opposed to their definition,

⁴³ Ibid, S. 59C.

⁴⁴ Ibid, S. 59.

⁴⁵ See Leon, J.A.R, ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,’ *Journal of Dispute Resolution*, op cit.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

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as this sets out the contexts in which such terms are used as opposed to their essential features.⁴⁹ This may be useful in contemplating every possible ADR and TDR mechanism as recognised settings. It is imperative to point out that the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.⁵⁰ Further, it requires the State to, *inter alia*, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.⁵¹

In traditional settings, some of the conflict management mechanisms could be classified as forms of cultural expressions. For instance, the mechanisms they used include, kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood.⁵² Caution should, therefore, be exercised while approaching the issue of definition to ensure that such mechanisms are given a chance. Courts ought to appreciate the fact that culture has a role to play in conflict management. Indeed, the 2010 Constitution of Kenya recognises culture as the foundation of the nation and as cumulative civilisation of the Kenyan people and nation.⁵³ Further, one of the principles of land policy is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.⁵⁴ It is therefore imperative that in matters that affect a whole community or even individuals, but with a bearing on cultural factors, courts should take into consideration such factors.

Regulation should not result in locking out viable mechanisms as this would defeat the constitutional intention of recognising TDR for aiding access to justice for all.

⁴⁹ NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (Commonwealth of Australia, November, 2006).

⁵⁰ Art. 11(1).

⁵¹ Art. 11(2).

⁵² See Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012), pp. 30-37.

⁵³ Art. 11.

⁵⁴ Art. 60 (1) (g); See also Sec. 39-42, *Community Land Act*, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016).

6. Referral of disputes to ADR

Law makers need to decide which method of ADR referral should be employed. Referral may be compulsory by a court or voluntary, where parties are at will to decide whether to submit their dispute to an ADR forum.⁵⁵ It may also be mandatory or at the discretion of the referrer, as contemplated in the Mediation (Pilot Project) Rules, 2015. The Civil Procedure Act provides for discretionary compulsory referral as well as voluntary referral.⁵⁶

Where there is compulsory participation, it is important that there be established professional standards for the process as well as for the practitioners, to ensure a quality process and a quality outcome. These processes also need to be described so as effectively promote public confidence. It is noteworthy that one of the main reasons why most of the ADR mechanisms are popular and preferred to litigation are their relative party autonomy which makes parties gain and retain control over the process and the outcome. It is therefore important for the court to ensure that there is no foreseeable factor that may interfere with this autonomy as it may defeat the main purpose of engaging in these processes.

One of the constitutional requirements with regard to access to justice in Kenya is that the State should ensure that cost should not impede access to justice and, if any fee is required, the same should be reasonable. It is, therefore, important that even where persons use private means of accessing justice, the cost should be reasonable. This is especially where there was no prior agreement to engage in ADR. One of the advantages of ADR mechanisms is that the outcome is flexible and parties can settle on outcomes that satisfactorily address their needs. This should not be lost as it would affect parties' ability and willingness to participate in such processes.

Courts are, therefore, under obligation to ensure that parties are able to access justice using the most viable and cost effective conflict management mechanism. In this regard, courts can play a facilitative role in encouraging the use of ADR and TDR mechanisms to access justice.

⁵⁵ See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,' *Journal of Dispute Resolution*, op cit.

⁵⁶ Sec 59A, Civil Procedure Act, Cap 21, Laws of Kenya.

7. Obligations of parties to participate in ADR

Compulsory participation in ADR is highly opposed by those in favour of voluntary participation in ADR who argue that conciliation or mediation is essentially a consensual process that requires the co-operation and consent of the parties.⁵⁷ On the other hand, those who argue in favour of compulsory participation in ADR respond that if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, then even the most fundamental resistance to compromise can turn to co-operation and consent.⁵⁸

The element of ‘good faith’ which is usually present in voluntary ADR is not assured in compulsory ADR, leading states and courts to give rules requiring parties to participate in ADR in good faith or ‘in a meaningful manner.’⁵⁹ Courts also sanction parties for violations of a good-faith-participation requirement such as for failing to attend or participate in an ADR process or engaging in a pattern of obstructive, abusive, or dilatory tactics.⁶⁰ Sanctions include the shifting of costs and attorney’s fees, contempt, denial of trial de novo, and even dismissal of the lawsuit.⁶¹ Law makers should thus have regard to what conduct constitutes good conduct, a system of handling claims of bad faith, maintenance of the confidentiality of the process even as such case of bad faith is before the court and the effects of non-compliance with the good faith participation requirement.⁶²

⁵⁷ See NADRAC, ‘Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,’ (November, 2006), Commonwealth of Australia.

⁵⁸ See Clarke, G.R. & Davies, I.T., ‘ADR — Argument For and Against Use of the Mediation Process Particularly In Family and Neighbourhood Disputes,’ *QLD. University Of Technology Law Journal*, pp. 81-96; Katz, L.V., ‘Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin,’ *Journal of Dispute Resolution*, Vol. 1993, Iss.1, Art. 4.

