The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution

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Abstract

Kenya's experience with the use of Alternative Dispute Resolution (ADR) Mechanisms and Traditional Dispute Resolution Methods (TDRM) mechanisms has seen tremendous transition over the years from a period when arbitration was the only legally recognised mechanism as alternative to litigation in managing domestic disputes, although with a mention of use of customary practices of communities in solving personal disputes, to a time when the use of the various ADR mechanisms is considered as one of the guiding principles of the exercise of judicial authority by Kenyan courts and tribunals. The Constitution of Kenya 2010 marked this worthy transition, heralding a new dawn where the use of ADR in both domestic and international disputes management in Kenya seeks to go beyond the perception of arbitration being the only ADR mechanism. This has been buttressed by the enactment of a number of sectoral statutes which are meant to promote the use of ADR mechanisms in management of disputes.

This paper examines the modernization of other ADR processes in Africa and specifically in Kenya in the post 2010 constitutional era. The discourse will however flow from the pre-Constitution 2010 jurisprudence in order to highlight the new developments as well as the prospects and challenges that have arisen from the changing legal, social and political landscape as far as management of disputes in the country is concerned. Notably, the main focus of the paper is the other ADR mechanisms apart from arbitration which is in fact considered a quasi-judicial mechanism. This discussion is based on the fact that there have been renewed efforts to modernise these mechanisms through constitutional and legal recognition and spelling out certain safeguards considering that their informal use by communities since time immemorial has had tremendous impact on the legal and social setup. The paper will offer an appraisal of some of the laid out legal and social safeguards and their effect on the effectiveness of these mechanisms.

1. Introduction

It is worth pointing out that 'every social group contains within it the elements and conditions in which disputes will arise'[1], and depending on the nature of such disputes, they can be dealt with using formal or informal mechanisms. For instance, some authors have rightly observed that 'people in business rarely invoke the law as a means of resolving business disputes over their

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[1] Harris, P., *An introduction to law*, (Cambridge University Press, 2015), p.150.

contractual agreements, mainly because this is seen as having the effect of perpetuating the conflict and polarising the disputants, instead of resolving the particular problem without damaging the continuing business relationships of the parties'.[2] Indeed, at the international level, the place of alternative means of addressing disputes away from courts are formally recognised, with the Article 33 of the *Charter of the United Nations*[3] outlining the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that:

> *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice* (emphasis added).[4]

It is against this background that this paper looks at the status of the various ADR and TDR mechanisms in Kenya, with the exception of arbitration, in the post constitution era.

2. Resolving Personal Disputes in Traditional Africa: African Communities Customary Practices

Unlike litigation which results in dispute settlement, TDR and majority of ADR mechanisms (perhaps except arbitration) focus on conflict resolution. Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. Conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.[5] The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes. On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the

[2] Harris, P., *An introduction to law*, (Cambridge University Press, 2015), pp.150-151.

[3] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://treaties.un.org/doc/Publication/CTC/uncharter.pdf

[4] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

[5] Mwagiru, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

issues without venturing into the root causes of the dispute.[6] Examples of dispute settlement mechanisms are arbitration and ligation.

Some scholars have observed that 'the traditional African system of dispute resolution has always been a collective enterprise with the involvement, in various ways, of the whole community, although the last word belongs to the chief and the most authoritative points of view are those of the elderly'.[7] Despite this, 'consent of the parties involved in the conflict and of the community in general is still viewed as the main source of legitimization of the decision', since 'the legal process is designed to re-establish social peace in order to prevent feuds'.[8]

Some scholars have even advocated for the traditional approaches to conflict management in search of lasting peace outcomes. According to them, 'supporters of indigenous, traditional and customary approaches to peace-making in the context of civil wars claim that indigenous approaches to peacemaking are participatory and relationship-focused, and that peaceful outcomes have a higher chance of community adherence than template-style international peace interventions effected through the `liberal peace"'.[9]

Unlike the court process which delivers retributive justice, TDR mechanisms encourage resolution of disputes through restorative justice remedies. TDR mechanisms derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDR mechanisms is to foster peace, cohesion and resolve disputes in the community.[10]

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[6] See Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at http://www.beyondintractability.org/bi-essay/culture-of-mediation [Accessed on 25/11/2018].

[7] Elisabetta, G., "Alternative dispute resolution, Africa, and the structure of law and power: the Horn in context." *Journal of African Law* 43, no. 1 (1999): 63-70, at 64.

[8] Ibid, , at 64.

[9] Mac Ginty, R., "Indigenous peace-making versus the liberal peace," *Cooperation and conflict* 43, no. 2 (2008): 139-163.

