

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Kariuki Muigua, Ph.D

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Kariuki Muigua*

Abstract

Access to justice is considered to be a critical part of universal human rights. This paper offers a status analysis of ADR and Informal Community Justice Systems as a means of access to justice for the Kenyan people. It also makes general recommendations on ways through which use of ADR mechanisms in accessing justice for the Kenyan people can be enhanced.

The main argument is that Access to Justice and Alternative Dispute Resolution Mechanisms are intertwined, and if well utilised, ADR can lead to improved access to Justice for Kenyans.

1. Introduction

The Constitution of Kenya 2010 was promulgated as a conclusion to an ambitious national progress that aimed at reversing many years of mis-governance and social decay. As a transformative Constitution, it seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society.¹ A transformative Constitution is considered to be “value laden, going beyond the state, with emphasis on social and sometimes economic change, stipulation of principles which guide the exercise of state power, requiring state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society”.² One of the areas, where such change is required is that of access to justice and the use of alternative dispute resolution (ADR) in the country. Access to justice is considered as a critical pillar for poverty reduction and sustainable development.³ This paper discusses the ways in which access to justice

* *PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [September, 2018].*

¹ Ghai, Y.P., “Interpreting Kenya’s Transformative Constitution,” *Awaaz Magazine*, Friday, 12 September 2014, available at <http://awaazmagazine.com/previous/index.php/editors/item/535-interpreting-kenya-s-transformative-constitution>

² Ghai, Y.P., “Interpreting Kenya’s Transformative Constitution,” *Awaaz Magazine*, Friday, 12 September 2014, available at <http://awaazmagazine.com/previous/index.php/editors/item/535-interpreting-kenya-s-transformative-constitution>

³ IDLO, “Access to Justice in Kenya,” 15 Feb 2017, Available at <https://www.idlo.int/what-we-do/initiatives/access-justice>

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

in Kenya can be enhanced through deepened and enhanced use of ADR. The same was informed by a baseline survey research carried out by the IDLO in Kenya.⁴ The IDLO research is relevant because it used indicators to measure the current status of the Kenyan ADR Mechanisms and can later measure and monitor the effectiveness and progress made by the use of legal and policy framework reforms in deepening ADR for access to justice and commercial disputes.⁵ The indicators are deemed effective tools in baseline assessment as they are yardsticks and markers of evaluating status, results and progress.⁶ The IDLO baseline assessment focused on two perspectives that ultimately affect the perceived level of access to justice in any society: the claimholder's and the duty bearer's perspective.⁷ The research identified the indicators of access to justice in relation to Kenya's ADR mechanisms which can be used in the baseline assessment and to classify and compare these indicators among all the key shareholders in provision and access to justice through ADR mechanisms.⁸

The overall objective of this paper is to offer a status analysis of Alternative Dispute Resolution Mechanisms and informal community justice systems and to make general recommendations for ways to enhance the use of ADR mechanisms in accessing justice for the Kenyan people.

2. Challenges Affecting Access to Justice in Kenya

The access to justice framework in Kenya is hinged on the citizen's knowledge of the existence of rights as enshrined in the Constitution's Bills of Rights and their capacity and empowerment and to seek redress from the available justice systems. Article 22(1) of the Constitution of Kenya provides that every person has a right to institute a claim that a right or fundamental freedom has been infringed, violated or denied. Further, the Chief Justice is to make rules for the court

⁴ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁵ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

proceedings in actualization of this provision.⁹ These rules must meet certain fundamental criteria that include that the formalities relating to the proceedings as well as the formalities of instituting such claim shall be kept at a minimum, observe the rules of natural justice and shall not be unreasonably restricted by procedural technicalities.¹⁰

In addition, Article 48 of the Constitution requires the State to ensure access to justice to all persons and the fees required, if any, should be reasonable and should not impede justice. The right to access to justice is further echoed under Article 159(1) of the Constitution that the courts and tribunals are to ensure that justice is not delayed, that it is done to all and administered without undue regard to procedure and technicalities.¹¹

Access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors. These factors include, but are not limited to, lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes.¹² In the past, the use of legal aid services has been utilized to promote access to justice through the courts. The legal aid services are inadequate and cannot cater for the needs of the larger population that cannot meet the legal cost. This notwithstanding, the recent enactment of the *Legal Aid Act*¹³ is laudable as it will enhance access to justice for a section of the populace.

There is a general perception by many Kenyans that their rights to access to justice have been limited. According to a survey conducted by Steadman reported that 83% of Kenyans felt that

⁹ Article 22(3), *Constitution of Kenya*, 2010.

¹⁰ Muigua, K., 'ADR under the Court Process: A Paradox?' *Alternative Dispute Resolution and Access to Justice in Kenya* (2015), pp.125-127.

¹¹ Article 159(2), *Constitution of Kenya*, 2010.

¹² *Ibid*, pp. 126.

¹³ The *Legal Aid Act, No. 6 of 2016* was enacted to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. There is also in place National Action Plan, Legal Aid 2017-2022 Kenya. The development of the Legal Aid Act and the National Action Plan, Legal Aid was formulated with a clear vision of facilitating access to justice for all. Their objectives and priorities included: To establish a framework for policies, laws and administrative processes that will ensure sustainable and quality access to justice to all; To provide quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable; To enhance access to justice through continuous legal awareness; To promote and institutionalize the paralegal approach in access to justice; To promote the use of Alternative and Traditional dispute resolution mechanisms; To establish an implementation, monitoring, regulatory and support framework for legal aid and awareness services in Kenya; and to ensure and promote adequate allocation of resources including fiscal, human and technical for legal aid and awareness services in Kenya.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

their right to access to justice was curtailed with only 17% indicating otherwise. This perception is contributed to factors that include poverty, gender, religion, corruption and illiteracy.¹⁴