⁵⁹ Weston, M.A, "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality," *Indiana Law Journal*, Vol. 76: Iss. 3, Article 2, 2001.

⁶⁰English, R.P., ‘Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation’ op cit.

⁶¹ Ibid.

⁶² See Leon, J.A.R, ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model’, *Journal of Dispute Resolution*, (2005).

The overall goal should be to promote meaningful access to justice for all. For purposes of ensuring justice is done, sometimes courts may force parties to the negotiating table especially where one of the parties refuses to do so with ulterior motive of defeating justice. The third party umpire in collaboration with the court, where necessary, may invent ways of dealing with power imbalances and bad faith for the sake of ensuring justice is achieved.

8. Standards and Accreditation of ADR practitioners

It has been argued that development of standards of practitioners will ensure much greater accountability of practitioners. Sociologists argue that professionals perform better “on stage” (in public) than they do “off stage” (in private) and this has consequences for issues of integrity in arbitration.⁶³ It is argued that documented standards would also provide a source of information to enable consumers to know what to expect of an ADR practitioner, a basis for choosing a particular type of ADR, and an ‘industry norm’ against which to measure the performance of the practitioner.⁶⁴ They would also improve the public awareness of ADR. These standards may be provided by either professional groups or by the government. The standards of conduct of individual professional groups are still the primary source of regulation in most states. Codes of professional conduct tailored to mediation and ADR have been issued by various professional organizations.⁶⁵

It is argued that as governments are increasingly legislating to require parties to attend ADR, such as in the litigation context, they need to be accountable for the competence of practitioners performing these services.⁶⁶ Legislative instruments that provide for compulsory submission of a dispute to ADR should thus also provide minimum standards of conduct for the

⁶³ Aloo, L.O. & Wesonga, E.K., ‘What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,’ *Alternative Dispute Resolution*, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

⁶⁴ National ADR Advisory Council (NADRAC), ‘The Development of Standards for ADR: Discussion Paper’ (March, 2000).

⁶⁵ Feerick, J., et al, ‘Standards of Professional Conduct in Alternative Dispute Resolution,’ *Journal of Dispute Resolution*, 1995.

⁶⁶ See English, R.P., ‘Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation’ op cit.

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practitioners. The provision of standards will also go towards boosting the public's confidence in ADR, as parties need to have confidence that the quality of the ADR service will meet the standards of professionalism. Knowledge of how the practitioner's standards are met through training and accreditation, as well as a complaints mechanism will also boost public awareness and public confidence.⁶⁷

Standards may, however, in detailing the structure of ADR, restrain creative ways of solving disputes, and with ADR being applicable in a variety of contexts, standards may not be applicable in all the available contexts.⁶⁸ Standards should be formulated with the objective of ensuring a fair ADR process, protecting the consumer, establishing public confidence and building capacity in the field. Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.⁶⁹

It has been suggested that rather than establishing a single body to accredit each mediator individually, a system is required to accredit organisations which in turn accredit mediators. In order for these organisations to be approved, they would need to develop common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediator.⁷⁰

The downside to this kind of approach would be the risk of locking out those who acquire their skills and expertise outside this jurisdiction as it would not be clear if they would need to compulsorily become members of local organisations for accreditation. For mediation, there is

⁶⁷ See Leon, J.A.R., 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, (2005), p. 50; see also Deane, P., et al, 'Making Mediation Mainstream: A User/Customer Perspective,' (International Mediation Institute, 2010). Available at https://imimmediation.org/private/downloads/A_W2d3v1h6edvLHjbTa0Kw/making-mediation-mainstream-1-article.pdf [Accessed on 10/12/2015]; De Palo, G., et al, "'Rebooting' The Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,' (European Union, 2014).

⁶⁸ Ibid; see also Silver, C., "Models of Quality for Third Parties in Alternative Dispute Resolution" *Articles by Maurer Faculty*, Paper 566, 1996.

⁶⁹ Ibid, p. 19; See also National ADR Advisory Council (NADRAC), *A Framework for ADR Standards: Report to the Commonwealth Attorney-General*, (Commonwealth of Australia, April, 2001)

⁷⁰ Ibid, p. 62.

already in place Mediation Accreditation Committee but for the other mechanisms it is not clear how such an approach would be implemented as there exists no body at the moment. This also risks leaving out the informal experts who may be lacking in the required ‘professional’ qualifications to qualify to join such bodies. This requires careful consideration by the concerned stakeholders.