[10] Articles 60(2) (g) & 67(1) (f) of the Constitution of Kenya; AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," An International *Multidisciplinary Journal*, Ethiopia, Vol. 8 (2), Serial No. 33, April, 2014, pp. 138-157 at p. 154.

3. The ADR and TDR Spectrum

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilises to resolve disputes without resort to costly adversarial litigation. Notably, most of the African communities had their own unique dispute resolution mechanisms.[11] In addition, each African community had a council of elders that oversees the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics /qualifications. The most commonly used ADR mechanisms by traditional communities include mediation, arbitration, negotiation, reconciliation and adjudication amongst others.[12]

3.1 Negotiation

Negotiation is an informal process of conflict resolution that offers parties maximum control over the process to identify and discuss their issues, without the help of a third party, thus enabling them to reach a mutually acceptable solution by focusing on their common interests rather than their relative power or position.[13] It is considered to be the most prevalent and perhaps primordial ADR process within and outside Africa.[14]

Negotiation aims at harmonizing the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party.[15] There are however those who argue that due to the generally informal nature of negotiation there is very little statistical information available on the effectiveness of negotiation.[16]

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[11] Laurence, B., "A History of Alternative Dispute Resolution," *ADR Bulletin*: Vol. 7: No. 7, Article 3, 2005. p. 1.
[12] Ibid, p. 1.
[13] Rahwan, I., Sonenberg, L. and Dignum, F., "Towards interest-based negotiation." In *Proceedings of the second international joint conference on Autonomous agents and multiagent systems* [15/11/2018], pp. 773-780, ACM, 2003.
[14] Sanchez, V.A., "Back to the Future of ADR: Negotiating Justice and Human Needs," *Ohio St. J. Disp. Resol.*, 18 (2002): 669, at p. 671.
[15] Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Centre for Conflict Research, Nairobi, 2006). p.115.
[16] Scottish Civil Justice Council, *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions*, July 2014, p.1. Available at http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2

Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate.[17] To the ordinary *mwananchi*[18] negotiation is usually the first port of call when there is a dispute. Negotiation, as an informal process of conflict resolution, offers parties maximum control over the process to identify and discuss their issues enabling them to reach a mutually acceptable solution without the help of a third party. Its focus is on common interests of the parties rather than their relative power or position. It is associated with voluntariness, cost effectiveness, informality, focus on interests and not rights, creative solutions, personal empowerment, enhanced party control, addressing root causes of the conflict, non-coerciveness and enduring outcomes. This makes it very applicable to everyday life disputes which would otherwise be aggravated by any attempts to litigate them.[19]

If negotiation fails, parties resort to mediation where they attempt to resolve the conflict with the help of a third party. Negotiation is the first step to mediation. The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.[20]

3.2 Mediation

In mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a solution. Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.[21]

While Mediation is one of the key dispute resolution mechanisms in traditional justice systems, it also forms part of the modern forms of ADR mechanisms recognised under the laws of Kenya.

[17] United Nations, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities.' *Study by the Expert Mechanism on the Rights of Indigenous Peoples*, August 2014, A/HRC/27/65.
[18] Mwananchi is the Swahili word for "Citizen" used to connote the people of Kenya.
[19] *See generally* J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu* (Vintage Books Edition, October 1965).
[20] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.
[21] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 27-28.

For instance, *Section 59A* establishes the Mediation Accreditation Committee. The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators. This also set the stage for establishment of the Court Annexed Mediation, especially with the fairly successful Judiciary pilot project on Court Annexed Mediation, which commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC)[22]; Alternative Dispute Operationalization Committee (AOC)[23]; and the Secretariat (Technical Working Group (TWG)[24]). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court. Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.[25] Mediation has been applied in resolving a wide array of commercial disputes. It works just like negotiation only that it has a third party who helps parties negotiate their needs and interests.

3.3 Adjudication

In adjudication, the elders, Kings or Councils of Elders summon the disputing parties to appear before them and orders are made for settlement of the dispute.[26] The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.[27]

Adjudication is an informal, speedy, flexible and inexpensive process where a neutral third party called the Adjudicator makes a rapid fair decision within disputes arising from contracts. It is

[22] The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The functions of the Committee include, inter alia, to determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators (Sec. 59A (4), Civil Procedure Act, Cap 21, Laws of Kenya).

[23] The Alternative Dispute Resolution Operationalization Committee (AOC) oversees the implementation of the Court Annexed Mediation project. It meets regularly to review the progress of the project, makes recommendations and formulates policies on how to guide the project. AOC was instrumental in the development of the Mediation Manual.