There is a compelling opinion that the use of alternative dispute resolution mechanisms to promote access justice is able to bridge these gaps by providing an accessible, affordable and timely avenue to dispose of disputes including those of commercial nature.¹⁵

Some of the findings that emerged from the IDLO research, fieldwork and national stakeholders' forums are as follows:¹⁶

a. Knowledge of rights

The capacity to exercise and enforce one's rights is also dependent on their knowledge and understanding of the existence of such right.¹⁷ Kenya's literacy levels have been on the rise with a high of 78% adult literacy levels being recorded by UNESCO.¹⁸ In a survey conducted by the GJLOS on the awareness of political, service and economic rights in Kenya, the larger number of Kenyans can identify the rights that they feel are important to them.¹⁹ The survey also found that most Kenyans are not aware of the rights enshrined in the Constitution and other laws and

¹⁴ Mbote, P.K., & Aketh M., "Kenya: justice sector and the rule of law," *African Minds*, 2011, Pp. 156-176.

¹⁵ Law Reform Commission, "Alternative Dispute Resolution," *Consultation Paper*, LRC CP 50 – 2008, ISSN 1393 – 3140, July 2008, available at <http://www.lawreform.ie/fileupload/consultation%20papers/cp50.htm>

¹⁶ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

¹⁷ See Ganju, D., Patel, S.K., Prabhakar, P. and Adhikary, R., "Knowledge and exercise of human rights, and barriers and facilitators to claiming rights: a cross-sectional study of female sex workers and high-risk men who have sex with men in Andhra Pradesh, India," *BMC international health and human rights*, Vol.16, no. 1 (2016): 29; Stellmacher, J., Sommer, G. and Braehler, E., "The cognitive representation of human rights: Knowledge, importance, and commitment," *Peace and Conflict* 11, no. 3 (2005): 267-292.

¹⁸ UNESCO Institute for Statistics, "Adult and youth literacy: National, regional and global trends, 1985–2015," (2013). Available at http://uis.unesco.org/sites/default/files/documents/adult-and-youth-literacy-national-regional-and-global-trends-1985-2015-en_0.pdf

¹⁹ Governance, Justice, Law and order Sector Reform Programme (2006); See also Kaguongo, W., "Introductory Note on Kenya." (2012), available at http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

policies which remain a stumbling block to access of justice. There is lack of adequate sources of information to the public and educational programmes for awareness creation.²⁰

Notably, the role of educating the public has been left in the sole hands of civil organizations with key actors such as the FIDA and Kituo cha Sheria undertaking community based comprehensive civil rights education to the public. This education continues to play a huge role in the empowerment of the public to access justice.²¹ There is however not enough progress in the civic education on the available dispute resolution mechanisms to the public as most of the civil rights education in Kenya is court centred.²²

b. Standardized Training Curriculum

There is a need to also look at the institutions that offer public training in legal education, especially those offering academic and professional training and courses in alternative dispute resolution and streamline the providers and accreditors of these institutions to achieve standards.²³ The legal education also locks out and discriminates against the majority of TDRs practitioners who settle disputes while governed by cultural laws. These practitioners dispense justice in their communities with little awareness of the existing formal legal educational framework in place that has isolated their valuable input to the access of justice.²⁴

²⁰ Ibid; See also Orinde, H., “Survey reveals how Kenyans are ignorant of their human rights,” The Standard Media, Mon, April 9th 2018. Read more at: <https://www.standardmedia.co.ke/article/2001276119/survey-reveals-how-kenyans-are-ignorant-of-their-human-rights>

²¹ IDLO, “Legal Empowerment,” available at <https://www.idlo.int/what-we-do/access-justice/legal-empowerment>

²² Mohamed, H.M., “Many Kenyan voters need civic education,” Daily Nation, Tuesday December 20 2016. Available at <https://www.nation.co.ke/oped/opinion/Many-Kenyan-voters-need-civic-education/440808-3493424-pwtbnv/index.html>

²³ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

²⁴ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

c. Physical Access

Alternative dispute resolution mechanisms have been an effective tool in the hands of claim holders and duty bearers to promote the right access to justice than the formal court systems because they are physically accessible.²⁵ The available court stations and judicial officers within the country are inadequate to meet the increasing population that is projected to grow to up 63.9 Million by 2030.²⁶

Currently, there are 7 Supreme Court Judges, 21 Court of Appeal Judges, 128 Judges of the High Court and the courts of equal status to the High Court as well as 436 magistrates. There are 38 High Court stations within 36 Counties and 2 sub registries. In addition, Kenya has a total of 59 operational mobile courts across the country, which courts seek to serve the rural residents.²⁷

What is more, the few who can afford to access the formal justice systems are unable to locate the physical courts and are unfamiliar with complex court processes.²⁸ Most litigants from the rural areas struggle finding the courts before which their matters are to be ventilated.²⁹ They often acquire assistance from the court officers and staff to understand the procedures and language of the court. The court facilities and resources are limited with fewer courts per district and inadequate judges and magistrates per district.³⁰ The majority of Kenyan court facilities, for instance, have not provided suitable facilities for persons living with disabilities, special needs or

²⁵ Kenya Legal and Ethical Issues Network on HIV and AIDS, "Trends in HIV & TB Human Rights Violations and Interventions," Report, July 2018. Available at <http://www.kelinkkenya.org/wp-content/uploads/2018/07/Trends-in-HIVTB-Human-Rights-Violations-and-Interventions.pdf>; Teehankee, J.C., "Background Paper on Access to Justice Indicators in the Asia-Pacific Region," (La Salle Institute of Governance, October, 2003). Available at <https://www.un.org/ruleoflaw/files/Access2JusticeIndicators.pdf>; UNDP, "Access to Justice: Practice Notes," 9/3/2004. Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ACCESSTOJUSTICEUNDPRACTICENOTE.pdf>; Alffram, H., "Equal Access to Justice: A Mapping of Experiences," (Sida, 2011). Available at https://www.sida.se/contentassets/8d1d0ea3d9464589af9259c07937ce35/equal-access-to-justice-a-mapping-of-experiences_3124.pdf

²⁶ Kenya National Bureau of Statistics, "Analytical Report on Population Projections Volume XIV "KNBS 2017. Pp 17 Assessed on 01/04/2018 from <https://www.knbs.or.ke/download/analytical-report-on-population-projections-volume-xiv-pdf-2/>

²⁷ Judiciary, "Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021" Jomo Kenyatta Foundation, 2017, pp 20.