9. Confidentiality of communications made during ADR and Inadmissibility of Evidence

Confidentiality is central to ADR as it allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute.⁷¹ The parties to the dispute and the neutral third party have a duty to maintain such confidentiality, with the neutral being held to a higher standard of non-disclosure. The neutral has a duty not to disclose to a third party, as well as not to disclose to the other party what has been told to him by a party in private. The question that law makers should consider is whether confidentiality should be mandated by statute, and what sanctions will be employed when breach occurs.⁷² They should also consider the circumstances under which an exception to confidentiality lies.⁷³

Limitations of confidentiality arise in a variety of instances: by consent of the parties; where mandated by law; where a crime is committed or a threat is made to commit such crime.⁷⁴

⁷¹ Interagency ADR Working Group Steering Committee, ‘Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators’ (April 2006).

⁷² Leon, J.A.R, ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model’, *Journal of Dispute Resolution*, (2005), p. 73.

⁷³ See Dore LK, ‘Public Courts versus Private Justice : It’ S Time to Let Some Sun Shine in on Alternative Dispute Resolution’ *Chicago-Kent Law Review*, Vol. 81, Issue 2, Symposium: Secrecy in Litigation, (2006), pp. 463-520.

⁷⁴ See Rule 12 (2) of the Mediation (Pilot Project) Rules 2015, which provides that the mediator and the parties to any mediation shall treat as confidential information obtained orally or in writing from or about the parties in the mediation and shall not disclose that information unless: required by law to disclose; it relates to child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes.

10. Confidentiality Issues

Inadmissibility is intertwined with the issue of confidentiality of communications during ADR. This is an approach taken to protect the confidentiality of the ADR process, by statutory provision that evidence of matters in an ADR proceeding is inadmissible in later court proceedings.⁷⁵ This issue also includes the compellability of ADR practitioners to give evidence before subsequent court proceedings.⁷⁶ The mediation (Pilot Project) Rules, 2015 also recognises the importance of this and provides that all communication during mediation including the mediator's notes are to be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.⁷⁷

Protection of communications in ADR should be guaranteed as this protects the finality of the decision reached by the parties and enhances communication for purposes of resolving conflicts. If parties knew that whatever they share may later be used against them, then they would be unwilling to do so, thus, defeating the essence of engaging in ADR and TDR. One of the selling points of these mechanisms is open communication for purposes of reaching a decision or ensuring that parties are able to craft an agreement through sharing.

11. Conclusion

The Government policy is to encourage ADR to foster a more conciliatory approach to conflict management. It can also be important that parties have a choice to use an effective ADR process.⁷⁸ This overcomes the risk that parties will fail to suggest ADR from fear they will appear weak to the other party.⁷⁹ However, there are limitations to the use of formal law in regulating ADR. ADR is practiced in diverse contexts and a single law is unlikely to be able to

⁷⁵ See Leon, J.A.R., 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, 2005, p. 81

⁷⁶ *Ibid*, p. 64.

⁷⁷ Rule 12(1).

⁷⁸ See Sarker, T.K., 'Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?' *Asian J Bus Ethics*, 2013, Vol. 2, pp.205–224, p. 210.

⁷⁹ *Ibid*; 'Court ordered mediation – the debate', *New Zealand Law Journal*, 210, June 2003.

address all these areas. This explains the widespread use of sector-specific legislation in other jurisdictions, which have deliberately chosen not to enact comprehensive general national ADR legislation.⁸⁰

The inadequacy of the common law to govern ADR in Kenya is plain. It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.⁸¹ The western concept of contract implies rights and obligations, whereas ADR and TDR have the object of preserving the relationship of the parties, and are thus inconsistent. Furthermore, TDR is practiced in the context of society while contract law is based on an individualistic western culture, which does not uphold the same values. Parties engaging in TDR are unlikely to have fulfilled the elements compounding a contract, such as offer, acceptance and consideration. There is thus a need for legislative governance of these informal systems.

Policy-makers should recognise the desirability of enabling diversity, flexibility and dynamism in conflict management practices and processes. They should also have in mind that ADR processes cannot be viewed in isolation. Party autonomy allows the parties to craft a hybrid process, linking different techniques and processes to meet their contextual need. They thus need to be viewed in the larger ADR context.⁸² In drafting legislation, provision should thus be made for parties to retain some autonomy.

The use of ADR and TDR mechanisms in enhancing access into justice can go a long way in achieving a just, fair and peaceful society for national development. While it is important to exercise some degree of regulation in these processes, regard should be had to the bigger picture: promoting access to justice for all people.

⁸⁰ See Buscaglia, E., 'The Comparative Advantage of Mediation in Ecuador' (1998a), Washington D.C., U.S. Agency for International Development, Unpublished Study (as quoted in Buscaglia Edgardo & Ratliff Wiliam, 'Law and Economics in Developing Countries', (2000), Hoover Institution Press, Stanford University, Stanford, California); Nadja Alexander, 'International and Comparative Mediation: Legal Perspectives', (2009), Kluwer Law International. Examples of such jurisdictions include Australia, the United States and England.

⁸¹ McConaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, p.23.

⁸² See Robert, J.M., 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium*, *op cit*.

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