[24] CAMP has a secretariat which also doubles up as the Technical Working Group (TWG). The TWG is charged with the day to day running of the project. The team consists of 3 MDRs, MAC Registrar, 1 Communication specialist, an Interim Program Manager and 2 Program Officers, 2 Mediation Clerks, 2 Executive Assistants and 4 Interns.

[25] Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?* , page 1, Available at http://www.adrbarbados.org/docs/ADR%Nicholls [Accessed on 21/4/2018]

[26] Ajayi, AT and Buhari, LO., "Methods of Conflict Resolution in African Traditional Society," *op cit* at p. 150.

[27] Ibid, at p. 150.

preferred when there is power imbalance between the disputants and is suitable for construction disputes. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry. For instance, the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer*[28] and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor*[29], contemplate the use of adjudication in construction disputes and provide for a procedure that is widely used internationally. They allow parties incorporate a dispute adjudication agreement into their contract.

Adjudication in the construction industry has displayed certain characteristics. First, the adjudicator is a neutral individual who is not involved in the day to day running of the contract. He or she is neither an arbitrator, nor a State appointed Judge. Second, the adjudicator enjoys his or her powers by virtue of the agreement between the parties. Third, the adjudicator's decision is binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties. Fourth, Adjudicator's decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration. Clause 20.4 of the *FIDIC Conditions of Contract for Construction* provides that if a dispute arises either party may refer it to a Dispute Adjudication Board (DAB), amicable settlement and arbitration as the dispute settlement avenues. However, a party dissatisfied by the decision of the Dispute Adjudication Board should first resort to amicable settlement before the commencement of arbitration.[30]

3.4 Reconciliation

Under reconciliation, once a dispute is heard before the Council of Elders, the parties are bound to undertake certain obligations towards settlement. These are mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there is reconciliation

[28] The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*: *for Building and Engineering Works Designed by the Employer* (First Edition, 1999, FIDIC).
[29] The International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical* Plant, *and for Building and Engineering Works, Designed by the Contractor*, (First Edition, 1999, FIDIC).
[30] The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*, Clause 20.5.

which results in restoration of harmony and mending relationships of the parties.[31] Notably, reconciliation is one of the ADR mechanisms recognised under the Constitution of Kenya and other statutes. Restorative justice which is closely related to reconciliation is defined under Section 2 of the *Victim Protection Act No. 17 of 2014* as follows -

> "restorative justice" includes –
>
> (a) the promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents, if the victim and offender are children, and their communities; or
>
> *(b) a systematic legal response to victims or immediate community that emphasises healing the injuries resulting from the offence;"*

The Criminal Procedure Code, cap. 75, provides for the use of reconciliation under section 176 on reconciliation and section 204 on withdrawal of complaint by the complainant. The two sections of the Criminal Procedure Code provide as follows:

> *"176. Promotion of reconciliation*
>
> *In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.*
>
> *204. Withdrawal of complaint*
>
> *If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."*

The use of reconciliation as a form of ADR mechanism is also provided for under Article 159 of the Constitution of Kenya 2010 as follows:

[31] See generally Kenyatta, J., *Facing Mount Kenya*, *The Tribal Life of the Kikuyu*, Vintage Books Edition, October 1965.

> *"159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*
>
> *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
>
> *(a) justice shall be done to all**,** irrespective of status;*
>
> *(b) justice shall not be delayed;*
>
> *(c) alternative forms of dispute resolution including **reconciliation**, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

Courts have also commented on the use of reconciliation in various matters especially those of personal or private nature. For instance, in the case of *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR*[32], the Court stated that:

> *7. In cases of common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, section 176 of the CPC allows the Court to promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the Court.*

In *Republic v. Juliana Mwikali Kiteme & Others* [2017] eKLR the Court stated:

> *"Having perused the affidavits of Katonye Mwangi the mother of the deceased and Stephene Wambua Mwangangi the brother of the deceased. Both are in agreement that the criminal proceedings against all the accused herein be terminated as the accused had paid cows in accordance with Kamba customs. A copy of the handwritten agreement on the mode of payment was filed up.*
>
> *Under Article 159 (2) (c) of the Constitution this court is enjoined traditional reconciliation, subject to certain limitations under Article 159(3).*
>
> *Having considered the request of the prosecuting counsel on behalf of the DPP and the documents filed on the reconciliation of the affected persons herein, I am of the view that this is a matter where the court should promote reconciliation as envisaged by the constitution."*

The place of reconciliation under the laws of Kenya was also discussed in the case of *Republic v. Mohammed Adow Mohamed* [2013] eKLR, where the court observed that:

> *"Mr. Kimathi then proceeded on the instructions of the DPP to make an oral application in court to have the matter marked as settled. He cited Article 159(1) of the Constitution which allows the courts and tribunals to be guided by alternative dispute resolution*

[32] Criminal Miscellaneous Application 79 of 2017.