²⁸ Ibid.

²⁹ Anderson, M.R., "Access to justice and legal process: making legal institutions responsive to poor people in LDCs," (2003).

³⁰ African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000).

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

children. There are few wheel chair ramps and lifts within the court facilities, further limiting the physical access to the courts.³¹ The courts are therefore inaccessible to many Kenyans living in the rural areas who have to incur significant transport cost. That leaves the poor, marginalized and vulnerable with little access to formal justice.³²

Unlike the court systems, TDRs conflict resolution mechanisms are mainly community centred with each of the 42 tribes in Kenya having their own dispute resolution mechanisms.³³ The institutions of these TDRs include families, clans, extended families and neighbours or elders who are physically within reach with little or no costs to the disputants.³⁴ The procedures of the TDRs and ADR conflict resolution systems are well known and familiar hence has promoted the access to justice.³⁵

d. Financial Access

The financial implication of settling disputes is one of the largest factor limiting the access to justice among Kenyans. With more than 60% of Kenyan's living below the poverty line legal cost that include court fees and advocates fees have greatly limited the access to Kenyan courts.³⁶ The average minimal cost of opening a file upon retaining the services of an advocate in Kenya is about USD60 and upon completion of a simple matter the costs including advocates fees and court filing fees add up to an average of USD300.³⁷ In a survey conducted to assess whether the

³¹ Mbote, P.K, & Aketh M., "Kenya: justice sector and the rule of law," African Minds, 2011, pp. 156-176.

³² Kalla, K. and Cohen, J., *Ensuring justice for vulnerable communities in Kenya: a review of HIV and AIDS-related legal services*. Open Society Institute, 2007. Available at <http://kelinkeny.org/wp-content/uploads/2010/10/Ensuring-justice-for-the-Vulnerable.pdf>

³³ Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," In *CIARB Africa Region Centenary Conference 2015*. 2015.

³⁴ Kariuki, F., "Conflict resolution by elders in Africa: Successes, challenges and opportunities," *Alternative Dispute Resolution* 3, No. 2 (2015): 30-53; Gaston, E. L., and Lillian Dang. *Addressing land conflict in Afghanistan*. US Institute of Peace, 2015; Murtazashvili, I. and Murtazashvili, J., "Can community-based land adjudication and registration improve household land tenure security? Evidence from Afghanistan," *Land Use Policy* 55 (2016): 230-239.

³⁵ Ibid; See also Laibuta, K.I., "ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution," Presented at the Chartered Institute of Arbitrators African Centenary Conference in Livingstone, Zambia 15th-17th July 2015. Available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/kibaya-laibuta.pdf?sfvrsn=0>

³⁶

³⁷ Mbote, P.K, & Aketh M., "Kenya: justice sector and the rule of law," African Minds, 2011, pp. 158

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

existing court fees are prohibitive in access to justice, it showed that a majority of Kenyans who had met these court fees found them to be prohibitive.³⁸

The Advocates Remuneration Order sets out and administers the advocate's fees as well as prohibits advocates from charging amounts below or above the stipulated amounts. Charging amounts less than the amounts prescribed is tantamount to undercutting which leaves the public with limited advocate representation. The legal aid provided by the state is minimal and limited to accused persons charged with murder at the High Court of Kenya or child sexual offenders who are unable to secure legal representation.³⁹ This leaves the majority of the Kenyans without legal representation since they do not have a choice to pick even cheap legal representation.⁴⁰ The Civil Procedure Rules have provided for application for a pauper's brief for persons who cannot afford the legal costs. These applications have an initial cost and are dependent on the availability of advocates willing to handle such matters on pro bono basis.⁴¹

Unlike these limitations present in the court systems, ADR conflict resolution mechanisms have a fairly minimal financial implication. The informal systems require little or no filing fees, there is no cost of representation as the disputants either represent themselves or use close family, friends or their clan system. The reduced costs of negotiation, mediation, conciliation and traditional dispute resolution mechanisms make it a preferred avenue to ventilate disputes thus enhancing the access to justice.⁴²

e. Unreasonable delay

In Kenya, access to justice has been greatly hampered by the fact that most disputes, especially those of commercial nature take a long time to be resolved by the court system. This delay is deterrent to most Kenyans to pursue disputes leading to prevalence of extrajudicial means of

³⁸ Ibid.

³⁹ Mbote, P.K, & Aketh M., "Kenya: justice sector and the rule of law," African Minds, 2011, pp. 158.

⁴⁰ Ibid.

⁴¹ Mbote, P. and Akech, M., *Kenya: Justice Sector and the Rule of Law*, Open Society Foundations, March 2011 at 159.

⁴² Harper, E., *Customary justice: from program design to impact evaluation*. Rome: International Development Law Organization, 2011. Available at http://www.burmalibrary.org/docs21/Customary_Justice-From_Program_Design_to_Impact_Evaluation.pdf; Veldman, M., and Lankhorst, M., "Enhancing Legal empowerment through engagement with customary justice systems: IDLO and Universiteit Leiden." *Faculty of law* (2011).

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

settling disputes.⁴³ The Constitution provides for the right to fair hearing. Every person has a right to have their dispute resolved by application of law and decided in a fair public hearing before a court or another independent or impartial tribunal. This provision also includes the right to have the trial begin and conclude without delay.⁴⁴ This right is yet to be achieved by many Kenyans as envisioned by the legislators.