> *including* ***reconciliation****, mediation, arbitration and tradition dispute resolution mechanism. He urged the court to consider the case as sui generis as the parties have submitted themselves of to* ***traditional the Islamic laws which provide an avenue for reconciliation****.*
>
> *……*
>
> *In the unique circumstances of the present application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application."*

In addition, in *Republic v. P K M* [2017] eKLR, the court made observation that:

> *"Although the learned trial magistrate did not cite* ***the provision of the Constitution that promotes reconciliation****, it is my view that he correctly applied alternative dispute resolution mechanism envisaged under Article 159 (2) (c. he did note that both the accused and the complainant were living together even as the charges were filed and it therefore made no sense to further push their disputes by not allowing the withdrawal of the case.* ***In view thereof, if this application were allowed, the court would vitiate the process of promoting reconciliation which has already taken effect, in any event****."*

In the case of ***Dennis Wanjohi Kagiri v. Republic*** [2016] eKLR, the Court factored the willingness of the complainant to withdraw the complaint and acquitted the accused person:

> *"Another factor that influenced this court in doubting the complainant's story is the fact that whereas the complainant alleged that she was strangled before she was robbed, no medical evidence was produced in court to support the claim. If indeed the complainant was strangled as she claim, then it was imperative that she secures medical evidence to support her claim. Further, prior to the commencement of the trial, the complainant indicated to the trial court that she wished to withdraw the complaint. The trial court denied the complainant's application to withdraw the charge.* ***The complainant told the court that she wished to withdraw the charge because village elders had successfully promoted reconciliation between herself and the Appellant. It may well be that the complainant and the appellant were being reconciled on account of their broken relationship. People who do not know each other cannot be reconciled.*** *The claim by the appellant to the effect that the charge may have been motivated by a relation gone sour may not be beyond the realm of possibility."*

In *Mary Kinya Rukwaru v. Office of the Director of Public Prosecution & another* [2016] the court also discussed the principal of reconciliation as enshrined under Article 159(2)(c) of the Constitution and rendered itself as follows:

> *"17] I would agree with counsel for the interested party that "the Constitution recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediation are the order of the day with Article 159 being the basic test for that purpose.*
>
> *20] The nature of the charges in the criminal matter and its effect on society are important factors. In the case where the court considered that "the nature of corruption*

> *and bribery is that they are indeed crimes against the entire population in Kenya" Lenaola. J. (as he then was) in* DPP v. Nairobi Chief Magistrate's Court and Anor**.** *Pet. No 21 of 2015 held that:*
>
> *"Although ADR serves as an avenue for resolution of contentious matters, including criminal matters, reconciliation cannot possibly apply to circumstances whereby the crimes that an accused has been charged with affect more that the person who reported them. In this case, reconciliation between the two persons does not engender effective and just resolution of the matter. More importantly, such resolution goes against the constitution, which espouses integrity, accountability and social justice."*

One of the issues that clearly come out in these cases is that matters of personal or private nature may generally be resolved by way of reconciliation but with a rider that consent of parties is necessary. There is also the evidence of courts still acknowledging the role of elders in conflict management in the modern society, by upholding their resolutions where the same do not offend the Constitution or other written laws. There are still those instances when courts may override the parties' consent to have the matter marked as resolved and go ahead to hear the same, in light of the constitutional and statutory safeguards on the use of ADR mechanisms. This was affirmed in the case of *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR*, where the Court stated as follows:

> *19. Although, the restriction on application to cases of personal nature or other non-aggravated cases in section 176 is not repeated in Article 159 of the Constitution, save in respect of the Traditional Dispute Resolution Mechanisms which are required to be consistent with the Constitution or any written law, the parameters under Article 157 (11) for the exercise by DPP of the prosecutorial mandate import considerations of "**the** public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process" in determining whether ADR is applicable in a particular case.*

3.5 Conciliation

Conciliation is defined as 'a process by which a conciliator attempts to assist parties to resolve a dispute by improving communications and providing technical assistance, and they are generally more interventionist than a mediator'.[33]

[33] Scottish Civil Justice Council, *Access to Justice Literature Review: Alternative Dispute Resolution in Scotland and other jurisdictions*, July 2014, p.3.

Conciliation involves a third party , called a conciliator, who restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations.[34]

It is worth pointing out that one of the areas that conciliation is mainly used under the laws of Kenya is labour law matters. Conciliation works well in labour disputes.[35] For instance, the *Employment and Labour Relations Court Act, 2011*[36] provides that:[37]

> *15. Alternative dispute resolution*
>
> *(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*
>
> *(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.*
>
> The use of conciliation is also reflected across all the other labour laws in Kenya.[38] This position has also been affirmed by Kenyan Courts in cases such as *Kenya Union Of Printing, Publishing, Paper Manufacturers, Pulp & Packaging Industries v Raffia Bags (EA) Limited [2014] eKLR*, where the Court stated that:*32. In my view, the correct legal position is the one expressed by Rika J. Section 54(6) of the Labour Relations Act as read with Part VIII and the provision in section 74 on urgent referral of recognition disputes to the Industrial Court has not made it mandatory for conciliation. But once the parties have taken the route of pre industrial court conciliation, the process should be exhausted before the parties move to court.*
>
> *33. I state so, well aware that alternative dispute resolution has been given constitutional underpinning in Article 159(2)(c) of the Constitution as well as statutory recognition in the Industrial Court Act. The Court is enjoined to promote conciliation as one method of alternative dispute resolution. It is quick and inexpensive and rests on sound judicial policy. Besides the social partnership between labour and capital in Kenya has always*

[34] Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.
[35] International Labour Office, "Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives." *High–Level Tripartite Seminar on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts*. Nicosia, Cyprus October 18th – 19th, 2007; S. 10 of the *Labour Relations Act*, No. 14 of 2007, Laws of Kenya.
[36] *Employment and Labour Relations Court Act,* No. 20 of 2011, Laws of Kenya.
[37] Ibid, sec. 15.
[38] See Laws of Kenya, http://www.kenyalaw.org/lex//index.xql

had conciliation between the partners as a cardinal method of resolving both individual rights and collective interests' disputes.

34. On this question, the Court therefore is of the view that conciliation is not mandatory in recognition disputes before moving to court, but it should be encouraged and promoted.

4. Post Constitution 2010 Dispensation and the Use of ADR Mechanisms

Generally, Article 159 (1) of the Constitution requires the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in discharging their duties under the Constitution. However,it sets out certain safeguards in the use of these mechanisms to ensure that their application will not offend the Constitution or nay other written law.

4.1 Legal and Social Safeguards on the Use of ADR and TDR Mechanisms in Kenya: The Appraisal

The current Constitution of Kenya, 2010 provides that the Constitution should be interpreted in a manner that: promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.[39]

Article 159(2) (c) and (3) of the Constitution of Kenya 2010 provides as follows:-

159(2) in exercised judicial authority, the courts and tribunals shall be guided by the following principles.
(a) ……
(b) ……
(c) Alternative formed of dispute resolution including reconciliation, mediation, arbitration and tradition dispute resolution mechanisms shall be promoted, subject to clause (3);
(d) ……..
(e)……..
(3) Traditional dispute resolution mechanisms shall not be used in a way that:-
(a) contravenes the Bill of Rights.
(b) is repugnant to justice and morality or results in outcomes that are repugnant of justice or morality; or
(c) inconsistent with this Constitution or any written law.

[39] Article 259(1), Constitution of Kenya 2010.

The place of the test of 'repugnancy' and 'inconsistency' with the Constitution or contravention of the Bill of Rights as far as the application of ADR and TDR mechanisms in modern society has been the subject of discussion in and out of Kenyan courts. The Constitution gives the courts the power to question the application of ADR and TDR mechanisms whether formally applied or informally used in managing disputes. For instance, in the case of *Githunguri vs Republic*[40] the High Court held that it has inherent powers to exercise jurisdiction over tribunals and individuals acting on administrative or quasi-judicial capacity.

Apart from the Constitutional provisions, the application of customary law is also qualified by the provisions of *Section 3(2)* of the *Judicature Act* that provides:

> "(*2) The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it so far as it is applicable and is* ***not repugnant to justice and morality or inconsistent with any written law****, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay"* (emphasis added).

In another Kenyan case of *Albert Ruturi & Others vs A.G & The Central Bank of Kenya*[41] the High Court affirmed the constitutional provision that any law that is inconsistent with the Constitution shall to the extent of the inconsistency be void and the Constitution shall prevail. Supremacy of the Constitution was also discussed in the case of *Kamlesh Mansukhlal Damji Pattni and Goldenberg International Limited vs the Republic*[42]*,* where the Court held that the High Court has the primary responsibility of safeguarding against contravention of the rule of law and the contravention, particularly with regard to fundamental rights and freedoms.