Ideally, simple commercial disputes involving undisputed facts and issues are fast tracked and ought to take a maximum of 180 days after the issuance of pre-trial directions to be resolved, while complex matters and issues are multi-tracked and ought to take about 240 days after the issuance of pre-trial directions.⁴⁵ This, however, is not the case as a research conducted in 2004 by Kenya AIDS Consortium revealed that on average, civil matters take between two to six years to be resolved.⁴⁶

In reality, the court system is facing a problem of backlog of cases that has hindered access to justice.⁴⁷ An audit carried out in 2013 revealed that there was a total of 426,508 pending cases in the courts. Of these cases, 332,430 were civil disputes and 94,078 were criminal in nature. 73 % of these cases were cases that had been on court for more than a year.⁴⁸ The Judiciary has however taken steps to reduce the backlog of cases through hiring of more judicial officers and legal researchers, improvement of case management system, creating public awareness, automation of court processes, opening new courts and amendment of key laws such as the Civil Procedure Rules.⁴⁹ These efforts have seen little success in the reduction of the backlog of cases with the figures of pending cases as at December 2016 being a total of 505,315 pending cases up

⁴³ The World Bank, "Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans," October 5 2017. Available at <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>

⁴⁴ Article 50, Constitution of Kenya, 2010.

⁴⁵ The Civil Procedure Act (Cap. 21), Civil Procedure Rules, 2010, Order 3; Order 11, Legal Notice No. 151, 10th September, 2010, Laws of Kenya.

⁴⁶ Kalla K. & Cohen, J., 'Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and Aids-related Legal Services', Law and Health Initiative, OSI's Public Health Programme, Open Society Initiative for East Africa (2007).

⁴⁷ Otieno, D., "Thousands of cases choke courts despite cleanup drive," Daily Nation, 7th February, 2018. Available at <https://www.nation.co.ke/newsplex/justice-denied/2718262-4295704-6ghvh1z/index.html>;

⁴⁸ Judiciary, "Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021," Jomo Kenyatta Foundation, 2017, p 19.

⁴⁹ Ibid pp. 20.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

from 494,377 at the beginning of 2016/17. A further total of 175,770 cases have been pending within the court systems for over five years.⁵⁰ The Judiciary has initiated efforts to use ADR conflict mechanisms to settle disputed within short periods of time allowing disputants expeditious remedies for their claims. This has been pivotal in the realization of the right to access to justice as enshrined in the Constitution.

f. Women in ADR Practice

Irrefutably, the effects of conflict on women are unequal and dissimilar from the effect it has on men. This is mainly premised on the fact that when social order collapses, women are likely to be vulnerable than the male counterparts.⁵¹ Unfortunately, the role of women in conflict resolution through ADR dispute resolution mechanisms in most African societies had often been underutilized and undervalued. Women are discriminated against and unwelcome in the negotiation discussions and are less likely to be selected to chair mediation and arbitration sittings. This is also evident in the low number of women arbitrators in Kenya.⁵²

The gender theory in conflict resolution states that a person's gender is one of the most prominent features of an individual that causes observers to notice and process it immediately in social situations.⁵³ This theory suggest that gender is also a defining factor in understanding the bargaining behaviour that can be observed within ADR causing disparity between the attitude, behaviour and outcomes of dispute resolution mechanisms involving men or women. One such difference is the interpersonal orientation in women in negotiation and mediation that is not common among men. Women are generally more interested in, and responsive to the interaction-specific aspects on negotiations causing them to perceive the relational dimension to negotiations and lean towards creating a harmonious and amicable relationship between parties. Studies show

⁵⁰ Ibid pp. 21.

⁵¹ Jonas Gahr Store, Minister of Foreign Affairs of Norway, Welcome Address at The Impact of Armed Conflict on Women Before The Norwegian Red Cross and The International Peace Research Institute (May 8, 2007), available at http://www.regjeringen.no/en/dep/ud/aktuelt/taler_artikler/utenriksministeren/2007/violence.html?id=465762.

⁵² Chartered Institute of Arbitrators-Kenya, Women in Arbitration Conference 2018, April 2018. Available at <https://www.ciarbkenya.org/women-in-arbitration-conference-2018/>

⁵³ Kray L. and Babcock L., "Gender in Negotiations: A Motivated Social Cognitive Analysis, in Negotiation Theory and Research," Leigh L. Thompson ed., 2006. pp. 205–09.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

that men are more inclined to the task-specific aspects of negotiation such as the subject matter of the dispute rather than the relational aspect of the dispute.⁵⁴

Further, women in ADR processes have suffered the negative effects of gender stereotyping and perceived expectations and bias in their role within dispute resolution.⁵⁵ This is because a pre-existing gender stereotypical expectation of an individual to act in a certain way may lead the individual to act in a manner evidencing those expectations. A 2001 study on gender bias showed that most people perceive men to be better negotiators than women.⁵⁶ This explicit and implicit negative bias may lead women to succumb to these expectations and perform less favourably than men. Women in dispute resolution who are able to overcome these negative stereotypes and gender bias are persistent, consistent and focused on attaining the goals often appearing as aggressive or socially inept.⁵⁷

It has been opined that Arbitration is gender sensitive and must incorporate the inclusion of all people.⁵⁸ As such, there is a need to eliminate the lack of transparency within Arbitration selection and gender bias for women to thrive and grow within arbitration practice in Africa. The problem of pipeline leak of women engaged in arbitration where the female arbitrators drop out after some years of practice has to be addressed. This is because more female arbitrators the lack of female role models and lack of female mentorship to nurture the younger women. Women are also prone to the work life challenges unlike men within the arbitration practice. Women suffer from the perceived lack of experience and opportunities that makes them drop out of the practice. Further, she stated that there ought to be diversity in choosing of the arbitration panels to avoid the instances where the same arbitrators are chosen to arbitrate on matters repetitively leaving out other equally qualified and competent female arbitrators.⁵⁹

⁵⁴ Ibid, p. 206.