The place of customary law within the Kneyan law was also the subject of discussion in the case of *Otieno v Ougo & Another***,** *2008 1 KLR 9 & F* page 948, where it was observed: -

> *"The place of customary law as the personal law is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere. Now suppose that exceptionally there is a difference between the customary and common law in a matter of personal law? First of all, if there is a clear customary law on this kind of a matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary*

[40] Criminal Application No. 271 of 1985 (1986).
[41] High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001
[42] High Court Misc. Application No. 322 of 1999 and No. 810 of 1999

> *laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality and were thus discarded, there would be the common law to fall back upon, at least in a modified form. In this way, these two great bodies of law for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complimentary to each other without conflict as laid down in Section 3 of the Judicature Act (Cap 8)".*

This was also the issue in in the case of *Wambugi w/o Gatimu v Stephen Nyaga Kimani, 1992 2 KAR 292*, where the Court discussed extensively the application of customary law vis vis *Section 3(2)* of the *Judicature Act (Cap 8)* as follows:

> *"The former Court of Appeal for East Africa in the case of Kimani v Gikanga, [1965] EA 735 held that where African Customary Law is neither notorious nor documented, it must be established for the court's guidance by the party intending to rely on it and also that as a matter of practice and convenience in civil cases, the relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinions adduced by the parties".*

The Constitution of Kenya provides that the Bill of Rights and fundamental freedoms is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.[43]

Access to justice is one of the most critical human rights since it also acts as the basis for the enjoyment of other rights and it requires an enabling framework for its realisation.[44] Perhaps to demonstrate the importance of the test for 'repugnancy' and 'contravention of the bill of rights' when applying ADR and TDR mechanisms to management of disputes, some authors have argued that:

> 'While it is now accepted that well-functioning, efficient court systems will incorporate and promote the use of ADR, it must be remembered the human rights for which it is a tool are: the right to a fair hearing by an independent tribunal, and the right to an effective remedy by an appropriate national tribunal.[45] Thus, if the ADR process does not operate consistently with [these] rights, it has ceased to be a tool, and has become an obstacle.[46] In addition, it is of critical importance always to remember that ADR, like all rules of

[43] Constitution of Kenya 2010, Art. 19(1).
[44] See D.L., Rhode, "Access to Justice," *Fordham Law Review*, Vol. 69, 2001. pp. 1785-1819.
[45] Australian Human Rights Commission, "ADR: an essential tool for human rights," Address *by The Hon. John von Doussa, QC at the National Mediation Conference*, 30 June 2004.
Available at https://www.humanrights.gov.au/news/speeches/adr-essential-tool-human-rights [Accessed on 16/11/2018].
[46] Ibid.

> practice and procedure, is intended to further the end of justice and recognised human rights by enabling a fair and equitable hearing'.[47]

The above assertion, while it may not have been fully compatible with the traditional African setting, depending on the prevailing circumstances, human rights have become a central element of any modern democracy which cannot be set aside. The law is not expected to restrict itself to those disputes that only involve public law but must also protect the constitutionally guaranteed rights of even those transacting under the sphere of private law.[48] Apart from facilitating and giving effect to private choice, the law must also protect the interests of the members of the society.[49] The challenge comes in balancing the western notions of justice with the traditional approaches to conflict management within African communities.

5. Modernisation or Erosion of Effectiveness of ADR and TDR Mechanisms? Prospects and Challenges

Despite the advantages highlighted in the preceding sections, ADR and TDR mechanisms do also have some disadvantages such as: disregard for basic human rights; application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.[50]

Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDR and general rights, among others. However, these disadvantages can effectively be addressed through putting in place an

[47] Australian Human Rights Commission, "ADR: an essential tool for human rights," Address *by The Hon. John von Doussa, QC at the National Mediation Conference,* 30 June 2004.

[48] See Cherednychenko. O.O., 'Fundamental rights and private law: A relationship of subordination or Complementarity?' *Utrecht Law Review*, Volume 3, Issue 2 (December, 2007), Available at http://www.utrechtlawreview.org/ Accessed on 29 November, 2018.

[49] See Burnett, H., *Introduction to the legal system in East Africa*, East African Literature Bureau, Kampala, 1975, pp267-412

[50] See generally, 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.

efficacious policy and legal framework in order to foster the use of these mechanisms since the advantages thereof outweigh the demerits.[51]

While there has been formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, ADR and TDR mechanisms and other community justice systems are yet to be institutionalized by way putting in place supporting adequate legal and policy measures that would ensure their effective utilisation in access to justice.[52]

Courts have observed that although the only situation where African customary law would be excluded is where such law was determined to be repugnant to any written law, "*repugnancy"* is such a polemical and subjective notion that it can hardly provide a stable yardstick in some cases involving application of customary law.[53]

Generally, many cases are resolvable through TDR except for serious criminal offences that require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.[54]

Indeed, in the case of *Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR*, the Court commented as follows on the limited application of ADR in criminal matters:

> *From the reading of the aforementioned statutory provisions, it is quite evident that application of alternative dispute resolution mechanisms in criminal proceedings was intended to be a very limited. The* ***Judicature Act*** *in fact only envisages the use of the*

[51] See generally, 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.
[52] Ibid.
[53] Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR, para. 44.
[54] The case of *Republic V Mohamed Abdow Mohamed* [2013] eKLR, High Court at Nairobi (Nairobi Law Courts) Criminal Case 86 of 2011, where the learned Judge of the High Court upheld a community's decision to settle a murder case through ADR. It is also important to point out that the *National Cohesion and Integration Act*, No. 12 of 2008 [2012] under S. 25(2) thereof states that the National Cohesion and Integration Commission is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. To achieve this, the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace. What remains to be seen is how the Commission will handle any cases which, just like the *Mohamed case*, the involved communities or families feel that they can be handled locally but the Commission feels that the same should go to courts owing to their magnitude.

> *African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in the criminal matters, it is limited to misdemeanors and not on felonies.*[55]

The Court in *Republic v Abdulahi Noor Mohamed (alias Arab) [2016]* however went on to state that:

> *22. The constitutional recognition of alternative justice systems as one of the principles to guide courts in the exercise of judicial authority does not exclude criminal cases. This recognition restated the place of alternative justice systems in the administration of justice. Article 11 recognises culture as 'the foundation of the nation and as the cumulative civilization of the Kenyan people and nation'. There are however, no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters. As noted above, statutory provisions only limit to certain category of offences, and this does not extend to capital offences. There is also no formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation. Policy engagement is paramount to provide guiding principles on such as aspects as the types of cases that can be determined through the alternative justice systems, interrelation of such application (if any) with the court process, how and when the alternative process is to be invoked in the course of proceedings among others.*
> *23. Owing to the seriousness of some offences such as in the instant case, some direction is needed; more so, to ensure that there is consonance with the constitutional principles, and the requirements set out under* ***Article 159(3)*** *on the application of tradition dispute resolution. Some efforts are underway with the appointment of the Task Force on Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems) in line with the Judiciary's plan to develop a policy to mainstream alternative justice system with a view to enhancing access to and expeditious delivery of justice.*

> *27. A crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any an offer by the accused to negotiate a plea agreement proposal. By asking this court to enforce an arrangement between the accused and the family of the accused, to the exclusion of the prosecution amounts to a disregard of the law on the exercise of prosecutorial powers. That cannot be the object envisioned under* ***Article 159*** *when recognizing alternative justice systems as one of the principles to be promoted by courts when exercising judicial authority. Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land.*

[55] Para 19, *Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR*, Criminal Case 90 of 2013.

> *29. The Constitution and the written laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice. The court does appreciate the good will of the accused family and that of the deceased in their quest to have the matter settled out of court. The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited. Furthermore, this request is being made too late in the day, when the case has been heard to its conclusion. For these reasons I find that the application lacks merit. The application is therefore disallowed.*

This case is a therefore a clear demonstration of the need for an effective policy and legal framework on ADR and TDR mechanisms although the debate on what may or may not be subjected to these mechanisms may go on for a while. The interpretation of the constitutional safeguards is still on a case by case basis thus making the application of these mechanisms very fluid. The rationale of the constitutional recognition of ADR and TDR is to validate alternative forums and processes that provide justice to Kenyans.[56] This was also affirmed in the case of *Muriuki Samson Murithi v Kirinyaga Dairy Farmers Co-op Society Ltd & another [2017] eKLR*[57] where the Court stated as follows:

> *17. The next issue for consideration is whether this court has exclusive jurisdiction to handle the appeal and if a referral to ADR would amount to an ouster, or abdication, of the court's jurisdiction. It should be borne in mind that the application of ADR in resolution of disputes in the exercise of judicial authority is recognized and encouraged by the Constitution of Kenya, 2010.* ***Article 159 (2)*** *requires the judiciary and tribunals to be guided by certain principles among them the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.*
>
> *18. The courts established under the Constitution of Kenya are therefore required to encourage the parties who appear before them to explore the various forms of ADR in the resolution of their disputes in accordance with the normal principles of ADR. The object of promoting ADR is obvious especially in the Kenyan context where we do not have an adequate number of judicial officers to handle such disputes thereby resulting in undue delays and backlog in the adjudication process. The idea is to promote the overriding objective of the court in administering justice in a timely, cost effective and proportionate manner.*
>
> *19. In my view, there is no contradiction between the conferment of judicial power to adjudicate over disputes before a judicial authority and the requirement for the same judicial authority to recognize and promote ADR. Promoting resolution of disputes*