⁵⁵ Stuhlmacher, A.F. and Morrissett, M.G., "Men and women as mediators: disputant perceptions," *International Journal of Conflict Management* 19, no. 3 (2008): 249-261.

⁵⁶Kray L. and Babcock L., "Gender in Negotiations: A Motivated Social Cognitive Analysis, in *Negotiation Theory and Research*," Leigh L. Thompson ed., 2006., p. 210.

⁵⁷ Klein, R.S., "The role of women in mediation and conflict resolution: lessons for UN Security Council Resolution 1325." *Wash. & Lee J. Civil Rts. & Soc. Just.* 18 (2011): 277.

⁵⁸Adedoyin Rhodes-Vivour, "Promoting Gender Diversity in Arbitration in Africa", Women in Arbitration Conference 2018, Nairobi, Key note speech available at <https://www.iarbafrica.com/en/events/66-arbitral-women-conference-2018>.

⁵⁹ Ibid.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

In response to the foregoing, the solution is to increase the participation of women in conflict resolution lies within making the conflict resolution mechanisms gender sensitive.⁶⁰ Despite the numerous challenges facing women in arbitration and other conflict dispute resolution mechanisms, women in arbitration ought not to push the male practitioners out but let them collaborate within dispute resolution. There is increased efficiency and effectiveness in arbitration panels executive boards and that includes gender balanced membership.⁶¹

g. Gaps within Pilot Court-Annexed Mediation Project

There are certain gaps that exist within the court annexed mediation pilot project.⁶² These gaps include;

1. Once a matter is screened and referred to mediation can a party who is “aggrieved” refuse to accept the referral? There are instances where the parties referred to Mediation make applications opposing to the referral. The law is silent on how these applications ought to be addressed within the pilot project.
2. Can one argue that the MDR’s direction is a “decision” capable of being appealed to a judge or challenged by an application for judicial review?
3. Does the referral to mediation violate a litigant’s constitutional rights to “have the dispute resolved before a court” or is mediation the “appropriate” body under Article 50 (1) of the Constitution? Does the court annexed mediation limit the right to have a dispute resolved within the courts of law?
4. Does compulsory mediation take away or limit the litigants’ constitutional rights to participate in a forum not of his choice other than before a court of law?

In addition, submissions from the national ADR stakeholder forum raised the following areas that have not been addressed within mediation as a conflict resolution process:

5. Who is a mediator? The definitional question of who a mediator and what qualifications is, qualities and attributes they must possess came up. Does coming up with a single

⁶⁰ Adedoyin Rhodes-Vivour, “Promoting Gender Diversity in Arbitration in Africa”, Women in Arbitration Conference 2018, Nairobi, Key note speech available at <https://www.iarbafrica.com/en/events/66-arbitral-women-conference-2018>.

⁶¹ Greenwood, L. and Baker, C.M., "Getting a Better Balance on International Arbitration Tribunals." *Arbitration International* 28, no. 4 (2012): 653-668.

⁶² Tanui.E. “Overview of Ongoing Initiatives by Judiciary Court Annexed Mediation Project.” Cultivating A Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya Towards Sustained Economic Growth and Access to Justice forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

definition of who is a mediator lock out the mediation practitioners who serve in informal settings or far flank areas.

6. Is there a need for the course content or curriculums within the mediation training within the several training institutions to be standardized for quality training in mediation courses?
7. Should mediation be a core unit in the law school's curriculum as most universities offer it as a non-compulsory course unit?
8. Should the cost involved in the mediation process be set within the law to provide cost effective mediation services?

h. Opportunities in Mediation

To deepen mediation as a dispute resolution mechanism, there are certain opportunities that must be harnessed and developed to streamline it as a mechanism of dispute resolution.⁶³

As an exemplar, there should be an effort to consolidate the efforts by the different institutions to develop rules of mediation that have a uniform application for mediation within the legal process. Currently, rulemaking mandate in mediation as a legal process has been left to the different mediation service providers. The institutions with their own mediation rules include NCIA, Strathmore Dispute Resolution Centre, COTU, FIDA and Commissions.

In addition, it was suggested during the stakeholders' forum that the Judiciary should make it standard practice to incorporate mediation as a condition precedent to filing of suits or referring a matter to arbitration. This is not a new concept as Uganda has already made rules that require all commercial disputes, other than those emanating from Small Claims Courts, to be submitted to mediation prior as part of the pretrial conference. The Judicature (Commercial Court Division) (Mediation) Rules 2007,⁶⁴ has made mediation an integral part of the Commercial Court case administration system and applies in the High Court and Magistrates court of the Republic of

⁶³ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁶⁴ S1. No. 55 of 2007.

Uganda. These rules require that all matters be referred to mediation within 60-days and there is no appeal or review of any orders obtained from the mediation process.⁶⁵

i. Challenges in Mediation

Lawyers are discouraging their clients from participating in the mediation process. Some of the lawyers have a negative perception over mediation since they are trained to litigate cases and they cherish arguing cases in open court. Lawyers perceive mediation as a threat to their income through litigation services. In mediation, the clients are left to speak and negotiate for themselves, the lawyers get frustrated and this has even led to some lawyers discouraging their clients from participating in mediation.⁶⁶

Also, Court Annexed Mediation is based within the precincts of the Family and Commercial and Tax Division of the High Court. There is a challenge among business-oriented parties may not attend the mediation due to their busy schedules leading to the matters taking longer than ought to.⁶⁷

In addition, mediation faces the challenge when deciding in multinational companies that operate in Kenya where the persons capable of making binding decisions on the company are not situated in Kenya but in the Company's headquarters.⁶⁸