[56] 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.
[57] *Muriuki Samson Murithi v Kirinyaga Dairy Farmers Co-op Society Ltd & another [2017] eKLR*, Environment & Land Case 04 of 2016.

> *through ADR does not amount to an ouster or abdication of the jurisdiction of the court. In my opinion, therefore, the exercise of judicial authority and the promotion of ADR are quite compatible, and not strange bed-fellows.*

As already pointed out, traditional dispute resolution mechanisms are not to be used in a way that (*a*) contravenes the Bill of Rights; (*b*) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (*c*) is inconsistent with the Constitution or any written law.[58] The policy behind subjection of customary law to the repugnancy test was founded on the need to ensure that certain aspects of customary laws that do not augur well with human rights standards are taken care of and sieved out when applying these laws. This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence affecting the efficacy of traditional justice systems.[59] Besides, it is arguable that the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African societies who have their own conceptions of justice and morality. Redefining the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.[60]

It is noteworthy that currently there is no policy on TDR and other community based justice systems in Kenya. There ought to be put in place a TDR policy framework in order to recognize and affirm the importance of TDR mechanisms in the administration of justice and establish a clear interface between TDR and the formal processes.[61] The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya.[62] The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law. The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on

[58] Article 159 (3), Constitution of Kenya.
[59] See also Section 3(2), Judicature Act, Cap.8, Laws of Kenya.
[60] 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.
[61] IDLO, Kenya Judiciary & NCIA, *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*, 2018.
[62] 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.

reconciliation and restorative justice.[63] The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDR mechanisms promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.[64]

The absence of a clear legal framework on coordination in matters arising between the State and local communities leaves room for potential conflicts between the State organs and such communities. National policy on ADR and TDR mechanisms should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

There is however hope because the Kenyan Judiciary has had many forums and engagements with stakeholders in the ADR and TDR sector in a bid to come up with the necessary legal and policy framework to facilitate implementation of the constitutional provisions on ADR and TDR mechanisms meant to enhance access to justice for the Kenyan people.[65]

6. Conclusion

Traditional conflict resolution processes are part of a well-structured, time-proven social system geared towards reconciliation, maintenance and improvement of social relationships since they are deeply rooted in the customs and traditions of peoples of Africa; they strive to restore a balance, to settle conflict and eliminate disputes.[66] Arguably, conflicts must be understood in their social context, involving values and beliefs, fears and suspicions, interests and needs,

[63] 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.

[64] For instance, see *National Cohesion and Integration Act*, No. 12 of 2008 [2012]. S. 25(1) thereof states that the object and purpose for which the National Cohesion and Integration Commission is established is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof. S. 25(2)(g) goes further to state that Without prejudice to the generality of subsection (1), the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.

[65] IDLO, Kenya Judiciary & NCIA, *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*, 2018.

[66] K. Osei-Hwedie and J.R. Morena, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p.33, University of Botswana.

attitudes and actions, relationships and networks in order to ensure that their root causes are addressed.[67]

The paper has discussed the attempt at modernisation of other ADR processes in Africa with a focus on experiences from Kenya and her 2010 Constitution. It has offered an appraisal of some of the laid out legal and social safeguards on the effectiveness of these mechanisms.

The ADR mechanisms are in fact not alternative; they are rooted in the African society. They do not need modernising. What is necessary is their legitimization and institutionalisation within the legal framework bearing in mind the thresholds of the Bill of Rights. ADR and TDR mechanisms must not go against the tenets of human rights. It is acknowledged that the adoption and application of Africa's traditional dispute resolution mechanisms including indigenous principles and methods on conflict management may not apply to all situations. However, there are relevant aspects of these principles and practices that can be integrated and harmonized with the formal legal and institutional framework to offer an all-round approach on access to justice which caters for all persons despite any social differences. They can be weighed against the constitutional safeguards so as to get rid of the negative aspects therein.

They are however worth promoting since they have the capacity to bring about lasting solutions and harmony within societies in instances where they work. TDR and ADR mechanisms will also go a long way in tackling the problems relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

[67] *Ibid*, pp. 35-36.

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