J. Lawyers in Arbitration and ADR Practice

Arbitration and ADR in general is now a service industry, and a very profitable one at that, with the arbitral institutions, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale.⁶⁹ The increasingly high cost of the arbitration has

⁶⁵ Justice Law and Order Sector, 'Judicature (Commercial Court Division) (Mediation) Rules 2007, Accessed 15 April 2018, from ww.jlos.go.ug/index.php/projects/alternative-dispute-resolution-adr/mediation-rules

⁶⁶ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Mustill, M.J., '[Arbitration: History and Background](#)' *Journal of International Arbitration*, Vol 6, Issue 2, 1989, pp. 43–56

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

made it inaccessible to many disputants.⁷⁰ In addition, there have not been very clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. The increase in arbitration costs has been accelerated by the following factors:⁷¹

- a. Lawyers who are arbitrators cannot agree on dates with other parties as they are occupied running private practices concurrently with arbitration practice.
- b. Court Users Committees have identified the lack of support of ADR mechanisms by lawyers.
- c. When lawyers are given autonomy over dispute resolution, they are more willing to litigate.
- d. Lawyers do not really understand their role in ADR dispute resolution mechanisms including Arbitration.

3. Overview of ADR Mechanisms use in Kenya: Legal and Policy Framework

Alternative Dispute Resolution mechanisms refer to all other dispute resolution or decision-making processes that are an alternative to litigation. The Charter of the United Nations⁷² makes provision for the use of Alternative Dispute Resolution mechanism. It states that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, 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.

These mechanisms are provided for by the Constitution of Kenya within the ambit of Article 159 that provides that in exercise of judicial authority, the Judiciary shall promote the use of

⁷⁰ Daniel E. González, Maria Catalina Carmona and Roland Potts, “Controlling the rising costs of arbitration,” October 2014, Special Report: International Dispute Resolution, *Financier Worldwide Magazine*. Available at <https://www.financierworldwide.com/controlling-the-rising-costs-of-arbitration/#.W6c0x2NRXIU>

⁷¹ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya’s ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁷² Art 33 (1), 24th October 1945.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

alternative dispute resolution mechanisms⁷³. These mechanisms and their use in access to justice are also captured across different sectoral laws and statutes.

3. Enhancing Access to Justice through ADR Mechanisms

ADR is a useful tool that can enhance access to justice in various sectors, both formal and informal as witnessed in the Judiciary's Pilot Project on Court Annexed Mediation as rolled out by the Commercial and Tax Division of the High Court, Milimani Law Courts. ADR is not really alternative. It is widely used by the ordinary Kenyans. However, ADR mechanisms such as negotiation, mediation, arbitration, amongst others, suffer from challenges.⁷⁴

There are gaps in their application and they are not harmonised. There is a need for the setting up of an enabling legal and institutional framework to facilitate the use of ADR.⁷⁵

Use of ADR in the various sectors needs to be mapped to enhance coordination and efficiency. There is a need for harmonisation of the use of ADR in the various sectors.

ADR should, however, be benchmarked against the Bill of Rights and international best practices on human rights and access to justice.

In the commercial justice sector, mediation and arbitration have been used successfully. Their use should be enhanced and supported. There is thus a need to create awareness as a way of enhancing public embracing and use of ADR mechanisms in dealing with different disputes.

In the analysis and stakeholders' forums, it was established that there is no distinct legal, policy or institutional framework for ADR and TDRs but there are various laws that promote the use of ADR and TDRs and other community justice systems in dispute resolution.⁷⁶

⁷³ Article 159(2)(c), Constitution of Kenya, 2010.

⁷⁴ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

⁷⁵ Ibid.

⁷⁶ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

It was also established that most ADR and TDRs mechanisms face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

There is need to formulate the policy or legislative framework to guide and promote the utilization of these alternative dispute resolution mechanisms to realize their benefit in promoting the access to justice for the majority of Kenyans. By formulating this policy, the potential of these mechanisms will be tapped and harnessed in order to offer support and complement the already overburdened formal court system that cannot reach the far reaching geographical regions of the country.⁷⁷

i. Promoting Wider application of AJS and TDRMs

The Judiciary should adopt the use of AJS and TDRMs in the dispensation of justice through the Multi-Door Court House concept.

In addition to using mediation as an avenue of ventilating grievances within the court system, the Judiciary should also use these AJS as the first port call in instances where it is most suited to resolve disputes. These are cases that marriage, divorce, child custody, maintenance, succession and related matters should first be referred to TJS and TDRMs before the cases can be heard before a judge.⁷⁸

In addition, there is need for research and codification of key concepts, practices and norms of different TJS to protect them and to ascertain where, when, how and under what conditions they operate. This also allows for analysis to determine whether they comply with the thresholds set in the Constitution.⁷⁹ The NCIA can work closely with the AJS Taskforce and community elders in such a task.

The African traditions and customs of the Kenyan communities should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of

⁷⁷ NCIA, which is charged with this role can work closely with other stakeholders such as the Kenya Law Reform Commission, to come up with this.

⁷⁸ Van Zyl, L.", *Alternative Dispute Resolution in the Best Interests of the Child*, PhD diss., Rhodes University, 1995. Available at <https://core.ac.uk/download/pdf/11985174.pdf>

⁷⁹ Kariuki, F., 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.⁸⁰

ii. Bridge AJS and TDRMs with the formal mechanisms

The AJS Taskforce the ADR Taskforce and the Judiciary ought to identify and utilize mediation to create a bridge between the traditional dispute resolution mechanisms as well as the alternative justice system with the formal court system and arbitration.⁸¹ In achieving this, the taskforce will be able to actualize the provisions of the Constitution in Article 159(2) (C). There is much advantage to be derived from bridging and linking mediation, AJS and the court system for dispute resolution.

iii. Setting up an Over-Arching Structural and Policy Framework for ADR in Kenya

There is need to come up with an over-arching structural framework for ADR in Kenya, and the first step will be to come up with a conceptual framework that guide the policy that can translate into a Draft ADR Bill.

There is also a need to come up with an over-arching policy framework for ADR. This will ensure that stakeholders seeking to employ ADR in dispute resolution within a sector can rely on the over-arching policy to develop further legislation. The ADR taskforce has the mandate to develop and formulate these recommendations.

In the formulation of the ADR policy, certain factors that must come into account such as: -

- a. Increased mobile courts and community justice days for legal interaction;
- b. Continuous legal literacy that focuses on the training TDRMs on extra judicial processes and probation modalities (Paralegal);

⁸⁰ Kariuki, F., 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

⁸¹ IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

- c. People centred delivery of justice as promoted by the Judiciary must be seen to embrace TDRMs with the same weight accorded to formal mediation;
- d. Roll out ADR & TDRMS in all matters especially in the emerging areas in land and extractives;
- e. Implement pro ADR statutes such as the Legal Aid Act; Small Claims Court Act;
- f. Enact the Courts of Petty Sessions; and
- g. Judiciary to monitor returns on ADR in all government enabled ministries and sectors.

NCIA by virtue of its statutory mandate, is a strategic player in ensuring that ADR use is enhanced especially in commercial matters.⁸² It can work closely with the Judiciary, and other stakeholders across various government sectors to ensure that there is synergy across the sectors to enhance the uptake and use of ADR in promoting access to justice.

5. Conclusion

Increased application of ADR is considered as one of the measures that will lead to faster dispensation of cases, particularly in tribunals and traditional justice mechanisms. There is a myriad of ADR mechanisms that can be employed. The Kenyan ADR legislative, policy, and strategic framework, and plans to develop to develop ADR, conforms to current international perspectives.

The paper has offered a status analysis of ADR and Informal Community Justice Systems and made general recommendations on ways to enhance use of ADR mechanisms in accessing justice for the Kenyan people.

Access to Justice and Alternative Dispute Resolution Mechanisms are intertwined. If well utilised, ADR can lead to improved access to Justice for Kenyans.

⁸² S. 5, Nairobi Centre for International Arbitration, No. 26 of 2013, Laws of Kenya.

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

References

Adedoyin Rhodes-Vivour, "Promoting Gender Diversity in Arbitration in Africa", Women in Arbitration Conference 2018, Nairobi, Key note speech available at <https://www.iarbafrica.com/en/events/66-arbitral-women-conference-2018>.

African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000).

Alffram, H., "Equal Access to Justice: A Mapping of Experiences," (Sida, 2011). Available at https://www.sida.se/contentassets/8d1d0ea3d9464589af9259c07937ce35/equal-access-to-justice-a-mapping-of-experiences_3124.pdf

Anderson, M.R., "Access to justice and legal process: making legal institutions responsive to poor people in LDCs," (2003).

Charter of the United Nations, 24th October 1945.

Chartered Institute of Arbitrators-Kenya, Women in Arbitration Conference 2018, April 2018. Available at <https://www.ciarbkenya.org/women-in-arbitration-conference-2018/>

Civil Procedure Rules, 2010, Civil Procedure Act (Cap. 21), Legal Notice No. 151, 10th September, 2010, Laws of Kenya.

Constitution of Kenya, 2010, Laws of Kenya.

Daniel E. González, Maria Catalina Carmona and Roland Potts, "Controlling the rising costs of arbitration," October 2014, Special Report: International Dispute Resolution, *Financier Worldwide Magazine*. Available at <https://www.financierworldwide.com/controlling-the-rising-costs-of-arbitration/#.W6c0x2NRXIU>

Ganju, D., Patel, S.K., Prabhakar, P. and Adhikary, R., "Knowledge and exercise of human rights, and barriers and facilitators to claiming rights: a cross-sectional study of female sex workers and high-risk men who have sex with men in Andhra Pradesh, India," *BMC international health and human rights*, Vol.16, no. 1 (2016): 29

Gaston, E. L., and Lillian Dang. *Addressing land conflict in Afghanistan*. US Institute of Peace, 2015

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Ghai, Y.P., "Interpreting Kenya's Transformative Constitution," *Awaaz Magazine*, Friday, 12 September 2014, available at <http://awaazmagazine.com/previous/index.php/editors/item/535-interpreting-kenya-s-transformative-constitution>

Greenwood, L. and Baker, C.M., "Getting a Better Balance on International Arbitration Tribunals." *Arbitration International* 28, no. 4 (2012): 653-668.

Harper, E., *Customary justice: from program design to impact evaluation*. Rome: International Development Law Organization, 2011. Available at [http://www.burmalibrary.org/docs21/Customary JusticeFrom Program Design to Impact Evaluation.pdf](http://www.burmalibrary.org/docs21/Customary_JusticeFrom_Program_Design_to_Impact_Evaluation.pdf)

IDLO, "Access to Justice in Kenya," 15 Feb 2017, Available at <https://www.idlo.int/what-we-do/initiatives/access-justice>

IDLO, "Legal Empowerment," available at <https://www.idlo.int/what-we-do/access-justice/legal-empowerment>

IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

Jonas Gahr Store, Minister of Foreign Affairs of Norway, Welcome Address at The Impact of Armed Conflict on Women Before the Norwegian Red Cross and The International Peace Research Institute (May 8, 2007), available at http://www.regjeringen.no/en/dep/ud/aktuelt/taler_artikler/utenriksministeren/2007/violence.html?id=465762.

Judicature (Commercial Court Division) (Mediation) Rules 2007, No. 55 of 2007.

Judiciary, "Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021," Jomo Kenyatta Foundation, 2017.

Justice Law and Order Sector, 'Judicature (Commercial Court Division) (Mediation) Rules 2007, Accessed 15 April 2018, from [ww.jlos.go.ug/index.php/projects/alternative-dispute-resolution-adr/mediation-rules](http://www.jlos.go.ug/index.php/projects/alternative-dispute-resolution-adr/mediation-rules)

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Kaguongo, W., "Introductory Note on Kenya." (2012), available at http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf

Kalla K. & Cohen, J., 'Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and Aids-related Legal Services', Law and Health Initiative, OSI's Public Health Programme, Open Society Initiative for East Africa (2007). Available at <http://kelinkkenya.org/wp-content/uploads/2010/10/Ensuring-justice-for-the-Vulnerable.pdf>

Kariuki, F., "Conflict resolution by elders in Africa: Successes, challenges and opportunities," *Alternative Dispute Resolution* 3, No. 2 (2015): 30-53.

Kariuki, F., 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

Kenya Legal and Ethical Issues Network on HIV and AIDS, "Trends in HIV & TB Human Rights Violations and Interventions," Report, July 2018. Available at <http://www.kelinkkenya.org/wp-content/uploads/2018/07/Trends-in-HIVTB-Human-Rights-Violations-and-Interventions.pdf>

Kenya National Bureau of Statistics, "Analytical Report on Population Projections Volume XIV "KNBS 2017. Assessed on 01/04/2018 from <https://www.knbs.or.ke/download/analytical-report-on-population-projections-volume-xiv-pdf-2/>

Klein, R.S., "The role of women in mediation and conflict resolution: lessons for UN Security Council Resolution 1325." *Wash. & Lee J. Civil Rts. & Soc. Just.* 18 (2011): 277.

Kray L. and Babcock L., "Gender in Negotiations: A Motivated Social Cognitive Analysis, in *Negotiation Theory and Research*," Leigh L. Thompson ed., 2006. pp. 205–09.

Laibuta, K.I., "ADR in Africa: Contending with Multiple Legal Orders for Wholesome Dispute Resolution," Presented at the Chartered Institute of Arbitrators African Centenary Conference in Livingstone, Zambia 15th-17th July 2015. Available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/kibaya-laibuta.pdf?sfvrsn=0>

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Law Reform Commission, “Alternative Dispute Resolution,” *Consultation Paper*, LRC CP 50 – 2008, ISSN 1393 – 3140, July 2008, available at <http://www.lawreform.ie/fileupload/consultation%20papers/cp50.htm>

Legal Aid Act, No. 6 of 2016, Laws of Kenya.

Mbote, P. and Akech, M., *Kenya: Justice Sector and the Rule of Law*, Open Society Foundations, March 2011.

Mohamed, H.M., “Many Kenyan voters need civic education,” *Daily Nation*, Tuesday December 20 2016. Available at <https://www.nation.co.ke/oped/opinion/Many-Kenyan-voters-need-civic-education/440808-3493424-pwtbnv/index.html>

Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," In *CI Arb Africa Region Centenary Conference 2015*. 2015.

....., ‘*ADR under the Court Process: A Paradox?*’ *Alternative Dispute Resolution and Access to Justice in Kenya* (2015).

Murtazashvili, I. and Murtazashvili, J., "Can community-based land adjudication and registration improve household land tenure security? Evidence from Afghanistan," *Land Use Policy* 55 (2016): 230-239.

Mustill, M.J., '[Arbitration: History and Background](#)' *Journal of International Arbitration*, Vol 6, Issue 2, 1989, pp. 43–56

Nairobi Centre for International Arbitration, No. 26 of 2013, Laws of Kenya.

Orinde, H., “Survey reveals how Kenyans are ignorant of their human rights,” *The Standard Media*, Mon, April 9th 2018. Read more at: <https://www.standardmedia.co.ke/article/2001276119/survey-reveals-how-kenyans-are-ignorant-of-their-human-rights>

Otieno, D., “Thousands of cases choke courts despite cleanup drive,” *Daily Nation*, 7th February, 2018. Available at <https://www.nation.co.ke/newsplex/justice-denied/2718262-4295704-6ghvh1z/index.html>;

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Republic of Kenya, “*Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021*” Jomo Kenyatta Foundation, 2017.

Republic of Kenya, National Action Plan, Legal Aid 2017-2022, Kenya.

Stellmacher, J., Sommer, G. and Brahler, E., "The cognitive representation of human rights: Knowledge, importance, and commitment," *Peace and Conflict* 11, no. 3 (2005): 267-292.

Stuhlmacher, A.F. and Morrissett, M.G., "Men and women as mediators: disputant perceptions," *International Journal of Conflict Management* 19, no. 3 (2008): 249-261.

Tanui.E. “Overview of Ongoing Initiatives by Judiciary Court Annexed Mediation Project.” Cultivating A Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya Towards Sustained Economic Growth and Access to Justice forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya

Teehankee, J.C., “Background Paper on Access to Justice Indicators in the Asia-Pacific Region,” (La Salle Institute of Governance, October, 2003). Available at <https://www.un.org/ruleoflaw/files/Access2JusticeIndicators.pdf>

The World Bank, “Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans,” October 5, 2017. Available at <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>

UNDP, “Access to Justice: Practice Notes,” 9/3/2004. Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/ACCESSTOJUSTICEUNDP PRACTICENOTE.pdf>

UNESCO Institute for Statistics, "Adult and youth literacy: National, regional and global trends, 1985–2015," (2013). Available at http://uis.unesco.org/sites/default/files/documents/adult-and-youth-literacy-national-regional-and-global-trends-1985-2015-en_0.pdf

Van Zyl, L., "Alternative Dispute Resolution in the Best Interests of the Child," PhD diss., Rhodes University, 1995. Available at <https://core.ac.uk/download/pdf/11985174.pdf>

Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya

Veldman, M., and Lankhorst, M., "Enhancing Legal empowerment through engagement with customary justice systems: IDLO and Universiteit Leiden," *Faculty of law* (2011).